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2021]

PROTECTING THE THRONE: THE THIRD CIRCUIT'S DECISION TO
PRESERVE SOVEREIGN IMMUNITY IN *GENTILE* v. *SEC*

INTRODUCTION

Sovereign immunity is a useful tool for governments because it shields federal bodies from legal claims brought by citizens.¹ The Administrative Procedure Act (“APA”) serves as a counterweight to sovereign immunity’s protection by allowing litigants to bring suit against the government under particular circumstances.² In a sense, the APA provides litigants, through the courts, with a tool to check government power.³ “Nevertheless, it can be challenging for a litigant to successfully leverage the APA waiver of sovereign immunity because there are several laws that serve as exceptions to the APA and maintain sovereign immunity.”⁴

In September 2020, the Court of Appeals for the Third Circuit examined the competing interests surrounding sovereign immunity in *Gentile* v. *SEC*.⁵ In *Gentile*, a stockbroker and self-proclaimed “rogue” government informant, Guy Gentile, tried to utilize the APA’s waiver to invalidate a Securities and Exchange Commission (SEC) investigation.⁶ Gentile’s relationship with the SEC began in 2012, when the SEC investigated him for “penny-stock manipulation.”⁷ After federal agents arrested

1. See JARED P. COLE, CONG. RESEARCH SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 3–4 (2016) (detailing the relevant questions that surround sovereign immunity in the context of challenges to agency action). Sovereign immunity is “[a] government’s immunity from being sued in its own courts without its consent.” *Sovereign Immunity*, BLACK’S LAW DICTIONARY (11th ed. 2019).

2. See COLE, *supra* note 1, at 1–2 (describing the history of the APA and its allowance of judicial review of federal agency action).

3. See *id.* at 4 (noting that the APA allows “individuals aggrieved by agency action to bring suit in federal court against the United States and government employees in their official capacity” since it was amended in 1976).

4. See *id.* at 11 (“Judicial review of agency action under the APA is unavailable in two important situations: (1) when a statute precludes review and (2) when the agency’s action is legally committed to an agency’s discretion.”). For more detail on sovereign immunity, see *infra* notes 24–34 and accompanying text.

5. 974 F.3d 311 (3d Cir. 2020).

6. See Zeke Faux, ‘Bro, I’m Going Rogue’: The Wall Street Informant Who Double-Crossed the FBI, BLOOMBERG (March 23, 2017), <https://www.bloomberg.com/news/features/2017-03-23/-bro-i-m-going-rogue-the-wall-street-informant-who-double-crossed-the-fbi> [<https://perma.cc/2EGW-CEQS>].

7. *Gentile*, 974 F.3d at 313 (“Guy Gentile and the Securities and Exchange Commission are not strangers. Their acquaintance dates back to 2012 when the SEC investigated Gentile for his role in penny-stock manipulation scheme in 2007–08.”); see also *SEC v. Gentile*, 16-1619, 2017 WL 6371301, at *1 (D.N.J. Dec. 13, 2017) (alleging Gentile’s involvement in penny-stock manipulation in 2007). See generally David S. Ruder, Chairman, U.S. Securities & Exchange Commission, Penny Stock Manipulation and the Small Investor, Remarks Before the Twenty-

Gentile, he struck a deal with the government and agreed to become an FBI informant.⁸ From 2012 to 2016, Gentile helped the FBI gather evidence on brokers suspected of securities fraud, often by participating in sham meetings where Gentile would surreptitiously record brokers pitching their schemes.⁹

In 2016, Gentile's relationship with the government soured after he learned that he would still be charged for his "pump-and-dump schemes . . . from 2007 to 2008."¹⁰ Gentile refused to continue his cooperation and was subsequently indicted in March of 2016.¹¹ Simultaneously, the SEC brought a civil enforcement action against Gentile in the District Court for the District of New Jersey seeking disgorgement of profits and an injunction that would prohibit him from trading penny stocks.¹²

While the SEC was pursuing a civil suit against Gentile in New Jersey, the SEC's regional office in Miami was conducting an ongoing investigation into Traders Café, LLC, a trading platform that Gentile was involved with through his own brokerage, SureTrader.¹³ Traders Café was run by two unregistered broker-dealers who used the platform as a vehicle for fraudulent day trading schemes.¹⁴ In 2013, during the course of the Traders Café investigation, the SEC issued a Formal Order of Investigation

First Annual Rocky-Mountain-State-Federal-Provincial Securities Conference 2 (Oct. 21, 1988) (transcript available at <https://www.sec.gov/news/speech/1988/102188ruder.pdf> [<https://perma.cc/HCK5-YC74>]) ("Penny stocks are low-priced securities traded over-the-counter. They are usually traded outside of the National Association of Securities Dealers' Automated Quotation System (NASDAQ) and are usually quoted in the National Quotation Bureau's 'pink sheets.'"). "[P]enny stocks will be sold to the public at ever increasing prices, so that the promoters will profit by selling at grossly inflated values and the broker-dealers will profit by huge markups and commissions." *Id.* at 7.

8. *See* SEC v. Gentile, 939 F.3d 549, 552 (3d. Cir 2018).

9. *See* Faux, *supra* note 6.

10. *Gentile*, 939 F.3d at 552; *see also* Faux, *supra* note 6 ("That June, his worst fear came true: Prosecutors told him he'd have to plead guilty to a felony stemming from the original charges against him. They said he wouldn't serve any time in prison, but Gentile nevertheless felt betrayed.").

11. *See* United States v. Gentile, 235 F. Supp. 3d 649, 651 (D.N.J. 2017) ("The plea agreement that was presented to Defendant, if followed by the Court, would have resulted in a sentence of probation. Defendant rejected the plea off[er] and was subsequent[ly] indicted on March 23, 2016." (citation omitted)).

12. *See* *Gentile*, 939 F.3d at 552 (describing the relief sought by the SEC).

