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No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT,
Petitioners,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Section 2462 of Title 28 of the United States Code provides that "except as otherwise provided by Act of Congress" any penalty action brought by the government must be "commenced within five years from the date when the claims *first accrued*." 28 U.S.C. § 2462 (emphasis added). This Court has explained that "[i]n common parlance a right accrues when it comes into existence." *United States v. Lindsay*, 346 U.S. 568, 569 (1954).

Where Congress has not enacted a separate controlling provision, does the government's claim first accrue for purposes of applying the five-year limitations period under 28 U.S.C. § 2462 when the government can first bring an action for a penalty?

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 653 F.3d 49. The opinion of the district court (Pet. App. 26a) is unreported.

JURISDICTION

The decision of the court of appeals was issued on August 1, 2011. A petition for rehearing and rehearing en banc was denied on November 22, 2011. Pet. App. 52a. On February 10, 2012, and March 7, 2012, Justice Ginsburg extended the time within which to file the petition for a writ of certiorari to and including April 20, 2012. The petition for a writ of certiorari was filed on that date, and was granted on September 25, 2012. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2462 of Title 28 of the United States Code provides:

> Except 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.

STATEMENT OF THE CASE

1. In the Fall of 2003, the Securities and Exchange Commission ("SEC") began an investigation of Gabelli Funds, LLC ("Gabelli Funds"), a registered investment adviser under the Investment Advisers Act ("IAA" or the "Act"), 15 U.S.C. § 80b-6, focusing on trading the SEC characterized as market timing that took place between 1999 and 2002 in the Gabelli Global Growth Fund ("GGGF" or "the Fund"), one of the several funds Gabelli Funds managed. J.A. 72-73, 89.[1] Among others, the investigation involved the portfolio manager for GGGF, Marc J. Gabelli,[2] and Gabelli Funds' Chief Operating Officer, Bruce N. Alpert. J.A. 76-77. The investigation followed the announcement, on September 3, 2003, that the New York Attorney General was conducting an investigation into "market timing" in the mutual fund industry. J.A. 88. *See Exemptive Rule Amendments of 2004: The Independent Chair Condition* (Apr. 2005), http://www.sec.gov/news/studies/indchair.pdf (describing the SEC's investigation of and recovery related to market timing

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[1] Market timing "refers to (i) frequent buying and selling of shares in the same mutual fund and (ii) buying and selling mutual fund shares to exploit pricing inefficiencies." *Exemptive Rule Amendments of 2004: The Independent Chair Condition* 32 (Apr. 2005), http://www.sec.gov/news/studies/indchair.pdf. The complaint alleged that Gabelli Funds permitted "time zone arbitrage" or "scalping," in which traders try to exploit the difference in closing times between foreign and U.S. markets. J.A. 79. Petitioners deny that allegation.

[2] Petitioner Gabelli is the son of the founder of the Gabelli complex of funds, but is not alleged to have been an officer of, or had any executive or management position with, Gabelli Funds. J.A. 76.

scandals beginning in 2003 as a result of the New York Attorney General investigation). The SEC concluded a number of similar investigations in 2003 and 2004, during the period it conducted the investigation here. *See* SEC Press Release Archives for 2003 and 2004, http://www.sec.gov/news/press/pressarchive/2003press.shtml; http://www.sec.gov/news/press/pressarchive/2004press.shtml. For reasons known only to the SEC, the SEC let this investigation languish. J.A. 89.

In the Spring of 2007, the SEC asked petitioners to enter into tolling agreements to suspend the applicable statutes of limitations. The tolling agreements recited that the SEC Division of Enforcement "ha[d] issued [] Wells notice[s][3] stating the Division intends to recommend civil and/or administrative proceedings" against each of the petitioners but "desire[d] sufficient time to consider the arguments" in submissions petitioners made to the SEC. *See* J.A. 96, 101. On May 4, 2007, Alpert entered into a tolling agreement suspending any statute of limitations until October 7, 2007, which he later agreed to extend to December 7, 2007. J.A. 101-04. On June 28, 2007, Gabelli executed a tolling agreement that suspended any statute of limitations to October 1, 2007, which he later agreed to extend to November 30, 2007. J.A. 96-100.

[3] A Wells Notice is the means by which the SEC staff advises subjects of an existing investigation "of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding." 17 C.F.R. § 202.5(c).

2. On April 24, 2008, long after the tolling agreements expired, the SEC filed a civil complaint in the United States District Court for the Southern District of New York against petitioners.[4] J.A. 72. The complaint asserted claims against Gabelli and Alpert under Sections 206(1) and 206(2) of the IAA, 15 U.S.C. § 80b-6(1) & (2).[5] J.A. 75. As relief, the SEC sought civil monetary penalties in addition to disgorgement and an injunction. J.A. 72.

