No. 19-997

In the Supreme Court of the United States

GARY S. WILLIKY, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in determining the amount of the civil penalty that the court imposed for petitioner's insider trading.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 942 F.3d 389. The order of the district court (Pet. App. 17-38) is not published in the Federal Supplement but is available at 2018 WL 3729137. An additional order of the district court (Pet. App. 12-16) is not published in the Federal Supplement but is available at 2019 WL 162578.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2019. The petition for a writ of certiorari was filed on February 6, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Securities and Exchange Commission (SEC or Commission) brought a civil enforcement action against

petitioner, alleging that he had engaged in market manipulation and insider trading, in violation of the securities laws. Pet. App. 5-6. In accordance with a settlement agreement, the district court entered judgment for the SEC. *Id.* at 6. The court of appeals affirmed. *Id.* at 1-11.

1. From 2010 to the end of 2011, petitioner worked as an investor-relations consultant for Imperial Petroleum, Inc. (Imperial), a company in Evansville, Indiana that sold biodiesel. Pet. App. 18. Imperial bought its biodiesel from middlemen, but it falsely claimed to the government and the investing public that it produced the biodiesel itself. *Id.* at 22. That misrepresentation enabled it to obtain tax credits and other government subsidies for biodiesel production. *Ibid.* Imperial reaped more than $50 million in profits from its scheme. *Ibid.*

Petitioner engaged in a scheme of market manipulation to raise Imperial's stock prices artificially. Pet. App. 4. First, he conducted a series of transactions—such as simultaneously buying and selling stock in the company—in order to create a false perception of activity in the market for Imperial's shares. *Ibid.* By thus inflating the volume of trades, petitioner attracted additional buyers and artificially increased the price of the stock. *Ibid.* Second, petitioner sent out promotional emails touting the value of Imperial's shares, but failed to disclose (as required by federal securities law) his own ownership of millions of shares in the company. *Id.* at 4-5. The emails encouraged recipients to buy shares in the company, but in the days after the emails were sent, petitioner sold many of his own shares, obtaining more than $60,000 in profit. *Id.* at 4.

Petitioner also engaged in a scheme of insider trading. Pet. App. 5. By July 2011, he became aware that Imperial was lying to investors about its production of biodiesel, and by November 2011, he became aware of the full extent of the fraud. *Ibid.* While in possession of that confidential information, petitioner sold all of his shares in the company, thereby avoiding a loss of $798,217. *Ibid.* As he sold his shares, petitioner contacted federal authorities in the hope of becoming a whistleblower. *Ibid.*

2. In March 2015, the SEC filed a civil action against petitioner, alleging that he had engaged in market manipulation, insider trading, and other unlawful conduct, in violation of 15 U.S.C. 77q(a), 78i(a), 78j(b), 78m(a), and 17 C.F.R. 240.10b-5, 240.13d-1. Compl. ¶¶ 66-102. The parties entered into a settlement under which petitioner admitted his involvement in the fraudulent scheme, agreed to the entry of injunctions prohibiting him from violating the provisions of the securities laws at issue in the complaint and from serving as an officer or director of a public company, and agreed that the district court would determine appropriate monetary remedies based on the facts alleged in the SEC's complaint. Pet. App. 2, 6.

The district court awarded the SEC disgorgement of $798,217 for petitioner's insider trading, disgorgement of $65,617 for petitioner's manipulative emails, a civil penalty of $1,596,434 for insider trading, and a civil penalty of $150,000 for the remaining counts. Pet. App. 38; see *id.* at 17-38. The only monetary remedy at issue here is the civil penalty of $1,596,434 for insider trading. See Pet. 21-32. The court observed that the governing statute authorizes civil penalties for insider trading of up to "three times the profit gained or loss avoided."

Pet. App. 37 (quoting 15 U.S.C. 78u-1(a)(2)). The court found that "a tripling" of the loss that petitioner had avoided would be "excessive in this case," but that a penalty of "two times" the loss avoided would be "appropriate." *Ibid.*

In reaching that conclusion, the district court emphasized that petitioner is a recidivist offender and that he "has not fully taken responsibility for his actions." Pet. App. 37. Petitioner contended that a lower penalty was appropriate in light of his efforts to become a whistleblower and to cooperate with the SEC. The court rejected that argument, noting that petitioner's "cooperation was of limited value." *Id.* at 38.