13. *See* *Gentile v. SEC*, No. 19-5155, 2019 WL 2098832, at *1 (D.N.J. May 5, 2019) ("Since around August of 2015, Plaintiff has been aware of an SEC investigation out of the Miami Regional Office into whether Plaintiff and his Bahamas-based broker-dealer, SureTrader, improperly solicited United States customers.").

14. *See* Press Release, U.S. Sec. & Exch. Comm'n, SEC Charges Unregistered Broker in Tampa Area With Stealing From Investors in Fraudulent Day Trading Scheme (Nov. 18, 2014), <https://www.sec.gov/news/press-release/2014-259> [<https://perma.cc/CTS2-XVWB>] (reporting that the two unregistered broker-dealers associated with Traders Café violated Section 17(a) of the Securities Act of 1933 and Section 15(a) and 10(b) of the Securities Exchange Act of 1934).

(“FOI”).¹⁵ The FOI authorized the SEC to investigate any individuals related to Traders Café.¹⁶ Despite the SEC charging the prime suspect in the Traders Café investigation, Albert J. Scipione, in 2014, and the New Jersey court’s dismissal of the SEC’s enforcement action, the SEC continued to use the Traders Café FOI as a tool to investigate Gentile and SureTrader.¹⁷

Traders Café had an account with Gentile’s SureTrader, creating the nexus that the SEC needed to use the Traders Café FOI to investigate Gentile.¹⁸ While investigating Gentile and SureTrader, the SEC issued numerous administrative subpoenas to individuals and entities associated with Gentile and SureTrader.¹⁹ Gentile believed the SEC was targeting him after the federal district court in New Jersey dismissed the SEC’s civil suit against him for a failure to satisfy the statute of limitations.²⁰

As a result of the SEC’s administrative subpoenas, Gentile claimed that his business interests had unfairly suffered due to illegal SEC activity.²¹ Gentile sought a preliminary injunction against the SEC in District Court.²² Gentile’s case made its way to the Third Circuit, where the court ruled in favor of the SEC by holding that Gentile’s claim was barred by sovereign immunity.²³

15. *See Gentile*, 2019 WL 2098832, at *2 (“According to Plaintiff, the Florida SEC investigation relies on a formal order of investigation . . . dated November 5, 2013 entitled ‘In the matter of Traders Café, LLC,’ which authorizes an investigation into individuals related to an entity called Traders Café.”).

16. *See id.*

17. *See Gentile*, 974 F.3d at 314 (“The SEC issued a Formal Order of Investigation into Traders Café on November 25, 2013. But later, without issuing a new Formal Order of Investigation, the SEC informed Gentile that he was a target in that investigation.”); *see also* Litigation Release, U.S. Sec. & Exch. Comm’n, Litigation Release No. 23136 (Nov. 19, 2014), <https://www.sec.gov/litigation/lit-releases/2014/lr23136.htm> [<https://perma.cc/7MT6-PMB3>] (reporting that Albert J. Scipione pleaded guilty to criminal charges involving Traders Café).

18. *See Gentile*, 2019 WL 2098832, at *2 (“Indeed, Plaintiff alleges that there is no connection whatsoever between Traders Café and Plaintiff’s Bahamian broker-dealer, other than the fact that Traders Café maintains or maintained an account at Plaintiff’s broker-dealer.”).

19. *See Gentile*, 974 F.3d at 314 (“Instead, the SEC has pursued other options for obtaining information, and it has not been shy about serving subpoenas on other entities associated with Gentile.”).

20. *See Gentile*, 2019 WL 2098832, at *2 (claiming the SEC Miami Regional Office “lack[ed] the necessary authority to proceed with or to enforce existing subpoenas absent a proper FOI”).

21. *See Gentile*, 974 F.3d at 314 n.2 (citing Gentile’s complaint where he claimed that banks and vendors had stopped doing business with him and his business entities).

22. *See Gentile*, 2019 WL 2098832, at *1 (stating that Gentile sought a preliminary injunction and the SEC moved to dismiss).

23. *See Gentile*, 974 F.3d at 320 (“Gentile’s complaint had to be dismissed for lack of subject matter jurisdiction, and we will affirm the judgment of the district court.”). For more information on sovereign immunity and subject matter jurisdiction, see *infra* note 25 and accompanying text.

This Casebrief argues that although the Third Circuit's decision in *Gentile* was a product of sound legal reasoning, the opinion exposed the limitations of the APA's waiver of sovereign immunity. Part I of this Casebrief analyzes the doctrine of sovereign immunity and the structure of the APA's waiver. Part II discusses the Third Circuit's reasoning and holding in *Gentile*. Part III sheds light on the problems inherent in the structure of the APA's waiver and the potential for abuse that may result from these defects. Finally, Part IV explores the impact that the Third Circuit's decision may have on future litigants challenging federal agency action.

I. BACKGROUND

Sovereign immunity is a legal doctrine that prevents a plaintiff from suing the government without the government's consent.²⁴ Although there are no "sovereigns" in the United States, American courts and government lawyers invoke the principle as a standard legal rule.²⁵ There are several competing theories that seek to explain this protection.²⁶ Commentators have questioned the applicability of the doctrine in the American context and some, if not most, believe that sovereign immunity has no place in the American legal landscape.²⁷

24. See William Baude, *Sovereign Immunity and the Constitutional Text*, 103 VA. L. REV. 1, 4 (2017) ("Read for all it is worth, [sovereign immunity] might be a bar to nearly all affirmative judicial relief against government action."); see also Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201-02 (2001) (noting that the sovereign immunity doctrine has roots in English law where it was intended to protect the king from legal claims).

25. See Chemerinsky, *supra* note 24, at 1202; see also *Gentile*, 974 F.3d 311 at 313 (dismissing *Gentile*'s claim due to lack of subject matter jurisdiction). Attorneys representing the federal government can invoke sovereign immunity as a bar to subject matter jurisdiction. See *id.* at 315 (laying out the SEC's argument for dismissal based on a lack of subject matter jurisdiction). Additionally, a court must throw out a claim it does not have subject matter jurisdiction over, regardless of whether the problem is raised by either party or whether either party is willing to waive the issue. See Michael G. Collins, *Jurisdictional Exceptionalism*, 93 VA. L. REV. 1829, 1831 (2007) (noting that subject matter jurisdiction requirements may not be waived by parties to a suit).

