No. 14-1142

In the Supreme Court of the United States

MICHAEL BOUDREAUX, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a municipal official is entitled to assert qualified immunity as a defense to a law-enforcement action for civil monetary penalties brought by a federal government agency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is not published in the *Federal Reporter* but is reprinted in 581 Fed. Appx. 757. The opinion of the district court (Pet. App. 9-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2014. A petition for rehearing was denied on December 17, 2014 (Pet. App. 52-53). The petition for a writ of certiorari was filed on March 17, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress created the Securities and Exchange Commission (SEC or Commission) to enforce the federal securities laws. See 15 U.S.C. 78b and 78d; see

also, *e.g.*, 15 U.S.C. 77t(a)-(d) and 78u(a)-(d). "Whenever it shall appear to the Commission that any person has violated" the Securities Act of 1933 (Securities Act), the Securities Exchange Act of 1934 (Exchange Act), or the Commission's "rules or regulations" under either statute, the Commission "may bring an action in a United States district court" for "a civil penalty to be paid by the person who committed such violation." 15 U.S.C. 77t(d)(1) and 78u(d)(3)(A).

To obtain such a civil penalty, the Commission need not show that anyone suffered damages as a result of the violation. See 15 U.S.C. 77t(d)(2) and 78u(d)(3). Rather, "[t]he amount of the penalty shall be determined by the court in light of the facts and circumstances." 15 U.S.C. 77t(d)(2)(A) and 78u(d)(3)(B)(i). The appropriate penalty in a particular case—which "shall not exceed" the greater of a congressionally specified amount or "the gross amount of pecuniary gain to such defendant as a result of the violation"—depends on the seriousness of the defendant's "fraud, deceit, manipulation," or other wrongdoing. 15 U.S.C. 77t(d)(2)(A)-(C) and 78u(d)(3)(B)(i)-(iii). Except in limited circumstances not relevant here, "[a] penalty imposed * * * shall be payable into the Treasury of the United States." 15 U.S.C. 77t(d)(3)(A) and 78u(d)(3)(C)(i); see 15 U.S.C. 7246.

2. In July 2013, the Commission brought a civil enforcement action in federal district court against petitioner and the City of Miami (City). The SEC alleged that the defendants had committed securities fraud in violation of Securities Act Section 17(a), Exchange Act Section 10(b), and the Commission's Rule 10b-5, and that petitioner had aided and abetted the City's violations. See Pet. App. 2-3, 26-27; see also 15 U.S.C.

77q(a) and 78j(b); 17 C.F.R. 240.10b-5. The Commission asked the district court to impose civil penalties pursuant to 15 U.S.C. 77t(d)(1) and 78u(d)(3)(A); permanently enjoin the defendants from further violations of the securities laws; and order the City to comply with a 2003 SEC cease-and-desist order. See Pet. App. 2; see also *In re City of Miami*, Securities Act Release No. 8213, 2003 WL 1412636 (Mar. 21, 2003).

The SEC's complaint "alleged material misrepresentations and omissions reflected in 2007 and 2009 fiscal year-end City financial documents that were incorporated by reference" into three municipal bond offerings in 2009. Pet. App. 2. The complaint alleged that petitioner—who was responsible for preparing the City's budgets, providing information used in the City's financial reports, and drafting portions of those reports—had realized in 2007 that the City would not be able to maintain certain publicly announced and legally mandated general revenue fund reserve balances. See *id.* at 2-3, 16-23. To conceal the City's financial problems, "help[] the City obtain positive bond ratings," and protect his own job, petitioner allegedly engineered a series of improper monetary transfers that artificially inflated the general revenue fund. *Id.* at 3; see *id.* at 15, 24-26. Petitioner then allegedly misrepresented the nature and purpose of those transfers to city officials, auditors, and the public. Those misrepresentations were reflected in "Comprehensive Annual Financial Reports" and other documents on which investors and bond-rating agencies relied in assessing the City's debt offerings. *Id.* at 2-3; see *id.* at 22, 25-26. When the City's Independent Auditor General discovered the improper trans-

fers, the City reversed them and terminated petitioner's employment, and the rating agencies downgraded the City's bond ratings. See *id.* at 2, 23-24.

3. Petitioner and the City each filed a motion to dismiss. The City argued that the complaint failed to state actionable claims for securities fraud. Petitioner joined that argument, and he also contended that he was entitled to qualified immunity from suit because he had acted at all relevant times in his capacity as a City official. The district court denied both motions in separate orders. See Pet. App. 3-4.