The complaint alleged that Gabelli Funds negligently or intentionally violated Section 206 of the IAA[6] from 1999 to 2002, by allowing a customer to market time GGGF in exchange for a $1 million

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[4] On the same day, the SEC settled an administrative action against Gabelli Funds. Joint Appendix dated Oct. 29, 2010 at 33-43, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581).

[5] The complaint also alleged Alpert violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), Rule 10b-5, 17 C.F.R. § 240.10b-5, and Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a). J.A. 75.

[6] Section 206 of the IAA, 15 U.S.C. § 80b-6(1)-(2), provides, in pertinent part:

> It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client[.]

investment in a hedge fund Gabelli managed, without disclosing that alleged arrangement to GGGF's board of directors. J.A. 80-81, 86. The complaint alleged that customer made the hedge fund investment in April 2000 and that the customer continued to invest in GGGF until August 7, 2002, when the customer was barred from trading by GGGF. J.A. 81, 83. The SEC alleged that petitioners knowingly and substantially assisted Gabelli Funds' Section 206 violations and thereby aided and abetted those violations. J.A. 92-93. The SEC did not allege when it discovered the alleged violations, but only that it did not discover it before "late 2003, at the earliest." J.A. 89.

3. On March 17, 2010, the district court dismissed the SEC's claim for penalties as untimely. Pet. App. 37a-38a. The SEC argued that its claim did not accrue until it discovered it and, alternatively, that its time to sue was suspended by fraudulent concealment. The court rejected those arguments and held, in relevant part, that the limitations period in 28 U.S.C. § 2462 began to run when the alleged violation occurred and accrued no later than August 7, 2002, when the alleged violation ended and that, in the absence of a statute to the contrary, "the discovery rule does not apply to claims subject to the limitations of § 2462." Pet. App. 36a. The court also held that the SEC could not invoke the doctrine of fraudulent concealment because it had failed to "allege with particularity under Rule 9(b) what acts Defendants took, *beyond the alleged acts of wrongdoing themselves*, or what contrivance or scheme

was designed to mask the SEC's causes of action." Pet. App. 39a.[7]

4. The SEC appealed the district court's discovery rule holding (but not its fraudulent concealment holding)[8] and, on August 1, 2011, the court of appeals reversed. Pet. App. 1a. The court of appeals recognized that the relevant language from Section 2462 provided that "a claim for civil penalties must be brought within five years 'from the date when the claim first *accrued*.'" Pet. App. 17a (quoting 28 U.S.C. § 2462). Nonetheless, it agreed with the government's argument that "the claim did not 'accrue' until September 2003 when, as the complaint alleges, the SEC first discovered the fraud." Pet. App. 17a. In so holding, the court distinguished the discovery rule from the "distinct" doctrines of fraudulent concealment and equitable tolling, which the district court had held did not apply and the SEC had abandoned on appeal. Pet. App. 18a-19a. The court stated that "[u]nder the discovery rule, the statute of limitations for a particular claim does not accrue until that claim is discovered, or could have

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[7] The court denied petitioners' motion to dismiss the complaint for failure to state a claim but granted their motion to dismiss the request for injunctive relief, ruling that the SEC's allegations did "not plausibly allege a reasonable likelihood that the Defendants will engage in future violations." Pet. App. 47a. After the district court ruled, the SEC successfully moved to dismiss its sole remaining claim for disgorgement. J.A. 105-06.

[8] On appeal, the SEC abandoned its fraudulent concealment argument and conceded equitable tolling did not apply. Brief of the SEC at 35, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581); Transcript of Oral Argument at 27:21-23, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581).

been discovered with reasonable diligence, by the plaintiff." Pet. App. 18a. The court reasoned that "since fraud claims by their very nature involve self-concealing conduct, it has been long established that the discovery rule applies where, as here, a claim sounds in fraud." Pet. App. 18a.

Thus, the court concluded categorically, "since the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme . . . the discovery rule defines when the claim accrues and, correlatively . . . the SEC need not plead that the defendants took affirmative steps to conceal their fraud." Pet. App. 19a. The court stated: "while Congress might have to affirmatively include language about a discovery rule in the event that it wanted a discovery rule to govern the accrual of non-fraud claims or wanted to impose a limit on using a discovery rule for certain fraud claims, it would be unnecessary for Congress to expressly mention the discovery rule in the context of fraud claims, given the presumption that the discovery rule applies to these claims unless Congress directs otherwise." Pet. App. 20a (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). The court further ruled that the SEC need not affirmatively plead facts sufficient to establish it did not discover the fraud earlier, stating "[t]he lapse of a limitations period is an affirmative defense that a defendant must plead and prove." Pet. App. 21a (citation and internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

Section 2462 and its predecessors have been on the books for more than two centuries. During that period, the government and its agencies have been subject to a clear rule when they seek to impose a penalty, fine or forfeiture: the limitations period begins when the government's right to sue first arises, regardless whether the government knows of that right, and expires when the limitations period concludes. If the government fails to timely sue, the defendant is entitled to repose. That rule has furthered all of the objectives of the statute of limitations: it has encouraged the government to devote its limited resources to fresh claims, it has prevented the government from bringing stale claims after necessary witnesses and evidence are no longer available, and it has protected the societal interest in repose. When the government has not had sufficient time to adequately investigate a particular category of violation, it has sought an extension of the statute of limitations from Congress, and when Congress has believed such extension appropriate, it has granted one.