26. See, e.g., Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1530 (1992) (arguing the doctrine of sovereign immunity is built on the "desire to maintain" the separation of powers in government). The doctrine of sovereign immunity serves "a structural protection for democratic rule." *Id.* at 1531; see also Corey Brettschneider & David McNamee, *Sovereign and State: A Democratic Theory of Sovereign Immunity*, 93 TEX. L. REV. 1229, 1241-52 (2015) (critiquing popular theories of sovereign immunity, including those based on constitutional interpretation and on the idea of the "inherent dignity" of a state); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523 (2003) (noting the doctrine's "meaning is contested and contestable").

27. See, e.g., Chemerinsky, *supra* note 24, at 1201 ("Sovereign immunity is an anachronistic relic and the entire doctrine should be eliminated from American law."); Jackson, *supra* note 26, at 609 (noting that the doctrine's "constitutional provenance is at best unclear"); Krent, *supra* note 26, at 1530 (stating that the doctrine "persists subject to near unanimous condemnation from commentators").

Sovereign immunity serves as a useful tool for the federal government.²⁸ The doctrine offers broad protection to the government, which the court in *Gentile* made clear when it pointed out that “sovereign immunity shields federal agencies from suit.”²⁹ Given the large number of federal agencies, from the Postal Service to the Department of Justice, and the amount of work that these various bodies undertake, sovereign immunity insulates a large amount of federal activity from legal challenge.³⁰

Although sovereign immunity provides far ranging protection for the government, Congress has limited the application of the doctrine.³¹ As previously noted, sovereign immunity’s protection is available only if the government does not consent to suit.³² The most well-known method by which the government establishes its consent to suit is through a waiver of sovereign immunity.³³ There are many statutes that waive sovereign immunity, including the Federal Tort Claims Act, the Tucker Act, and of course, the APA.³⁴

Congress enacted the APA in 1946 on the heels of creating and expanding many federal agencies throughout the New Deal era.³⁵ Congress created the APA as an attempt to codify rules for regulating the growing reserve of federal agency power.³⁶ In fact, the Chair of the Senate Judici-

28. See Krent, *supra* note 26, at 1530 (“[U]nlike private individuals and entities, the government is liable only to the extent it deems appropriate.”). Krent argues that the doctrine places the government in a preferred position over other potential defendants. *Id.*; see also *Gentile*, 974 F.3d at 320 (dismissing *Gentile*’s claim against the SEC based on sovereign immunity).

29. *Gentile*, 974 F.3d at 313.

30. See Krent, *supra* note 26, at 1542.

31. See *id.* at 1543 (discussing the power of Congress to waive sovereign immunity for various types of claims against federal agencies). Krent analyzes the structural and political considerations that Congress makes when deciding when and how to waive sovereign immunity for agencies. *Id.* at 1542 (noting that political controls are less effective when applied to agency rather than legislative action and that this structural issue calls for less robust protection for agency action).

32. See *Sovereign Immunity*, BLACK’S LAW DICTIONARY (11th ed. 2019).

33. See Gregory C. Sisk, *A Primer on the Doctrine of Federal Sovereign Immunity*, 58 OKLA. L. REV. 439, 458–59 (2005) (noting that “Congress has gradually lowered the shield of sovereign immunity” through the use of statutory waivers). Sisk outlines the evolution of Congressional waivers and concludes that these statutory provisions have become the focus of challenges to government activity. *Id.* at 460 (noting the shift from common law arguments to claims based directly on Congressional waivers).

34. See 28 U.S.C. § 1346 (2021) (Federal Tort Claims Act); 28 U.S.C. § 1491 (2021) (Tucker Act); 5 U.S.C. § 702 (2020) (APA); see also Sisk, *supra* note 33, at 458–59 n.118 (describing these and other statutes limiting sovereign immunity).

35. Roni A. Elias, *The Legislative History of the Administrative Procedure Act*, 27 FORDHAM ENVTL. L. REV. 207, 208–09 (2015) (describing how the growth of the administrative state prompted discussions about control over these bodies). Political motivations on both sides of the aisle prompted the APA’s passage. See *id.* at 211–14.

36. See *id.* at 208–09 (discussing the desire to increase control over federal agencies). Prior to the APA, and despite the constantly increasing reserve of administrative power, “there were . . . no comprehensive standards for governing

ary Committee in 1946 referred to the law as “a bill of rights for the hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government. It is designed to provide guarantees of due process in administrative procedure.”³⁷

At first glance, the APA’s waiver of sovereign immunity appears broad.³⁸ In its original form, the waiver had a statutory standing requirement that forced plaintiffs to have experienced either a legal wrong or an adverse effect due to agency action.³⁹ A 1976 amendment to the waiver “explicitly waived sovereign immunity to sue the United States for ‘relief other than monetary damages[,]’” providing a clear right of action against agencies.⁴⁰ As explained by the Third Circuit, an explicit Congressional waiver must exist in order for challenges to agency action to proceed.⁴¹

Although the APA granted citizens the right to sue the federal government, Congress placed four relevant limitations on this ability.⁴² The 1976 amendment included two provisos: one requiring that any application of the APA’s waiver complies with “other limitations on judicial review[,]” and one barring claims if another statute granting consent to suit prevents the specific relief sought.⁴³ As a result, if either of these provisos are met, sovereign immunity bars legal relief. According to the Third Cir-

agency action.” *Id.* at 209.; *see also* COLE, *supra* note 1, at 1 (“[T]he Administrative Procedure Act (APA) [is] perhaps the most prominent modern vehicle for challenging the actions of a federal agency.”).

