No. 00-1889

In the Supreme Court of the United States

RICHARD D. DONOHOO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

STUART E. SCHIFFER
Acting Assistant Attorney General

JACOB M. LEWIS
SANDRA WIEN SIMON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the five-year statute of limitations on this action to collect an unpaid civil monetary penalty imposed under the Federal Deposit Insurance Act, 12 U.S.C. 1818(i)(2), began to run at the time of the conduct that led to the imposition of the penalty, or not until (at the earliest) the time of the final administrative decision imposing the penalty.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 232 F.3d 637. The order of the district court (Pet. Supp. App. A11-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 2000. A petition for rehearing was denied on January 29, 2001 (Pet. App. A10). The petition for a writ of certiorari was filed on April 30, 2001 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

STATEMENT

1. The Federal Deposit Insurance Act (the Act), 12 U.S.C. 1811 *et seq.*, authorizes the Federal Deposit

Insurance Corporation (FDIC) and other federal bank regulatory agencies to impose civil monetary penalties on any insured depository institution or "institution-affiliated party" that "violates any law or regulation." 12 U.S.C. 1818(i)(2); see 12 U.S.C. 1813(q) (defining "appropriate Federal banking agency"). A penalty so imposed is to be "assessed and collected" by written notice. 12 U.S.C. 1818(i)(2)(E)(i). If the party assessed does not request an agency hearing within 20 days after the notice of assessment is issued, the assessment becomes a "final and unappealable order." 12 U.S.C. 1818(i)(2)(E)(ii) and (H).

If the assessed party requests a hearing, the banking agency must hold the hearing and then, "within ninety days after [it] has notified the parties that the case has been submitted to it for final decision, * * * render its decision * * * and * * * issue and serve upon each party to the proceeding an order or orders consistent with the provisions of [the Act]." 12 U.S.C. 1818(h)(1); see 12 U.S.C. 1818(i)(2)(H). Any party to the administrative proceeding may seek judicial review of the agency's order in the court of appeals for the circuit in which the home office of the depository institution is located, or in the District of Columbia Circuit. 12 U.S.C. 1818(h)(2). The judgment of the court of appeals "shall be final" unless this Court grants a petition for certiorari. 12 U.S.C. 1818(h)(2).

If a party "fails to pay an assessment after any penalty assessed under [the Act] has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court." 12 U.S.C. 1818(i)(2)(I)(i). In such a collection action, "the validity and appropriateness of the penalty shall not be subject to review." 12 U.S.C. 1818(i)(2)(I)(ii). Under 28 U.S.C. 2462, "[e]xcept as

otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

2. Petitioner was an officer, director and shareholder of Capital Bank, a federally insured depository institution. In July 1990, petitioner and others arranged for the issuance, sale and purchase of new shares of the bank without prior regulatory approval, in violation of the Change in Bank Control Act of 1978, 12 U.S.C. 1817(j) (1994 & Supp. V 1999). See Pet. App. A2; *Lindquist & Vennum* v. *FDIC*, 103 F.3d 1409, 1412-1413 (8th Cir. 1997). Petitioner also engaged in a variety of other improper transactions involving the bank. See *Lindquist & Vennum*, 103 F.3d at 1413-1417. On the basis of petitioner's actions, in September 1992 the FDIC assessed civil penalties against him in the amount of $1,000,554. Pet. App. A2-A3.

Petitioner appealed the assessment, and an administrative hearing was held in April and May of 1993. Pet. App. A3. The administrative law judge issued his Recommended Decision in September 1994. *Ibid.* The FDIC's Board of Governors reviewed and modified that decision, and in September 1995 issued its own decision, also ordering petitioner to pay $1,000,554. *Ibid.* Petitioner sought review of that order in the court of appeals, which affirmed assessment of the penalty on January 8, 1997. *Lindquist & Vennum*, 103 F.3d at 1418-1419. Petitioner then sought review by this Court, but the Court denied his petition for a writ of

certiorari on October 6, 1997. *Donohoo* v. *FDIC*, 522 U.S. 821.

2. Petitioner did not pay the amount assessed. In November 1998, the FDIC brought the present action to enforce the penalty. Pet. App. A3. The district court granted summary judgment for the government. Pet. Supp. App. A1-A13. The court rejected, without discussion, petitioner's argument that the action was barred by the statute of limitations. *Id*. at A7-A8.

The court of appeals affirmed. Pet. App. A1-A9. The court rejected petitioner's argument that the FDIC's claim for payment of the civil penalties "first accrued," for purposes of the statute of limitations in 28 U.S.C. 2462, on the date of the violation for which the penalty was ultimately assessed. See Pet. App. A5, A8. The court noted that the Fifth Circuit had accepted a similar argument in applying Section 2462 to a suit to collect a civil penalty imposed under the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*, but that the First Circuit had held that because the Export Administration Act provided an administrative procedure for the assessment of penalties, the statute of limitations on a collection action would not begin to run until the penalty had been assessed. Pet. App. A5-A7 (discussing *United States* v. *Meyer*, 808 F.2d 912 (1st Cir. 1987), and *United States* v. *Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985)).