The court below, for the first time ever, held that the statute of limitations began to run not when the government first had the right to sue, but rather when the government alleges it realized it had the right to sue. In so doing, the court undermined all the salutary objectives of the statute of limitations. It gave the government the right to set the clock for when it must bring a claim, rather than requiring it to abide by the congressionally established clock. It permitted the government to sue for a penalty long after the evidence necessary for a defense has vanished. And, it cast

aside the societal interest in repose—permitting the government to reach as far back in time as it wants to bring a penalty claim subject only to the affirmative defense (to be pleaded and proved only after a defendant suffered the harm of being named in a governmental penalty action) that the government knew or should have known of its cause of action earlier (without explaining how, short of public disclosure, that burden could be satisfied).

That result violates the plain language of Section 2462. That statute as written provides that a court may not entertain a claim for a penalty unless suit is brought within five years of the date the claim first "accrued," a term that was understood at the time the statute was enacted—and continues so today—to mean when a claim was complete and the plaintiff had a legal right to sue. It also violates other established principles of statutory interpretation: Congress knew how to "provide otherwise" when it wanted a statute of limitations to run from the date of discovery or some other date than the date the claim arose. Congress did so in connection with a number of other statutes the language of which would be rendered surplusage if the court of appeals' understanding of "accrual" were correct. The decision below would also lead to absurd results. Under the government's theory that the Second Circuit endorsed, no one would ever enjoy repose from a potential governmental enforcement action. And, it is inconsistent with Section 2462's history. Until the decision of the court below, no appellate court had ever concluded that the mere fact that the government charged the defendant with violation of an anti-fraud statute gave the government

license to bring that claim without regard to the congressionally established statute of limitations.

The decision of the court below was error. The determination how to strike the balance between law enforcement and repose involves policy judgments entrusted by the separation of powers and statute to Congress. The political process cannot be avoided by judicial reference to the "discovery rule." Even if the statute had not precluded its application, the discovery rule is singularly inapplicable. It was developed by case law and statute in some States to defer the running of the statute of limitations on a claim by a fraud victim until the victim knew or should have known of the injury or damage that was an essential element of its cause of action. The rule was not consistently applied at the time of Section 2462's passage. It has no place in the interpretation of a federal statute regarding a governmental penalty claim that does not even require proof of damage or injury. The applicable presumption is one that has been followed since the founding of the Republic: the presumption against perpetual penalties.

Congress knew how to specify clearly that a claim should be "deemed to accrue" on a date later than the date the claim actually accrued. It also knew how to legislate a time period greater than five years if it desired to do so. It did neither here. If the SEC believes that the current statute of limitations does not give it sufficient time to investigate any category of violation, the answer is for it to ask Congress for more time. It is not to create a judicial rule that would have the statute begin to run on the date of discovery for any

statute that a court might deem, as a categorical matter, to "sound in fraud."

ARGUMENT

I. THE PLAIN LANGUAGE OF SECTION 2462 PROHIBITS A COURT FROM ENTERTAINING A PENALTY ACTION MORE THAN FIVE YEARS AFTER THE CLAIM ACCRUED

A. A Claim Accrues When The Factual And Legal Prerequisites For Bringing Suit Are In Place

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also Dodd v. United States*, 545 U.S. 353, 359 (2005) ("[W]hen the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.")(citation and internal quotation marks omitted) (alteration in original); *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (holding that statutory provision itself answered the question whether the discovery rule applied). The language of Section 2462 could not be more plain:

> Except 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.

28 U.S.C. § 2462.

This Court has held that the language "first accrued" or "accrued" as used in other statutes refers to the "point of time the cause of action has come into existence" or "the events have occurred which determine that the [defendant] is liable." *Reading Co. v. Koons*, 271 U.S. 58, 64 (1926); *see also Crown Coat Front Co. v. United States*, 386 U.S. 503, 511, 514 (1967) (claim "first accrues" under 28 U.S.C. § 2401 when plaintiff first has "the right to file a civil action in the courts against the United States" and the "claim or right to bring a civil action against the United States matures"); *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 65 (1953) ("A cause of action is created when there is a breach of duty owed to the plaintiff."). This Court has also rejected the argument that the single word "accrued" or phrase "first accrued" should be given different interpretations depending on the claim that is alleged to have accrued, reasoning that "the fact that the limitation is made applicable equally to the Two causes of action, one of which admittedly 'accrues' on the happening of the events which fix the defendant's liability, leads persuasively to the conclusion that a like test was intended for determining when the cause of action accrued for wrongful death [*i.e.*, the other cause of action]." *Reading*, 271 U.S. at 64.