In ruling on the City's motion, the district court reviewed the allegations of the complaint in detail to determine whether the Commission had stated plausible securities-fraud claims with sufficient particularity. See Pet. App. 14-51. The court concluded that the SEC had adequately alleged that "[d]efendants carried out a scheme to defraud, and [petitioner] was its architect." *Id.* at 24; see, *e.g.*, *id.* at 48 (recounting allegations that the City, acting through petitioner, "knew it was misrepresenting the true nature of the transfers to mask declines in the General Fund balance, * * * made misrepresentations to the rating agencies" about the transfers, and knew "those misleading disclosures would affect the City's financial statements relied on by purchasers of City debt"); see also *id.* at 24-25 (noting allegations that petitioner had "devised" the transfers, had misrepresented their "true nature" in "public meetings" and briefings with City staff and external auditors, had "falsified the justification" for the transfers "in the City's internal records," and had "furnished materially false and misleading information that was incorporated into the City's filings").

In denying petitioner's motion, the district court agreed with the SEC that "qualified immunity has no application * * * as the Complaint presents claims seeking injunctive relief and civil penalties." Pet. App. 10. Relying on the D.C. Circuit's decision in *Meredith* v. *Federal Mine Safety & Health Review Commission*, 177 F.3d 1042 (1999), the district court ruled that "qualified immunity applies only to lawsuits seeking damages." Pet. App. 12; see *id.* at 10.

4. The court of appeals affirmed in an unpublished per curiam opinion. See Pet. App. 1-8. The court concluded that, although qualified immunity is "routinely applied" in "private suit[s]" that seek "damages against public officials," that defense is not available in an SEC "enforcement action that seeks civil monetary penalties against the defendants." *Id.* at 6-7; see *id.* at 5-6 (observing that "[n]either this court nor any of our sister circuits has addressed the issue of whether municipal officials are entitled to qualified immunity in an SEC enforcement action under the federal securities laws"). In support of that conclusion, the court noted the absence of any "history at common law of civil immunities being applied as a defense to federal enforcement actions." *Id.* at 6. The court also emphasized the many differences between private damages suits and federal enforcement actions seeking civil penalties, explaining that such penalties go "beyond compensation" and are instead "intended to punish, and label defendants wrongdoers." *Id.* at 7 (quoting *Gabelli* v. *SEC*, 133 S. Ct. 1216, 1223 (2013)).

ARGUMENT

The Eleventh Circuit correctly held that qualified immunity is not an available defense to a Commission enforcement action seeking civil penalties. That deci-

sion does not conflict with any decision of this Court or another court of appeals. And even if petitioner's qualified-immunity defense were not categorically foreclosed, petitioner cannot satisfy the requirements for qualified immunity if the allegations in the SEC's complaint are taken as true, as they must be at the current motion-to-dismiss stage of this case. That complaint alleges the sort of deliberate wrongdoing for which qualified immunity is never a valid defense, even in private damages actions. Further review is not warranted.

1. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). That doctrine, which is derived from a "tradition of immunity * * * firmly rooted in the common law," is intended to "safeguard government, and thereby to protect the public at large," *Wyatt* v. *Cole*, 504 U.S. 158, 164, 168 (1992) (citation omitted), by shielding officials "from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231; see, *e.g.*, *Anderson* v. *Creighton*, 483 U.S. 635, 638-639 (1987) (referring to "inhibit[ing]" effects of a "fear" of "harassing litigation").

This Court has repeatedly described the qualified-immunity defense as extending only to suits for money damages, and has done so in cases where damages were sought by private persons claiming that government officials had violated their constitutional or statutory rights. See, *e.g.*, *Ashcroft* v. *al-Kidd*, 131 S. Ct.

2074, 2080 (2011) ("Qualified immunity shields federal and state officials from money damages."); *Anderson*, 483 U.S. at 638 (stating that qualified immunity shields officials "from civil damages liability" because "permitting damages suits against government officials can entail substantial social costs"); *Harlow*, 457 U.S. at 807, 818 (explaining that the "recognition of a qualified immunity defense * * * reflected an attempt to balance" the "importance of a damages remedy to protect the rights of citizens" and "the need to protect officials," and holding that "government officials performing discretionary functions generally are shielded from liability for civil damages"). The Court has rejected the proposition that relief amounting to the "functional equivalent of monetary damages" is necessarily subject to an immunity defense. See *Pulliam* v. *Allen*, 466 U.S. 522, 543-544 (1984) (holding that immunity does not bar a statutorily authorized award of attorneys' fees).