37. David H. Rosenbloom, *1946: Framing a Lasting Congressional Response to the Administrative State*, 50 ADMIN. L. REV. 173, 179 (1998) (quoting 92 CONG. REC. 2149 (1946) (reporting remarks by Senator Pat McCarran, a Democrat from Nevada)).

38. *See* 5 U.S.C. § 702 (2020). The waiver’s first sentence provides that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” *Id.*; *see also* *Gentile v. SEC*, 974 F.3d 311, 315 (3d Cir. 2020) (referencing the waiver’s scope).

39. *See* *Gentile*, 974 F.3d at 316.

40. *Id.* (explaining the development of the APA’s waiver); *see also* 5 U.S.C. § 702 (“The United States may be named as a defendant in any such action, and a judgement or decree may be entered against the United States . . .”).

41. *See* *Gentile*, 974 F.3d at 315–16 (citing *Alden v. Maine*, 527 U.S. 706, 749 (1999)) (stating that courts will look for “an unequivocal statutory waiver” of sovereign immunity before entertaining a claim against the government); COLE, *supra* note 1, at 4 (noting that courts will not imply a waiver).

42. *See* 5 U.S.C. §§ 701–702 (2021) (outlining the waiver’s limitations); *Gentile*, 974 F.3d at 316–17. The Third Circuit described the limits included in section 701 as “exceptions” to the waiver and the limits included in section 702 as “provisos.” *Id.*

43. *See* § 702; *Gentile*, 974 F.3d at 316 (describing the provisos added to the waiver by the 1976 amendment); COLE, *supra* note 1, at 4 n.38 (discussing the amendment’s impact). In this Casebrief, “judicial review” refers to courts analyzing and evaluating government action for compliance with statutory standards rather than the traditional meaning of evaluating legislation for compliance with the Constitution. *See generally* Jackson, *supra* note 26, at 568–69 (discussing judicial review under the APA).

cuit, these provisos were needed to prevent the waiver from “overtak[ing] pre-existing limitations on judicial review”⁴⁴

Two additional exceptions further restrict the APA’s waiver of sovereign immunity.⁴⁵ The first exception requires that no other statute “preclude judicial review[.]”⁴⁶ The second exception prohibits judicial review of “agency action [that] is committed to agency discretion by law.”⁴⁷ Thus, despite the APA’s “broad waiver[.]” there are four explicit limitations placed on a federal court’s ability to entertain claims against federal agencies.⁴⁸

The waiver’s provisos and exceptions are precise, requiring careful analysis of both statutory language and the challenged agency activity.⁴⁹ The APA’s waiver requires that a plaintiff challenge “agency action[.]”⁵⁰ When a party contests SEC activity, the claim may implicate the waiver’s first proviso, which triggers a provision in the Securities Exchange Act of 1934 that arguably prevents challenges to SEC subpoenas.⁵¹ This statutory provision sets forth “that subpoena enforcement actions under the Exchange Act, ‘are the exclusive method by which the validity of SEC investigations and subpoenas may be tested in federal courts.’”⁵²

Although all four of these limitations may be used to negate the waiver, the carve out for “agency discretion” seems to require particularly careful judicial analysis.⁵³ Unlike “agency action,” which has a statutory definition, “agency discretion” has been largely defined by Supreme Court precedent.⁵⁴ The Supreme Court has ruled that judicial review is not available when “a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”⁵⁵ While some types of agency action have been classified as falling within the realm of agency

44. *Gentile*, 974 F.3d at 316 (discussing the interplay between the amendment’s unequivocal waiver and provisos).

45. *See* §§ 701(a)(1)–(2) (setting forth exceptions to the applicability of the APA’s waiver); *Gentile*, 974 F.3d at 316–17.

46. § 701(a)(1).

47. *Id.* § 702(a)(2).

48. *Gentile*, 974 F.3d at 316.

49. *See infra* notes 67–76 for a description of how the Third Circuit approached this analysis in *Gentile*.

50. Agency action is defined as “the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof or failure to act[.]” 5 U.S.C. § 551(13) (2021).

51. *See* 15 U.S.C § 78u(c) (2020) (providing a method by which the SEC may seek judicial assistance to enforce subpoenas).

52. *Gentile*, 974 F.3d at 318 (quoting *Sprecher v. Graber*, 716 F.2d 968, 975 (2d Cir. 1983)). This provision arguably gives the SEC unilateral power to have subpoenas reviewed by courts. *See id.*

53. *See infra* notes 72–76 for a discussion of the Third Circuit’s analysis of the agency discretion question.

54. *See Gentile*, 974 F.3d at 318–19 (reviewing Supreme Court precedent discussing the limits on judicial review attributable to agency discretion); 5 U.S.C. § 551(13).

55. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

discretion, sovereign immunity is extended to all decisions that “involve ‘a complicated balancing of a number of factors which are peculiarly within [the agency’s] expertise.’”⁵⁶

II. NARRATIVE ANALYSIS

In 2019, Gentile sued the SEC, seeking a preliminary injunction for the SEC’s ongoing investigation into himself and SureTrader, Gentile’s Brokerage.⁵⁷ Gentile argued that it was improper for the SEC to investigate himself and SureTrader based on the Trader’s Café FOI.⁵⁸ Gentile alleged that the SEC was using the Traders Café investigation to gather additional information to strengthen its civil suit against Gentile in New Jersey.⁵⁹

The district court ruled in favor of the SEC, granting its motion to dismiss for lack of subject matter jurisdiction.⁶⁰ On appeal, the Third Circuit ultimately found that Gentile’s claim fell outside of the APA’s waiver of sovereign immunity.⁶¹ While the Third Circuit affirmed the judgment of the district court, the two courts used different reasoning to reach their conclusions.⁶² The district court used the *Sprecher v. Graber* method to determine that sovereign immunity barred Gentile’s complaint by triggering one of the waiver’s provisos.⁶³ Relying on *Sprecher*, the district court noted that statutory language “makes explicit that the APA’s waiver does not af-

56. *Id.* at 831.