There is no reason to believe that Congress had a contrary intent in enacting Section 2462. The statute provides that an action for a 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." "In common parlance a right accrues when it comes into existence . . . ." *United States v. Lindsay*, 346 U.S. 568, 569 (1954). It refers to the moment "when the [government] has 'a complete and present cause of action,'" not only when it knows it does. *Wallace v. Kato*, 549 U.S. 384, 388 (2007) (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). In a case involving a comparably worded statute of limitations, 28 U.S.C. § 2501, the government itself has remarked that "[i]t is settled law that claims first accrue when plaintiffs are first able to file suit." Brief for the United States at 11, *Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (No. 01-455), 2002 WL 471831.

Moreover, Congress provided that the five years from accrual rule applied uniformly to a claim for "any" fine, penalty or forfeiture. The statute does not distinguish among penalties based on anti-fraud statutes, penalties based on statutes that did not sound in fraud, or other penalties. *See, e.g.*, *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))). Congress thus made clear that it wanted the same rule to apply to all penalty, fine or forfeiture claims. *See Reading*, 271 U.S. at 63-64 (interpreting "accrued" in Federal Employers' Liability Act "to apply uniformly to

the time when the events have occurred which determine that the carrier is liable" regardless of whether claims are based on death or on personal injury).

This plain meaning interpretation is consistent with Nineteenth Century dictionary definitions. At the time of the enactment of Section 2462's predecessors, dictionaries defined "accrue" to mean to "arise, or begin to have a legal existence; as an action accrues when the plaintiff has a right to commence it," 1 Alexander M. Burrill, *A New Law Dictionary and Glossary* 3 (1850), and made clear that a "[c]ause of Action shall accrue or shall have accrued. . . . whenever the defendant's liability became perfect and complete," 1 *American and English Encyclopaedia of Law* 142 (John H. Merrill ed., 1887).[9] That definition remained consistent throughout the Twentieth Century when Congress enacted Section

[9] *See also* 1 Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 14-15 (1888) ("A right is said to accrue when it vests in a person . . . . Thus, the statue[s] of limitation contain provisions for ascertaining when the right to be barred is deemed to have first *accrued*, i.e. vested in the person entitled to exercise it."); 1 John Bouvier, *Bouvier's Law Dictionary* 66 (1897) (defining accrue as "[t]o arise, to happen, to come to pass; as the statute of limitation does not commence running until the cause of action has accrued"); 1 Noah Webster, *An American Dictionary of the English Language* (1828) (defining accrue as "to grow to; hence to arise, proceed or come"); 1 John Bouvier, *A Law Dictionary* 50 (5th ed. 1855) (defining accrue as "to arise, to happen, to come to pass; as the statute of limitations does not commence running until the cause of action has accrued"); Charles Richardson, *A New Dictionary of the English Language* (1839) (defining accrue as "to arise, or spring from; to be produced or derived from, in addition, or accession").

2462's most recent predecessor in 1911 and its current form in 1948.[10] It is also consistent with current definitions of the term "accrue."[11] Under all these definitions, a claim accrues when it arises and the plaintiff has the *right* to sue, not when it discovers that it has that right.

Here, the SEC's penalty claim "first accrued" when the SEC first had a right to sue petitioners for a penalty and expired five years later. Section 209(e)(1) of the IAA gives the SEC the right to bring a penalty action "[w]henever it shall appear . . . that any person has violated any provision" of the IAA. 15 U.S.C. § 80b-9(e)(1). On the SEC's theory, the penalty claim accrued as early as September 1999, when the IAA

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[10] *See*, *e.g.*, *Black's Law Dictionary* 18 (2d ed. 1910) (defining accrue as "to arise, to happen, to come into force or existence; to vest; as in the phrase, 'The right of action did not accrue within six years'"); John Bouvier, *Bouvier's Law Dictionary* 34 (William E. Baldwin ed., 1948) (defining accrue as "to arise, to happen, to come to pass, as the statute of limitations does not commence running until the cause of action has accrued"); James A. Ballentine, *The College Law Dictionary* 11 (2d. ed. 1948) (defining accrue as applied to a cause of action as "to arrive; to commence; to come into existence; to become a present and enforceable demand").

[11] *See, e.g.*, *Black's Law Dictionary* 23 (9th ed. 2009) (defining the term accrue, as applied to a claim, to mean "to come into existence as an enforceable claim or right; to arise"); *The American Heritage Dictionary* 12 (3d ed. 1994) ("[t]o come into existence as a claim that is legally enforceable"); Merriam-Webster.com, *available at* http://www.merriam-webster.com (Aug. 7, 2011) (defining accrue as "[t]o come into existence as a legally enforceable claim"); *Random House Compact Unabridged Dictionary* 13 (spec. 2d ed. 1996) (defining accrue as "to become a present and enforceable right or demand").

violation petitioners allegedly abetted began, and no later than August 2002 when it ended. J.A. 73-74, 82-83. The alleged violation was complete and the SEC could have sued as of those dates.[12] *See, e.g.*, *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963); *SEC v. Blavin*, 760 F.2d 706, 711 (6th Cir. 1985). Yet, the SEC waited until April 24, 2008, to commence this action for a penalty—long after the five year period from the latest date on which a penalty claim could have accrued (even taking into account the time covered by a tolling agreement). Thus, under the plain language of Section 2462, the SEC's penalty claim is too late.