The court below correctly refused to extend the doctrine of qualified immunity from cases involving "liability for civil damages," *Pearson*, 555 U.S. at 231, to federal enforcement actions in which civil penalties are the requested relief.[1] First, "there is no history at common law of civil immunities being applied as a defense to federal enforcement actions." Pet. App. 6. Where (as here) the statute that is the basis for a claim against a government official does not speak to immunity, see *ibid.*, a critical question is whether the

[1] The complaint against petitioner in this case seeks an injunction as well as civil penalties. Petitioner does not contest the district court's ruling that qualified immunity is unavailable with respect to "claims for injunctive relief." Pet. App. 10; see, *e.g.*, *Pearson*, 555 U.S. at 242-243.

official "can point to a common-law counterpart to the privilege he asserts." *Malley* v. *Briggs*, 475 U.S. 335, 339-340 (1986); see, *e.g.*, *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1660 (2012) ("Our decisions have looked to * * * common law protections in affording either absolute or qualified immunity to individuals sued under § 1983."); *Owen* v. *City of Independence*, 445 U.S. 622, 638 (1980) ("Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity.").

Second, contrary to petitioner's argument (Pet. 8-10), the purposes of the qualified-immunity doctrine would not be served by extending that doctrine to civil-penalty actions brought by federal enforcement agencies against municipal officials. While private damages actions may be used to distract and harass, federal enforcement actions like the Commission's here are instituted by government officials after an investigation and pursuant to authorization from a politically accountable body. See, *e.g.*, 17 C.F.R. 200.10; Enforcement Division, SEC, *Enforcement Manual* § 2.5.2 (Oct. 9, 2013); see also, *e.g.*, *Pearson*, 555 U.S. at 231-232 (stating that "driving force" behind qualified immunity is concern about "insubstantial claims"); *Crawford-El* v. *Britton*, 523 U.S. 574, 601 (1998) (Kennedy, J., concurring) (noting that Section 1983 damages actions can involve "frivolous" claims). In addition, qualified immunity reflects a long-established balance between the private interest in compensation for governmental wrongs and the public interest in "protecting government's ability to per-

form its traditional functions." *Wyatt*, 504 U.S. at 167. But where the plaintiff is a federal enforcement agency, curtailing the action undermines the "work of government" and disserves the public interest. *Filarsky*, 132 S. Ct. at 1665; see, *e.g.*, *SEC* v. *Calvo*, 378 F.3d 1211, 1218 (11th Cir. 2004) (per curiam) (emphasizing that, in a suit like this one, "the United States is acting in its sovereign capacity" to "enforce the securities laws" and to "vindicat[e] public rights and further[] the public interest"); *SEC* v. *Rind*, 991 F.2d 1486, 1490 (9th Cir.), cert. denied, 510 U.S. 963 (1993).

Petitioner contends (Pet. 9) that qualified immunity applies whenever a government official is subject to any potential liability with a "financial effect." It is well established, however, that qualified immunity is unavailable in criminal prosecutions, see *Imbler* v. *Pachtman*, 424 U.S. 409, 429 (1976); see also, *e.g.*, *Mireles* v. *Waco*, 502 U.S. 9, 10 n.1 (1991) (per curiam), even though convictions may subject offenders to fines or restitution orders. The fact that civil-penalty actions seek to impose financial liability therefore cannot be a sufficient basis for recognizing a qualified-immunity defense.

2. Contrary to petitioner's argument (Pet. 6-15), the Eleventh Circuit's decision in this case does not conflict with any decision of this Court or of another court of appeals.

The decisions of this Court on which petitioner relies all address private claims for money damages, and their holdings are carefully limited to that fact pattern. See pp. 6-7, *supra*; see also, *e.g.*, Pet. 7 (quoting language from *Anderson*, 483 U.S. at 638, referring to "damages suits against government officials" and

"civil damages liability").[2] Petitioner identifies no decision in which this Court has suggested that qualified immunity is an available defense to a federal enforcement action asking a court to impose civil penalties.