57. See *supra* notes 13 and 21–23 and accompanying text for a discussion of the SEC’s investigation into SureTrader.

58. *Gentile*, 974 F.3d at 317–18 (“Gentile argues that the Formal Order of Investigation exceeds the SEC’s authority because it does not have a sufficient nexus to his conduct and because it allows a retributive investigation.”).

59. *Gentile v. SEC*, No. 19-5155, 2019 WL 2098832, at *1 (D.N.J. May 5, 2019) (“Plaintiff alleges that the SEC is using the Florida investigation as a pretext to gather additional information to further its case in New Jersey and to overcome the statute of limitations.”).

60. *Id.* at *9.

61. *Gentile*, 974 F.3d at 319 (dismissing Gentile’s complaint for lack of subject matter jurisdiction and affirming the judgment of the district court).

62. See *id.* at 313–19; *Gentile*, 2019 WL 2098832, at *1–6.

63. See *Gentile*, 974 F.3d at 315 (citing *Sprecher v. Graber*, 716 F.2d 968 (2d Cir. 1983)). In *Sprecher*, the plaintiff sought to enjoin an SEC investigation claiming that he was being harassed. *Sprecher*, 716 F.2d at 971. The court found that the APA was the only statute that could possibly enable the plaintiff to challenge the SEC’s sovereign immunity. *Id.* at 973. However, the court found that the plaintiff’s complaint triggered a proviso of Section 702 of the APA. *Id.* Specifically, the complaint fell under the proviso stating that the APA does not limit other avenues for judicial review. See *id.* at 974. The court reasoned that the plaintiff’s claim triggered the proviso because Section 78u(c) of the Exchange Act limited judicial review. *Id.* “Section 78u(c) is the exclusive method by which the validity of SEC investigations and subpoenas may be tested in the federal courts.” *Id.* at 975. The court noted that Congress did not intend to waive sovereign immunity where another statute provided a form of relief. *Id.* at 973. Therefore, the plaintiff’s claims were barred by sovereign immunity. *Id.* at 971.

fect other limitations on judicial review.”⁶⁴ The district court reasoned that section 78u(c) of the Securities Exchange Act provided the exclusive mechanism for disputing SEC-issued subpoenas.⁶⁵ “Thus, due to the proviso, the APA’s waiver of sovereign immunity could not expand the Exchange Act’s limitation on judicial review—leaving Gentile’s complaint barred by sovereign immunity.”⁶⁶

However, the Third Circuit found that the *Sprecher* analysis was improper.⁶⁷ The court, in contrast to the district court, reasoned that section 78u(c) of the Securities Exchange Act did not apply because Gentile had not challenged individual subpoenas, but the FOI itself.⁶⁸ Gentile broadly argued that the SEC did not have authority to initially open the investigation.⁶⁹ Gentile contended that the SEC lacked a sufficient nexus to link his conduct to Traders Café, thus nullifying the validity of the subpoenas stemming from the Traders Café FOI.⁷⁰ Therefore, the Third Circuit found the district court’s use of the *Sprecher* analysis to be misplaced.⁷¹

Nevertheless, the Third Circuit agreed with the SEC’s argument that “due to the exception for ‘agency action committed to agency discretion by law,’ sovereign immunity prevents judicial review of its Formal Order of Investigation.”⁷² The court recognized the long history of jurisprudence upholding agency discretion as nonreviewable, citing Supreme Court decisions that protected agency discretion not to investigate or prosecute.⁷³ Importantly, the Third Circuit equated the considerations that dictate agency decisions *not to* investigate with considerations that dictate agency decisions *to* investigate.⁷⁴ Thus, the court held, “because an agency deci-

64. *Gentile*, 974 F.3d at 315 (recounting the Second Circuit’s decision in *Sprecher* and the District Court of New Jersey’s application of the *Sprecher* holding); see also 5 U.S.C. § 702 (2021).

65. *Gentile*, 2019 WL 2098832, at *4 (“Section 78u(c) is the exclusive method by which the validity of SEC investigations and subpoenas may be tested in federal courts.” (quoting *Sprecher*, 716 F.3d at 975)).

66. *Gentile*, 974 F.3d at 315 (noting that the district court did not address the SEC’s argument that agency action is protected by the use of agency discretion).

67. *Id.* at 318 (“And by directing his challenge to the SEC’s Formal Order of Investigation, Gentile avoids the SEC’s *Sprecher* argument, which involved a challenge to individual subpoenas—not solely a direct challenge to the agency’s decision to open an investigation.”).

68. *Id.*

69. See *id.* at 317–18 (“Gentile argues that the Formal Order of Investigation exceeds the SEC’s authority because it does not have a sufficient nexus to his conduct and because it allows a retributive investigation.”).

70. See *id.*

71. *Id.*

72. *Id.* (citation omitted) (quoting 5 U.S.C. § 701(a)(2)) (finding that the SEC’s use of discretion meant that the APA’s waiver was inapplicable).

73. *Id.* at 318–19 (first citing *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270 (1987); then citing *Heckler v. Chaney*, 470 U.S. 821 (1985); then citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)).

74. *Id.* at 319 (“[T]he same set of considerations governs both decisions to investigate and decisions not to investigate.”).

sion to investigate fits within the section 701(a) exception, targeted piecemeal challenges to that action fall outside of the APA's waiver of sovereign immunity."⁷⁵ Ultimately, the Third Circuit held that sovereign immunity barred Gentile's complaint and subsequently dismissed it for lack of subject matter jurisdiction, affirming the district court's holding.⁷⁶

III. CRITICAL ANALYSIS

Whether legal scholars deem sovereign immunity an appropriate bar to a legal claim against the government depends on the theory applied.⁷⁷ As applied to *Gentile*, a broad interpretation of the sovereign immunity doctrine would suggest the SEC's investigation into Gentile is uncontested because the SEC, as a federal agency, requires freedom to perform its Congressional mandates.⁷⁸ A narrower view of sovereign immunity would suggest that the SEC's activity should be reviewed in light of the direct negative effects that the agency's investigation had on Gentile and his business interests.⁷⁹ Regardless of the theory applied, the Third Circuit's decision shows that the current construction of the doctrine of sovereign immunity, as applied to the activity of federal agencies, permits few claims against the government.⁸⁰

The Third Circuit's decision is not judicial overreach; the court dutifully followed the APA's provisos and exceptions and closely adhered to Supreme Court precedent.⁸¹ Despite the general display of judicial re-

75. *Id.* at 320 (noting the SEC's power to investigate contains a power to defame and destroy).