B. The Structure Of Section 2462 Reflects Congress's Intent That Courts Not Entertain Penalty Actions Unless Commenced Within Five Years Of The Date The Government First Had The Right To Sue

The structure of Section 2462 confirms what the plain language of the section says: the government must bring a claim for a penalty within five years of when it first had the right to sue for a penalty unless Congress otherwise provided. Congress made a single explicit exception to the rule that a penalty action must

[12] Courts uniformly recognize that IAA claims are complete and accrue at the time of violation. *See, e.g.*, *Kahn v. Kohlberg, Kravis, Roberts & Co.*, 970 F.2d 1030, 1042 (2d Cir. 1992) (holding that cause of action under the IAA accrued "when the agreements were entered into"); *SEC v. Jones*, 476 F. Supp. 2d 374, 381 (S.D.N.Y. 2007) (SEC's IAA claim time-barred under Section 2462 where claim was filed "six years after the alleged wrongdoing").

be brought within five years from when it first accrued. It specified that penalty claims need not be brought within five years where "the offender or the property is [not] found within the United States" to effect service of process. 28 U.S.C. § 2462. It did not provide that such claims need not be brought where the government did not know and reasonably should not have known of its claim. "'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'" *TRW*, 534 U.S. at 28 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)). The point is highlighted by Congress's use of the language "*first* accrue."

Section 2462 also specified in language that could not be more clear that the rule that penalty claims must be commenced within five years of the date on which the SEC first had the right to commence its lawsuit is subject to a single qualification: "Except as otherwise provided by Act of Congress." This language could scarcely be considered "surplusage." It must be given effect. *See*, *e.g.*, *Reiter v. Sonotone Corp*., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."). Thus, if there are to be exceptions to Section 2462's strict command, those exceptions must come from Congress and may not be implied by the courts. *See Toussie v. United States,* 397 U.S. 112, 115 (1970).

Finally, the language of Section 2462 is peremptory. It directs that the courts "shall" not entertain "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise"

unless such action, suit or proceeding is "commenced within five years from the date when the claim *first accrued*." 28 U.S.C. § 2462 (emphasis added). That language, too, admits of no exceptions except as otherwise provided by Congress itself—and not by the courts. "'The word 'shall' is ordinarily the language of command.'" *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). It "creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Thus, contrary to the decision below, the statute does not give the courts room to entertain some tardy penalty claims—but not others—based on the court's assessment that the government "will be able to discover the conduct underlying non-fraud claims" but not discover the conduct underlying fraud claims within the otherwise applicable limitations period. Pet. App. 19a.

II. CONGRESS KNEW HOW TO DRAFT A DISCOVERY RULE AND DID NOT IN SECTION 2462

When Congress "wished to" include a discovery rule in a statute of limitations, "it knew how to do so and did so expressly." *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 176 (1994) ("Congress knew how to impose aiding and abetting liability when it chose to do so."); *Pinter v. Dahl*, 486 U.S. 622, 650 (1988) ("When Congress wished to create such liability, it had little trouble doing so."). "Congress . . . has taken a statute-by-statute approach" to the discovery rule throughout the

United States Code, specifying that the statute of limitations should run from the date of discovery in some instances but not in other instances. *Cent. Bank*, 511 U.S. at 182. It did not provide that the statute should run from the date of discovery in Section 2462, and this Court should not substitute that rule by implication.

Section 2415 of Title 28 provides that every action for money damages founded on a tort or contract claim must be brought within three or six years, respectively, after the right of action "accrues," "except as otherwise provided by Congress." 28 U.S.C. § 2415(a) & (b). Congress has "otherwise provided" in that situation by enacting Section 2416 of Title 28, which explicitly provides that "[f]or the purpose of computing the limitations periods *established in section 2415*," a number of time periods are excluded including, among others, "all periods during which . . . facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances[.]" 28 U.S.C. § 2416(c) (emphasis added).[13] That statute pointedly does not provide that time is excluded "for the purpose of computing the

[13] According to the House Report, "the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action." H.R. Report No. 89-1534, at 7-8 (1966).

limitations period established for a penalty claim by Section 2462."[14]

The Tariff Act of 1930, 19 U.S.C. § 1621(1), likewise, provides in pertinent part that "in the case of an alleged violation of section 1592 and 1593a of this title,[15] no suit or action . . . may be instituted unless commenced within 5 years after the date of the alleged