This case likewise does not implicate any conflict among the circuits. Only one other court of appeals has addressed whether qualified immunity may be asserted as a defense to a federal government suit requesting civil penalties. Like the court below, that court held that "qualified immunity does not bar" such a claim. *Meredith* v. *Federal Mine Safety & Health Review Comm'n*, 177 F.3d 1042, 1049 n.5 (D.C. Cir. 1999); see Pet. App. 5-6 (noting that no other court of appeals has had occasion to decide whether qualified immunity is a proper defense to a claim for civil penalties brought by the SEC).

Petitioner argues (Pet. 11-12) that the circuits disagree on whether qualified immunity is a defense to a civil action under the Wiretap Act. But resolution of the question presented here would have no logical

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[2] See also Pet. 7-9; *Anderson*, 438 U.S. at 637 (*Bivens* damages action alleging Fourth Amendment violation); *Butz* v. *Economou*, 438 U.S. 478, 480-481 (1978) (involving "immunity of federal officials in the Executive Branch from claims for damages" brought by individual claiming retaliation); *Filarsky*, 132 S. Ct. at 1661, 1665 (Section 1983 action claiming damages for constitutional violations allegedly committed by investigator); *Richardson* v. *McKnight*, 521 U.S. 399, 401, 408-409 (1997) (Section 1983 damages action brought by prisoner against guards); *al-Kidd*, 131 S. Ct. at 2080-2081 (*Bivens* damages action against Attorney General for authorizing prosecutors to obtain warrants); *Malley*, 475 U.S. at 338-339 (Section 1983 damages action arising out of arrest warrants); *Pearson*, 555 U.S. at 227, 231 (Section 1983 damages action arising out of warrantless entry of home).

bearing on the proper resolution of that conflict. The Wiretap Act cases that petitioner cites all involve money damages, not civil penalties. They all involve actions brought by private parties, not federal government enforcement actions. And they turn on interpretation of a specific provision in the Wiretap Act that has no analogue in the relevant securities laws. See *Berry* v. *Funk*, 146 F.3d 1003, 1005, 1007-1008, 1013-1014 (D.C. Cir. 1998) (resting qualified-immunity ruling on Wiretap Act provision that establishes a defense for "good-faith reliance" on court order or other official authorization); *Blake* v. *Wright*, 179 F.3d 1003, 1005-1007, 1011-1013 (6th Cir. 1999), cert. denied, 528 U.S. 1136 (2000); *Tapley* v. *Collins*, 211 F.3d 1210, 1211-1212, 1214-1216 (11th Cir. 2000); 18 U.S.C. 2520(b) and (c).

Petitioner asserts more generally (Pet. 11; see Pet. 12-13) that conflicting decisions exist as to the availability of qualified immunity under "federal statutes." But the fact that one court has found qualified immunity to be a proper defense to a claim under the Rehabilitation Act of 1973, see *McGregor* v. *Louisiana State Univ. Bd. of Supervisors*, 3 F.3d 850, 862 & n.19 (5th Cir. 1993), cert. denied, 510 U.S. 1131 (1994) (cited in Pet. 13), while another has found the defense precluded with respect to a False Claims Act suit, see *Samuel* v. *Holmes*, 138 F.3d 173, 178 (5th Cir. 1998) (cited in Pet. 14), does not indicate the existence of conflicting approaches. Rather, it simply reflects the fact that analysis of specific statutes may bear on the availability of qualified immunity.[3] See, *e.g.*, *Pulliam*,

[3] The Second Circuit's decision in *Abrams* v. *Department of Public Safety*, 764 F.3d 244 (2014), which petitioner cites in support of the assertion that clarification is needed "as to whether and when

466 U.S. at 539 (immunity may be "abrogated" by Congress). Petitioner does not cite any qualified-immunity decision involving the securities laws. And because all of the decisions that petitioner lists (Pet. App. 12-14) address private actions seeking money damages, they are not in conflict with the decision of the court below that a different rule applies when the federal government sues for civil penalties.

3. Finally, this case is a poor vehicle for considering whether qualified immunity is a defense to federal government enforcement actions seeking civil penalties. Even if that defense were generally available in such actions, petitioner could not successfully assert it here. Qualified immunity does not apply when "a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *al-Kidd*, 131 S. Ct. at 2080 (citing *Harlow*, 457 U.S. at 818). If the SEC ultimately succeeds in proving the allegations of its complaint, there is no reasonable likelihood that petitioner could show that he is entitled to qualified immunity.