76. *Id.*

77. For a discussion of some of the competing theoretical underpinnings for sovereign immunity, see *supra* notes 26–27 and accompanying text. Some commentators who have a particular concern over the possibility of judicial review violating separation of powers principles may see the doctrine as properly applicable in the United States. See Krent, *supra* note 26, at 1530. Other commentators who denounce sovereign immunity's applicability in the American context are likely to think that the doctrine is never appropriate to insulate the government from suit. See Chemerinsky, *supra* note 24, at 1201.

78. See Krent, *supra* note 26, at 1542 (discussing Congressional delegations of power to federal agencies in the context of sovereign immunity). Although Krent notes that judicial review of agency activity is more appropriate than judicial review of Congressional action, he recognizes that preventing overzealous judicial review of agency policymaking is an important protection afforded by sovereign immunity. See *id.*

79. See *Gentile*, 974 F.3d at 314 n.2 (outlining the financial injuries that Gentile claimed to have suffered because of the SEC's investigation). Supporters of this interpretation would likely point to Senator McCarran's description of the APA as "a bill of rights" to ensure that citizens' interests would be protected from overreaching by federal agencies. For an overview of Senator McCarran's remarks, see *supra* note 37 and accompanying text.

80. See *infra* notes 83–85 and accompanying text for an analysis of sovereign immunity's relationship with agency action and discretion.

81. See *supra* note 73 and accompanying text for a discussion of the Third Circuit's decision-making process and adherence to statutory and judicial precedent.

straint, the court's ruling to equate agency decisions to investigate with agency decisions not to investigate was a choice that was not explicitly supported by either statute or judicial precedent.⁸²

This decision further insulates federal agencies from suit and strengthens the leeway that agencies enjoy when it comes to the APA waiver's discretion requirement.⁸³ Discretion, described by the Third Circuit as a balancing of various factors for which there is "no meaningful standard" by which to evaluate agency activity, is a relatively vague term that agencies can point to in order to secure the protections afforded by sovereign immunity.⁸⁴ Maintaining a zone in which agencies can freely operate to satisfy their mandates is important, but insulating them from suit based on "discretion," particularly when that term is vaguely defined, provides a wide berth for agencies that can lead to agency overreach.⁸⁵

Gentile's main complaint in suing the SEC was that the agency was harassing his business and business associates.⁸⁶ Interestingly, the Third Circuit indicated its agreement with Gentile noting that the SEC had other means at its disposal to gather information on Gentile.⁸⁷ Discussing the subpoenas issued to Gentile stemming from the Traders Café, LLC investigation, the Third Circuit stated that "[Gentile] refused to comply with those subpoenas, and despite having the ability under the Exchange Act to initiate an action to enforce those subpoenas, the SEC has not done so."⁸⁸ The Third Circuit pointed out that instead of utilizing the sub-

82. See *Gentile*, 974 F.3d at 319–20 (discussing the similarity between decisions to investigate and decisions to refrain from investigation). The paragraph in which the court concludes that decisions to investigate are not susceptible to challenge is one of the few in its opinion that does not reference Supreme Court precedent. See *id.*

83. See *Krent*, *supra* note 26, at 1542 (stating that "the constraints on agency action cannot be trusted fully . . ."); see also *Gentile*, 974 F.3d at 319 (noting that the traditional decisions that have been deemed to be products of agency discretion are decisions not to investigate, decisions involving national security concerns, and decisions regarding lump sum spending). The decision to institute an investigation does not appear in this list of "traditional" examples. *Id.*

84. *Gentile*, 974 F.3d at 318–19 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)) (noting that the factors considered are often "peculiarly within the agency's expertise"). Although the court notes that the discretion exception applies in "rare circumstances," its holding nonetheless expands the scope of the protection offered by the APA and provides agencies with another type of action to compare future activity with when hoping to seek protection under the discretion umbrella. See *id.* at 318 (quoting *Lincoln*, 508 U.S. at 19).

85. See *Krent*, *supra* note 26, at 1542 ("Because the constraints on agency action cannot be trusted fully, Congress has subjected much agency policymaking to judicial review . . .").

86. See *Gentile v. SEC*, No. 19-5155, 2019 WL 2098832, at *5 (D.N.J. May 5, 2019) ("Plaintiff argues that the ongoing Florida investigation is intended only to harass him, to blacklist him in his business community, and to circumvent this Court's 2017 dismissal of the SEC's claims of penny stock manipulation.").

87. *Gentile*, 974 F.3d at 314 (noting that the SEC did not enforce the original subpoenas and was not shy about issuing subpoenas to Gentile's associates).