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[14] The statute of limitations set forth in Section 2415 uses the word "accrue" the same way Section 2462 does—as the date the claim came into existence. *See, e.g.*, 28 U.S.C. § 2415(b) (every action for money damages founded upon a tort is barred unless brought within three years "after the right of action first accrues"). The Justice Department's statement accompanying the proposed bill reflects all of the considerations that also require interpreting Section 2462 according to its plain language (and without implying an exception that Congress in passing Section 2416 decided not to make) including, among other things, "the effective and fair conduct of Government litigation requires that lawsuits be instituted and trials held in reasonably prompt fashion . . . . Experience tends to justify the thesis that stale claims are usually neither effective claims nor just claims" and that "potential defendants are entitled eventually to put to one side thoughts of possible suits against them. At some point, and with some exceptions, bygones should be bygones." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before the H. Comm. on the Judiciary*, 89th Cong. 6-7 (1966) (statement of John W. Douglas, Assistant Att'y Gen., Civil Division, Department of Justice); *see also* H.R. Report No. 89-1534, at 4, 8, 11 (1966); S. Rep. No. 89-1328, at 2, 7 (1966); 112 Cong. Rec. 14378 (1966) (statement of Sen. Ervin).

[15] Sections 1592 and 1593a of Title 19, address, respectively, persons who "introduce any merchandise into the commerce of the United States" or "seek . . . the payment or credit . . . of any drawback claim" using a statement that is "material and false."

violation or, if such violation arises out of fraud, within 5 years after the date of discovery of [the] fraud."[16] *See also* 19 U.S.C. § 1641(d)(4). That language would have been unnecessary and surplusage if, as the Second Circuit held, Section 2462 already provided for the statute to run from date of discovery in the event of a fraud. *See, e.g.*, *Reiter*, 442 U.S. at 339. The False Claims Act, 31 U.S.C. § 3731(b), a law that pertains only to claims that "sound in fraud," also contains an explicit discovery provision. It states: "A civil action under section 3730[17] may not be brought (1) more than 6 years after the date on which the violation of section 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed whichever occurs last."[18]

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[16] The suit or action that is authorized is that for a fine, penalty or forfeiture that Section 2462 otherwise governs. *See* 19 U.S.C. §§ 1592(c)(1), 1593a(c)(1).

[17] Section 3730 authorizes the Attorney General to bring a civil action against any person that violates Section 3729 of Title 31, which in turn authorizes "a civil penalty of not less than $5,000 and not more than $10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. §§ 3730(a), 3729(a)(1).

[18] *See also* Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 335b(a)(1) & (b)(3) (authorizing civil penalties against persons who "knowingly" make "a false statement or misrepresentation of a material fact in connection with an abbreviated drug application" and requiring an action to collect such a penalty to be filed within

In drafting the federal securities laws themselves, Congress explicitly used the language of discovery when it wanted the limitations period to run from the date of discovery and did not use that language when (as in the case of governmental penalty claims) it did not intend the statute to run from date of discovery. Thus, in Section 323 of the Trust Indenture Act of 1939, Congress explicitly provided that a claim against a defendant for making a "false or misleading" statement "in any application, report, or document filed with the Commission" must be brought "within one year after the *discovery* of the facts constituting the cause of action and within three years after such cause of action *accrued*." 15 U.S.C. § 77www(a) (emphasis added). Congress adopted identical language in Section 18(c) of the Exchange Act of 1934, drawing a distinction between the date of "accru[al]" and the time of "discovery" for claims relating to "false or misleading" statements "in any application, report or document filed pursuant to this chapter." 15 U.S.C. § 78r. It also has drawn a similar distinction between the time of the violation and the time of discovery in other statutes of limitations applicable to private rights

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"6 years after the date when facts material to the act are known or reasonably should have been known . . . but in no event more than 10 years after the date the act took place"); Federal Deposit Insurance Corporation Improvement Act of 1991, 12 U.S.C. § 1817(g) (authorizing FDIC to assess civil penalties and to collect such assessments through actions "brought within 3 years after the date the assessment payment was due" unless the defendant "has made a false or fraudulent statement with intent to evade any or all of its assessment," in which case "the Corporation shall have until 3 years after the date of discovery of the false or fraudulent statement in which to bring an action").

of action throughout the federal securities laws (*see, e.g.*, 28 U.S.C. § 1658(b), 15 U.S.C. § 78i(f), 15 U.S.C. § 77m).

Congress also provided that a "right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of [the securities laws]" may be brought "2 years after the discovery of the facts constituting the violation," but only if the right of action is a "private" one, not if it is a governmental one for penalties. 28 U.S.C. § 1658(b). Even then, Congress limited the period for a private defrauded victim—one without the extensive powers of the SEC—to bring such a claim to recover *damages* to five years after the violation. *Id*. That limitation, and the repose Congress intended to provide, would be defeated if at the same time those same defendants were subject to open-ended liability for a penalty from a regulator who was not a victim.