The court observed that under 12 U.S.C. 1818(i), an agency may not bring a collection action "until the defendant 'fails to pay an assessment after any penalty imposed under [Section 1818(i)(2)] has become final.'" Pet. App. A9 (quoting 12 U.S.C. 1818(i)(2)(I)(i)). Thus, "the government is precluded from bringing an enforcement action until the penalty has been finalized through administrative proceedings." *Ibid*. With that

constraint, the court pointed out, "[u]nder the Fifth Circuit's rule [running the statute of limitations from the time of the original violation], the government could find itself unable to collect on a penalty simply because those proceedings have taken too long." *Ibid.* The court rejected that result, reasoning that "[a] violator should not be able to escape paying a penalty by dragging his feet through the administrative penalty-assessment process." *Ibid.* The court instead found the First Circuit's reasoning more persuasive, and held that "where an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination." *Id.* at A8.[1]

ARGUMENT

1. Under 28 U.S.C. 2642, an action for the enforcement of a federal civil penalty must be commenced "within five years from the date when the claim first accrued." But a claim for the enforcement of such a penalty does not "accrue" until, at a minimum, the person on whom it is imposed has come under a legal obligation to pay it. When a banking agency assesses a penalty under 12 U.S.C. 1818(i)(2), the party assessed has the right to an administrative hearing. If such a hearing is requested, the administrative order imposing the penalty becomes final and enforceable, at the earli-

[1] The court found it unnecessary to decide whether the administrative decision became "final" before judicial review was complete. In this case, the court noted, "[b]oth the date that the final administrative order was entered, and the date the Supreme Court denied review are within five years of the date the government initiated" the collection action. Pet. App. A8-A9 n.3.

est, only once the agency has held the hearing and rendered its "final decision." See 12 U.S.C. 1818(h)(1), (i)(2)(E)(ii) and (H). The agency may seek judicial enforcement of the penalty only "[i]f any * * * person fails to pay an assessment after any penalty assessed * * * has become final." 12 U.S.C. 1818(i)(2)(I)(i). Accordingly, the claim for such enforcement does not accrue before the penalty has become final and the agency may legally demand payment. See *United States* v. *McIntyre*, 779 F. Supp. 119, 122 (S.D. Iowa 1991); *In re Donohoo*, 243 B.R. 139, 142 (M.D. Fla. 1999); cf., *e.g.*, *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 201-202 (1997) (pension plan's claim against withdrawing employer did not accrue until plan set schedule of withdrawal payments and employer failed to pay; "standard rule" is that "the limitations period commences when the plaintiff has 'a complete and present cause of action,'" and generally "a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief") (citation omitted).[2]

Petitioner argues (Pet. 10-11) that a claim to enforce a civil penalty imposed under Section 1818(i)(2) should accrue at the time of the underlying banking-law violation, or at the time the agency makes its initial ad-

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[2] As the court of appeals explained (Pet. App. A8-A9 n.3), there is no need to decide in this case precisely when a penalty under Section 1818(i)(2) becomes "final" for purposes of collection, or when a claim for judicial enforcement accrues. The penalty might become final at the time of the final administrative decision, or only after the decision has been sustained on judicial review or the time for seeking further review has expired. The claim for enforcement might accrue when the penalty becomes final, or only after the assessed party has refused to honor a proper demand for payment.

ministrative assessment of the penalty. Such a rule would make no sense. First, the "claim" for enforcement is entirely inchoate until the agency makes its initial decision to assess a penalty of a particular amount. Second, even at that time, the propriety and amount of the assessment remain subject to further agency proceedings at the behest of the assessed party, and an enforcement action may not be brought until the administrative assessment "has become final." 12 U.S.C. 1818(i)(2)(I)(i). As the court of appeals observed, a rule under which the time for judicial enforcement began to run before the commencement of administrative proceedings (or at the time such proceedings were first commenced) would produce an incentive for the assessed party "to delay the [administrative] process as much as possible" (Pet. App. A7), and would lead to a situation in which "the government could find itself unable to collect on a penalty simply because [the administrative] proceedings have taken too long" (*id.* at A9). That would not be a sensible result. Cf. *Reiter* v. *Cooper*, 507 U.S. 258, 267 (1993) ("While it is theoretically possible for a statute to create a cause of action that accrues at one time for the purpose of calculating when the statute of limitations begins to run, but at another time for the purpose of bringing suit, we will not infer such an odd result in the absence of any such indication in the statute.").