88. *Id.* at 314 (citation omitted).

poena enforcement provision contained in the Exchange Act, the SEC issued numerous subpoenas to Gentile's business associates.⁸⁹

The SEC's decision to issue new subpoenas rather than enforce Gentile's original subpoenas might lend support to Gentile's complaint that the SEC was intentionally trying to negatively affect his business interests.⁹⁰ In fact, the Third Circuit's opinion included the SEC's recognition that the agency's power, if wielded unjustly, has the potential to destroy businesses and lives.⁹¹ This supports an argument that the SEC went out of its way to maximize disruption to Gentile's business interests and personal life.⁹² The very investigative abuse the Third Circuit warned against might have been on display in *Gentile*.⁹³

Similarly, the Third Circuit's description of the interplay between the APA waiver's provisos and exceptions shows that Gentile may have had no way of getting around the sovereign immunity barrier.⁹⁴ Gentile had two options in structuring his complaint. First, Gentile could have attacked the validity of individual subpoenas.⁹⁵ As the district court found, however, the Exchange Act provides the exclusive method for challenging an SEC subpoena.⁹⁶ Any complaint challenging an individual subpoena would have been analyzed under the *Sprecher* test and likely would have been dismissed.⁹⁷ Second, Gentile could have pleaded as he did, challenging the validity of the SEC's entire investigation.⁹⁸ However, the Third Circuit made clear that a challenge to an FOI is barred by the ex-

89. *See id.* (stating that the SEC served Gentile's personal attorney and an entity affiliated with Gentile's Bahamian broker-dealer with subpoenas instead of relying on the Exchange Act's provision); *see also* 15 U.S.C. § 78u(c) (2020).

90. *See Gentile*, 2019 WL 2098832, at *2 ("Plaintiff claims that the [Litigation Release] 'was intended to tar [Plaintiff] as a wrongdoer' and to 'inflict maximum harm to [Plaintiff] before this Court has an opportunity to rule on his cause of action.'" (alteration in original)).

91. *See Gentile*, 974 F.3d at 320 (citing 17 C.F.R. § 200.66, which explicitly recognizes the potential harm that SEC investigations may cause to those being investigated).

92. *See supra* notes 90–91 and accompanying text.

93. *See id.*

94. *See Gentile*, 974 F.3d at 319 ("Gentile attempts to avoid [triggering the proviso] by limiting his challenges to two components of the SEC's investigation: its nexus to him and its allegedly retributive motive.")

95. *See supra* notes 64–71 and accompanying text.

96. *See Gentile*, 974 F.3d at 315 (describing the district court's *Sprecher* analysis which found that the Exchange Act provides the exclusive mechanism for disputing SEC-issued investigative subpoenas); *see also* *Gentile v. SEC*, No. 19-5155, 2019 WL 2098832, at *4–6. (D.N.J. May 5, 2019).

97. *See Gentile*, 974 F.3d at 318 ("And by directing his challenge to the SEC's Formal Order of Investigation, Gentile avoids the SEC's *Sprecher* argument, which involved a challenge to individual subpoenas—not solely a direct challenge to the agency's decision to open an investigation."); 5 U.S.C. § 702 (stating that the APA's waiver does not affect "other limitations on judicial review"); *see also* *Gentile*, 2019 WL 2098832, at *6 (holding that Gentile's complaint was dismissed for lack of subject matter jurisdiction under a *Sprecher* analysis).

98. *See supra* notes 72–76 and accompanying text.

ception protecting agency discretion.⁹⁹ Therefore, regardless of Gentile's pleading strategy, he would have triggered an APA exception and been barred by sovereign immunity.¹⁰⁰

Given the deterioration of his prior relationship with the federal government, Gentile rationally feared harassment from the SEC during the early stages of the investigation.¹⁰¹ Regardless of whether this fear was substantiated, however, Gentile's desire to be free from unwarranted government harassment can certainly be appreciated.¹⁰² While there is a need to balance allowing agencies to operate and affording citizens a zone of autonomy, the exceptions that have been carved out of the APA's waiver appear to tilt this scale in favor of agency freedom.

At the end of its opinion, the Third Circuit goes out of its way to remind readers that "the power to investigate carries with it the power to defame and destroy[.]"¹⁰³ The recognition of this power shows that more robust limitations on the sovereign immunity doctrine may be necessary in order to protect citizens from agency overreach and satisfy the original hopes of the APA's framers. Specifically, Gentile's inability to bypass sovereign immunity regardless of his pleading route highlights the underinclusive nature of the APA.¹⁰⁴ Ultimately, the Third Circuit's decision reaffirmed sovereign immunity as a powerful insulator for federal agencies and displayed how the APA can leave litigants in a no-win situation.

CONCLUSION

The story of Guy Gentile, his relationship with the SEC, and his eventual legal battle with the same agency offers a powerful case study of the sovereign immunity doctrine. If you ask Gentile, he has been the target of

99. See *Gentile*, 974 F.3d at 320. ("[B]ecause an agency decision to investigate fits within the §701(a)(2) exception, targeted piecemeal challenges to that action fall outside of the APA's waiver of sovereign immunity.")

100. See *id.* ("A litigant cannot, therefore, avoid the exception by challenging only the most problematic component of an agency action that is committed to agency discretion by law.")

101. See *supra* notes 8–10 and accompanying text for a discussion of Gentile's work for the federal government and the subsequent falling out between the parties.

102. See *supra* notes 35–37 and accompanying text for a discussion of the political motivation to curtail this very type of government overreach, which led Congress to enact the APA.

103. *Gentile*, 974 F.3d at 320 (quoting 17 C.F.R. § 200.66) (pointing to a federal regulation in which the SEC recognizes the potential effects of its investigative power).

104. See Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 *DRAKE L. REV.* 77, 84–85 (2005) ("The APA, for its part, has some well-known limitations. It does not authorize suits against the President, suits challenging actions that are committed to agency discretion, or suits seeking relief that is expressly or impliedly precluded by another statute." (footnotes omitted)).

SEC badgering and harassment and deserves to be left alone.¹⁰⁵ If you ask the SEC, the agency is just doing its job, which it cannot do effectively if it is constantly being hauled to court to explain itself to the judiciary.¹⁰⁶

The Third Circuit's decision in *Gentile*, with its detailed explanation of proper pleading standards and contestable agency action, should make it easier for plaintiffs to understand the APA's waiver and its limitations.¹⁰⁷ The court dismissed *Gentile*'s claim because it found that the government did not waive sovereign immunity under the APA.¹⁰⁸ For a plaintiff looking to avoid the same fate as *Gentile*, this case serves as an instruction manual on how to identify agency action that is susceptible to challenge.