Indeed, when Congress wanted the date of accrual to be something other than the date the claim was complete and the plaintiff had the right to sue, Congress explicitly "deemed" the date of accrual to be a date other than the real date of accrual.[19] Congress provided, for example, that the limitations period for a claim based on "a false or fraudulent certified statement" filed by an insured credit union with the National Credit Union Administration Board begins to run not when it has accrued but when it is "deemed to

[19] *Black's Law Dictionary* (9th ed. 2009) (defining "deem" as "[t]o treat (something) as if (1) it were really something else, or (2) it has qualities it does not have").

have accrued," a date defined by "the discovery by the Board of the fact that the certified statement is false or fraudulent." Federal Credit Union Act, 12 U.S.C. § 1782(e); *see also* 28 U.S.C. § 2409a(g) ("Any civil action under this section [*i.e.*, real property quiet title actions], except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be *deemed to have accrued* on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." (emphasis added)); *see also* 28 U.S.C. § 2415(d) (six-year statute of limitations for actions for the recovery of money erroneously paid: "*Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action *shall be deemed to accrue again* at the time of each such payment or acknowledgment" (emphasis added)).[20]

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[20] State legislatures have followed a similar practice. *See, e.g.*, Nev. Rev. Stat. § 11.190(3)(d) (requiring fraud claims to be filed within three years "but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud"); Ariz. Rev. Stat. § 12-543(3); Cal. Civ. Proc. Code § 338(d); Idaho Code Ann. § 5-218; Iowa Code § 614.4; Kan. Stat. Ann. § 60-513(a)(3); Md. Code Ann. § 5-203; Minn. Stat. Ann. § 541.05(6); Miss. Code § 15-1-67; Mo. Rev. Stat. § 516.120(5); Mont. Code Ann. § 27-2-203; N.D. Cent. Code § 28-01-16(6); Neb. Rev. Stat. § 25-207; N.M. Stat. Ann. § 37-1-7; N.C. Gen. Stat. § 1-52(9); Okla. Stat. tit. 12, § 95(3); S.D. Codified Laws § 15-2-3; Wash. Rev. Code § 4.16.080(4); Wis. Stat. § 893.93(1)(b); Wyo. Stat. Ann. § 1-3-106. *See Cent. Bank*, 511 U.S. at 185 (holding that Congress's failure to explicitly provide for aiding and abetting liability when eleven States did so explicitly shows that Congress did not intend for there to be aiding and abetting liability).

Congress did not include language of "discovery" or "deem" in Section 2462 or in the specific penalty provision of the federal securities laws that is relevant here. It could have done so if it wanted discovery to apply to Section 2462. It chose not to. The government thus should not be heard to seek by judicial fiat what it could not obtain by legislation. "The fact that Congress chose to impose" a discovery rule in some statutes of limitations, "but not others, indicates a deliberate congressional choice with which the courts should not interfere." *Cent. Bank*, 511 U.S. at 184.

III. THE DECISION BELOW IS INCONSISTENT WITH THE DISCOVERY RULE

The court below improperly redefined "accrue" in Section 2462 based on this Court's decision in *Bailey v. Glover*, 88 U.S. 342 (1874), and what it characterized as the "discovery rule." Even if their application were not otherwise precluded by Section 2462's language, *Bailey* does not apply to the facts of this case and the discovery rule could not apply as a matter of law.

A. This Case Does Not Involve The Doctrine Of Fraudulent Concealment Or Equitable Tolling

In decisions spanning a century, this Court has confirmed that *Bailey* and the Court's later decision in *Holmberg* were based on principles of fraudulent

concealment and equitable tolling:[21] where a defendant has concealed a fraud from the plaintiff or committed a fraud "of such character as to conceal itself [from the plaintiff], the statute [for a fraud claim] does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him." *Bailey*, 88 U.S. at 349-50; *see also Holmberg v. Ambrecht*, 327 U.S. 392, 396-97 (1946). The Court has described the rule as being "in *mitigation* of the strict letter of general statute of limitations." *Bailey*, 88 U.S. at 347 (emphasis added); *see also* H.G. Wood, *A Treatise on the Limitations of Actions at Law and in Equity* § 274 (1901) (describing the discovery rule as "a judicial exception engrafted upon the statute, by the assumption of legislative and equitable powers, and is not warranted by any principle or rule of law, nor can it be supported by any known rule for the construction of statutes"). Those principles require the plaintiff to plead and affirmatively prove that the defendant affirmatively concealed the existence of her wrongful conduct from the plaintiff, frustrating the plaintiff's ability to bring a timely claim. *See, e.g.*, *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20

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[21] *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1420 (2012); *Holland v. Florida*, 130 S. Ct. 2549, 2562-63 (2010); *Young v. United States*, 535 U.S. 43, 49 (2002); *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 551 & n.5 (2002); *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001); *Rotella v. Wood*, 528 U.S. 549, 560-61 (2000); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 184 (1997); *Taylor v. Freeland & Kronz*, 503 U.S. 638, 647-48 (1992); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.4 (1990); *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 559 (1974); *Int'l Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 711 & n.2 (1966); *Traer v. Clews*, 115 U.S. 528, 537 (1885).