3. The court of appeals affirmed. Pet. App. 1-11.

The court of appeals rejected petitioner's contention that the district court had abused its discretion in determining the amount of the civil penalty. Pet. App. 7-11. The court of appeals explained that "[b]oth parties concur that in determining a civil penalty for violations of federal securities law, the court should generally consider factors such as: 'the seriousness of the violation; the defendant's scienter; the repeated nature of the violations; whether the defendant has admitted wrongdoing; the losses or risk of losses caused by the conduct; any cooperation provided to enforcement authorities; and ability to pay.'" *Id.* at 8 (citation omitted). The court further explained that the structure of the applicable statutory provisions—which cap civil penalties at the amount of the ill-gotten gain for most violations, but at three times that amount for insider trading—shows that "the overriding concern of the civil penalty against insider trading is to 'effect general deterrence and to make insider trading a money-losing proposition.'" *Id.* at 9 (citation omitted).

The court of appeals concluded that the district court had not abused its discretion in determining the amount of petitioner's civil penalty. Pet. App. 9. The court of appeals emphasized that petitioner "is a recidivist federal securities law offender who attempted to avoid responsibility in his district court proceedings and, on appeal, still fails to admit any wrongdoing related to insider trading." *Ibid.* It concluded that, given those circumstances, "the district court properly determined that [the] civil penalty was necessary to serve as an effective deterrent." *Ibid.* The court of appeals rejected petitioner's argument that the district court had accorded inadequate weight to petitioner's efforts to become a whistleblower and his willingness to enter into a settlement with the SEC. *Id.* at 9-10. The court of appeals stated that petitioner "has been notably uncooperative throughout the course of litigation," and that any cooperation petitioner had provided "was of limited value." *Id.* at 10-11.

ARGUMENT

Petitioner contends (Pet. 21-32) that the district court abused its discretion in determining the amount of his civil penalty. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review of petitioner's factbound argument is not warranted.

1. The court of appeals correctly held that the district court had not abused its discretion in determining the amount of petitioner's civil penalty. Federal law authorizes the imposition of a civil penalty of up to "three times the profit gained or loss avoided" for insider trading. 15 U.S.C. 78u-1(a)(2). The district court may determine the precise amount of the penalty "in light of

the facts and circumstances." *Ibid.* In this case, the court concluded that a penalty of three times the loss petitioner had avoided would be excessive, but that a penalty of two times the loss avoided would be appropriate in light of petitioner's pattern of recidivism and his failure to accept responsibility for his insider trading. Pet. App. 37-38.

Petitioner argues (Pet. 21-31) that the district court gave inadequate weight to his efforts to cooperate with federal authorities. The court explicitly considered that factor, however, and found that "[petitioner's] cooperation was of limited value." Pet. App. 38. The court of appeals similarly concluded that petitioner "has been notably uncooperative throughout the course of litigation." *Id.* at 11. And in all events, the district court stopped short of imposing the maximum penalty authorized by the statute. *Id.* at 37. The court's assessment of petitioner's cooperation thus did not constitute an abuse of discretion.

Petitioner does not contend that the court of appeals' decision conflicts with any decision of this Court or another court of appeals. Nor does he contend that the civil penalties awarded in this case exceed the maximum permitted by the statute. Petitioner likewise does not contend that the court of appeals applied an erroneous legal standard in evaluating the propriety or permissible amount of civil penalties; to the contrary, the court noted that "[b]oth parties concur" about the relevant factors. Pet. App. 8. Petitioner instead asserts (Pet. 21) that the district court "ma[de] a serious mistake in weighing the fact" of his cooperation. That factbound argument does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is

rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

2. In addition to imposing civil penalties, the district court in this case awarded disgorgement to the SEC. See Pet. App. 38; p. 3, *supra*. Although this Court is currently considering the question whether disgorgement is an available element of relief in civil actions brought by the SEC, see *Liu* v. *SEC*, No. 18-1501 (argued Mar. 3, 2020), the Court need not hold the petition for a writ of certiorari in this case pending its decision in *Liu*. In the court of appeals, petitioner did not contest either the district court's authority to order disgorgement or the amount of the disgorgement award. In this Court, petitioner likewise does not challenge the disgorgement award or ask that the petition be held for *Liu*, even though the Court had granted certiorari in *Liu* well before the petition in this case was filed. Any challenge to the disgorgement order in this case has thus been forfeited.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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