For starters, plaintiffs must challenge specific agency action.¹⁰⁹ As the Third Circuit explained, a broad attack on an agency's general authority is not sufficient.¹¹⁰ *Gentile*'s failure to contest specific SEC actions, such as certain subpoenas or other concrete investigatory steps or documents, other than the FOI, sunk his case before it even began.¹¹¹

105. *See Gentile*, 974 F.3d at 313–15. According to the complaint filed by *Gentile*, his business activity was severely hampered as a result of the SEC's investigation. *Id.* at 314 n.2. The court noted that the SEC pursued "other options" for obtaining subpoenas rather than using established statutory procedures. *Id.* at 314.

106. *See id.* at 317 (discussing the impropriety of challenging the general administration of agency programs); *see also* Krent, *supra* note 26, at 1530 (arguing that sovereign immunity is intended to "maintain a proper balance among the branches of the federal government . . ."). Krent recognizes the potential chilling effect that judicial preferences may have on legislative or agency action. *See id.*

107. *See Gentile*, 974 F.3d at 316 (stating that a plaintiff must have statutory standing, seek non-monetary relief, and have a claim that is not barred by either of the statute's provisos). The court also discussed the two exceptions to otherwise non-barred claims. *Id.* at 316–17. The opinion provided future claimants with a practical examination of these statutory requirements and how they interact with one another. *See id.*

108. *Id.* at 320 (dismissing *Gentile*'s claim for a lack of subject matter jurisdiction).

109. *See id.* at 317–18. As the court noted, Section 551(13) defines agency action and provides examples of the same. *See id.* at 317. Although the actions listed in Section 551(13) are "exemplary, not exhaustive," they provide a good indication of the types of activity that are contestable. *Id.*; *see also* COLE, *supra* note 1, at 10 (noting that the statutory definition of agency action "is not comprehensive").

110. *See Gentile*, 974 F.3d at 317 (noting that "broad challenges to the administration of an entire program" are insufficient for a claim to fall within the APA's waiver).

111. *See id.* at 317–18. The Third Circuit described *Gentile*'s approach as an attempt "to undermine the SEC's authority." *Id.* at 318. The court drew a distinction, as required by the APA, between agency activity and an agency's power, with the former being subject to challenge. *See id.*; *see also* COLE, *supra* note 1 at 10 (providing examples of specific agency action that is reviewable under the APA's waiver).

The court also made clear that plaintiffs must avoid challenges to agency action that is the product of “agency discretion.”¹¹² The court explained that any agency decision that requires the agency to balance various factors will likely be insulated from challenge.¹¹³ As a result of the structure of the relevant statutes and a court’s faithful interpretation of those laws, most, if not all, agency decisions to investigate are likely to be insulated from judicial review.

Future plaintiffs who look to *Gentile* for guidance will find that the potential avenues for challenging agency activity are narrow. When pieced together, the court’s decision explains that plaintiffs, in addition to a host of other requirements, must target specific agency action that is not a product of agency discretion.¹¹⁴ The Third Circuit’s decision was not unprecedented in creating this limited path to relief, but relied on prior statutory and judicial construction of the sovereign immunity doctrine and of the APA’s waiver.¹¹⁵ Plaintiffs hoping to challenge agency action are unlikely to prevail unless they contest a very narrow subset of activity.¹¹⁶

The APA, and more specifically its waiver of sovereign immunity, serves as a means of regulating agency activity.¹¹⁷ Indeed, it was intended to be a “bill of rights” for American citizens against the growing mass of federal agency power.¹¹⁸ *Gentile*, however, displays how easily these assur-

112. *Gentile*, 974 F.3d at 318. The court noted that this requirement is at least in part a result of concern over judicial overreach. *See id.* (noting that “an agency decision to exercise its investigative power overcomes the ‘basic presumption’ in favor of judicial review” (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967))); *see also* Krent, *supra* note 26, at 1531 (discussing relationship between sovereign immunity and separation of powers).

113. *See Gentile* 974 F.3d at 318–19 (noting that the hallmark of non-reviewability is the absence of “judicially manageable standards”). This approach may provide federal agencies with an avenue to attack challenges to their activity. Agencies can assert that any decision that is contested involved careful decision-making processes and required the balancing of different factors. Of course, a court could always find that there is a “meaningful standard” of review,” but the balancing analysis described by the Third Circuit provides a ground for the government to assert a discretion argument. *Id.* at 318–19; *see also*; COLE, *supra* note 1, at 12 (discussing the non-reviewability of decisions based on agency discretion, including those regarding whether to initiate an investigation).

114. *See Gentile*, 974 F.3d at 319–20. The court explained that even though *Gentile* correctly challenged agency action, in the form of the FOI, the waiver’s discretion exception still barred his claim. *Id.* Additionally, the court outlined the various other requirements that plaintiffs must satisfy in order to benefit from the APA’s waiver. *Id.* at 316; *see also* COLE, *supra* note 1, at 2–7 (providing an overview of the many requirements that plaintiffs must satisfy before securing judicial review).

115. For a discussion of the precedent that led to the Third Circuit’s decision in *Gentile*, *see supra* notes 72–76 and accompanying text.

116. Any claim brought must challenge statutorily defined agency action that is not a product of agency discretion and is not otherwise barred. *See Gentile*, 974 F.3d at 319–20.

117. For a discussion of the APA, *see supra* notes 35–37 and accompanying text.

118. *See supra* note 37 and accompanying text.

ances may be swept away in the name of agency discretion.¹¹⁹ With a vast amount of agency activity and decision-making protected by the shield of sovereign immunity, it is unclear just how much the APA protects citizens from agency overreach.

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119. See *supra* notes 53–56 and accompanying text for a discussion of the balancing analysis which courts engage in when determining whether an agency has acted using discretion and the potentially broad scope of activity that may fall satisfy this balancing test.