Petitioner protests that postponing accrual until the cause of action for enforcement is ripe will result in individuals "remain[ing] for ever liable to a pecuniary forfeiture." Pet. 6 (quoting *3M Co.* v. *Browner*, 17 F.3d 1453, 1457 (D.C. Cir. 1994), in turn quoting *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 341 (1805)). But the question is not whether judicial enforcement of a penalty imposed under Section 1818(i)(2) is subject to

any period of limitation. Whether the claim for judicial enforcement accrues when the administrative assessment becomes final, when judicial review has concluded, or when the assessed party has failed to make a properly demanded payment, the time for such enforcement is specifically limited by Section 2462.

In this case, as petitioner explains (Pet. 3-4, 6), petitioner violated the Act in 1990. The FDIC made its initial penalty assessment in 1992, held a hearing in 1993, and issued its interim decision in 1994 and its final decision in 1995. The judicial review pursued by petitioner was completed in October 1997, when this Court denied review of the Eighth Circuit's decision sustaining the administrative order. Petitioner did not pay the penalty, and the FDIC brought this enforcement action in 1998. The collection suit was therefore timely under any proper construction of when the claim for enforcement accrued, and there is no substance to petitioner's fears (Pet. 6-7) of administrative delay or "perpetu[al]" liability.

2. Petitioner contends (Pet. 5-9) that the decision of the court of appeals conflicts with *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 73 (1953), and *United States* v. *Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985). *Unexcelled Chemical* involved a suit to collect "liquidated damages" under the Walsh-Healy Act, 41 U.S.C. 35 *et seq.*, and held that the two-year statute of limitations in the Portal-to-Portal Act of 1947, 29 U.S.C. 255, had begun to run at the time of the underlying violation. See 345 U.S. at 65. *Core Laboratories* held that for purposes of Section 2462, a claim for collection of sanctions imposed under the antiboycott provisions of the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*, accrued at the time of the sanctionable conduct.

In *Unexcelled Chemical*, the Court emphasized that the Attorney General was authorized to bring suit to collect the liquidated damages without regard to the pendency of administrative proceedings before the Secretary of Labor. 345 U.S. at 65-66. In this case, by contrast, 12 U.S.C. 1818(i)(2)(I)(i) expressly precluded the FDIC from bringing suit to collect a penalty assessed under Section 1818(i)(2) until the penalty "ha[d] become final." Here, therefore, awaiting the outcome of the administrative proceedings was a necessary prerequisite to suit, not simply a matter of "judicial administration." 345 U.S. at 66; see also *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 519 (1967) (distinguishing *Unexcelled Chemical*); *United States* v. *Meyer*, 808 F.2d 912, 917 (1st Cir. 1987) (same).

In *Core Laboratories*, the Fifth Circuit emphasized that each statute must be examined on its own terms for purposes of construing the applicable statute of limitations. 759 F.2d at 481-482 (citing *Crown Coat Front*, 386 U.S. at 517). In applying Section 2462 in the context of the Export Administration Act, the court relied, in significant part, on legislative history indicating that Congress specifically intended the five-year limitation period to apply to administrative as well as to judicial proceedings, and to run from the time of the act giving rise to the liability. *Id.* at 482. Petitioner points to no evidence of congressional intent that the period of limitations for a collection action under Section 1818(i)(2)(I) should run from the time of the violation. Moreover, the Export Administration Act provides that in an action brought to recover a civil penalty "the court shall determine de novo all issues necessary to the establishment of liability," 50 U.S.C. App. 2410(f), whereas in a collection action under Section 1818(i)(2)(I)(ii), "the validity and appropriateness of the penalty

shall not be subject to [judicial] review." There are, accordingly, material differences between the provisions at issue in *Core Laboratories* and in this case, and there is no reason to assume that the Fifth Circuit would disagree with the decision below.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

JACOB M. LEWIS
SANDRA WIEN SIMON
Attorneys

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[3] For the same reason, there is no need to consider in this case the conflict between *Core Laboratories* and the First Circuit's more recent (and better reasoned) decision in *Meyer*, which reached a different conclusion concerning the application of Section 2462 to suits for collection of sanctions imposed under the Export Administration Act. See Pet. App. A6-A7. Nor is there any reason to hold this case pending the Court's consideration of *TRW Inc.* v. *Andrews*, No. 00-1045, which involves whether a "discovery rule" applies in determining when the limitation period begins to run for consumer actions under the Fair Credit Reporting Act, 15 U.S.C. 1681 *et seq.*, or *National Railroad Passenger Corp.* v. *Morgan*, No. 00-1614, which presents a question concerning the "continuing violation" doctrine in the context of federal anti-discrimination statutes. The questions at issue in those cases are quite distinct from the question petitioner seeks to present.