The SEC's complaint alleges that petitioner was the knowing "architect" of a "scheme to defraud" purchasers of the 2009 bonds. Pet. App. 24; see *id.* at 2-3. According to the complaint, petitioner "devised" improper monetary transfers "for the purpose of helping the City obtain positive bond ratings"; misrepre-

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qualified immunity is available as a defense to federal statutory claims," Pet. 14-15, is especially beside the point. In *Abrams*, the Second Circuit merely observed that, because "Title VII imposes no liability on individuals," there is no need for individuals facing a Title VII claim to assert qualified immunity (or any other affirmative defense). 764 F.3d at 255 (citation omitted).

sented the transfers' "true nature" in "public meetings" and briefings with City staff and external auditors, even when "he was challenged by others"; "falsified the justification" for the transfers "in the City's internal records"; made "false representations to third parties, such as the rating agencies"; and "furnished materially false and misleading information that was incorporated into the City's filings." *Id.* at 3, 24-25. The SEC thus alleged that petitioner *knew* that the City was "misrepresenting the true nature of the transfers to mask declines in the General Fund balance," and that "those misleading disclosures would affect the City's financial statements relied on by purchasers of City debt." *Id.* at 48. The district court correctly held that those allegations plausibly and specifically made out claims that petitioner had violated various provisions of the securities laws, including Securities Act Section 17(a)(1), Exchange Act Section 10(b), and Rule 10b-5. See Pet. App. 9, 31-49.

No reasonable City official could have believed that deliberately lying about the City's financial condition so as to mislead municipal-bond purchasers was outside the reach of the securities laws' anti-fraud provisions, which have long forbidden such conduct.[4] See

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[4] A person may not "directly or indirectly" make an untrue statement of material fact, or omit to state a material fact necessary in order to make statements not misleading in light of the circumstances in which they were made, in connection with an offer or sale of securities. 15 U.S.C. 77q(a) and 78j(b); see 17 C.F.R. 240.10b-5; *United States* v. *Naftalin*, 441 U.S. 768, 773 & n.4 (1979). It is well established that those strictures apply to offers and sales of municipal bonds. See 15 U.S.C. 77q(c) (municipal-securities exception does not apply to Securities Act Section 17(a) antifraud provisions); 15 U.S.C. 78c(a)(9) and (10) (defining bonds as securities and stating that "person" includes "a natural person"

Pet. App. 48-49; see also *Malley*, 475 U.S. at 341 (qualified immunity does not protect "the plainly incompetent or those who knowingly violate the law"). Nor could petitioner have the scienter required to establish a violation of Securities Act Section 17(a)(1), Exchange Act Section 10(b), or Rule 10b-5 and nevertheless be entitled to qualified immunity. See *Wood* v. *Moss*, 134 S. Ct. 2056, 2067 (2014); Pet. App. 32. Scienter is a "mental state embracing intent to deceive, manipulate, or defraud," *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 n.12 (1976), and an official with that mental state cannot reasonably believe that his conduct was lawful "in the situation he confronted." *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001); see *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1254 n.3 (2012) (explaining that the "qualified immunity test focus[es] on an officer's objective good faith").

In the courts below, petitioner argued that he was entitled to qualified immunity because the allegedly improper transfers were in fact appropriate accounting measures and his statements about them were true. See Pet. C.A. Br. 22-23. That contention, however, simply contradicts "what the Complaint alleges." Pet. App. 37. Petitioner offers no sound basis on which a court could accept the allegations of the SEC's complaint as true (as the court is required to do in ruling on a motion to dismiss) and nevertheless

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as well as a "government, or political subdivision, agency, or instrumentality of a government"); see also, *e.g.*, *Sonnenfeld* v. *City & Cnty. of Denver*, 100 F.3d 744, 748-749 (10th Cir. 1996) ("Congress * * * clearly intended that municipal securities would remain subject to the antifraud provisions."), cert. denied, 520 U.S. 1228 (1997); *In re CitiSource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1073 (S.D.N.Y. 1988); *In re City of San Diego*, Securities Act Release No. 8751, 2006 WL 3298665 (Nov. 14, 2006).

conclude that petitioner is entitled to qualified immunity. See, *e.g.*, *Wood*, 134 S. Ct. at 2066-2067. If at some later stage of the proceedings petitioner can establish that his characterization of the transfers is correct, he will escape liability without regard to qualified-immunity principles, since in that event the SEC will be unable to prove either scienter or the making of any material misrepresentations or omissions. See Pet. App. 32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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