(2012); Pet. App. 38a-39a. Fraudulent concealment is thus case-specific and focuses on the conduct of the individual defendant; it does not make all frauds "self-concealing" or deprive all persons accused of aiding and abetting a fraud of the protection of the statute of limitation regardless whether they engaged in concealing conduct. *See* 2 Calvin W. Corman, *Limitations of Actions* § 9.7.1 (1991). In *Bailey*, for example, plaintiffs made "a distinct allegation that the defendants kept secret and concealed from the parties interested the fraud which is sought to be redressed." 88 U.S. at 348-49. The complaint alleged that the defendants "kept secret their said fraudulent acts, and endeavored to conceal them from the knowledge [of plaintiffs], whereby both [plaintiffs] were prevented from obtaining any sufficient knowledge or information thereof [and] . . . had not been able to obtain full and particular information as to the [fraud]." *Id*. at 343.

The district court correctly held that the government had not adequately pleaded fraudulent concealment, and the government correctly determined to abandon that argument on appeal and to concede that equitable tolling does not apply. Brief of the SEC at 35, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581); Transcript of Oral Argument at 27:21-23, *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011) (No. 10-3581). This Court has never held that fraudulent concealment or equitable tolling apply to the distinct context of a governmental penalty claim where the statute requires exceptions to be reflected in an Act of

Congress.[22] *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (doctrine of equitable tolling did not apply where "fundamentally inconsistent" with language of statute). Even if it had, as the district court concluded, there is no allegation that either petitioner ever concealed or attempted to conceal from the government the alleged violation for which it seeks a penalty. The SEC always

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[22] *Holmberg* involved a private claim by creditors of a joint stock land bank. The creditors argued that an implied statute of limitations should not bar their lawsuit against the bank's owner because he had *actively concealed* his ownership of the bank's shares under a nominee name, thus frustrating the creditors' ability to file a timely claim. 327 U.S. at 393. The Court recognized that had there been a federal statute of limitations on point, "there is an end of the matter. The Congressional statute of limitation is definitive." *Id*. at 395. The Court also said, "[a]part from *penal enactments*, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications," and then ruled that "[w]hen Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Id.* at 395 (emphasis added). Applying those "historic principles of equity," the Court relied on "the old chancery rule that where a plaintiff has been *injured* by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered.'" *Id*. at 397 (quoting *Bailey*, 88 U.S. at 348) (emphasis added). But here Congress has not left the statute of limitations to "judicial implications." It passed a "penal enactment" and it has not left to the federal courts the formulation of remedial details but has reserved those rights for itself. The only governmental case cited by the government is *Exploration Co. v. United States*, 247 U.S. 435 (1918), where the government was suing for restitution, standing in for a private stakeholder who was defrauded by a private party.

had the ability to obtain the information on which it based its complaint. The emails and other documents were readily available. It simply chose not to ask for them until the New York Attorney General announcement in 2003. J.A. 80-84, 88-89. Thus, the court of appeals did not hold and could not have held that fraudulent concealment or equitable tolling applied. Pet. App. 18a-19a.

B. The Discovery Rule Is Not Applicable

Unable to satisfy the requirements of fraudulent concealment, the government argued below for a more radical rule and the court below accepted it. The government argued, and the court agreed, that under *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), even if the defendant did not engage in any concealing conduct—presumably, even if the violation were known to the victim—the SEC's claim did not accrue because, as a categorical matter, when a penalty is sought under an antifraud statute, the time for the government to bring that claim begins to run only when the government knows or should have known of the violation. Pet. App. 18a-20a.

The court's holding rests on a fundamental misunderstanding of *Merck* and the discovery rule it discussed. *Merck* involved "a statute, not a court-created exception to a statute," that incorporated a discovery rule—namely Section 1658. *Merck*, 130 S. Ct. at 1797. It did not require the Court to interpret the term "accrue" or determine when a claim accrued where Congress provided that the government's claim arose upon the occurrence of a violation. This Court has also ruled that—in the absence of an express

federal statute of limitations—the statute of limitations for particular claims that require proof of injury begins to run on discovery of the injury. *See, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Even then, this Court has "not adopted [the] position" that "federal courts 'generally apply a discovery accrual rule when a statute is silent on the issue.'" *TRW*, 534 U.S. at 27 (2001) (quoting *Rotella*, 528 U.S. at 555).

Those cases are not applicable here. They do not change the meaning of "accrue" or apply to claims where injury is not an element. Moreover, leaving aside that they have been applied only where the statute is either silent or explicitly runs from discovery, they discuss the date of accrual for a particular type of claim—one brought by a victim seeking damages on a claim where injury is an element. As the Court stated, the statute of limitations for a fraud claim requiring evidence of damage or injury is suspended "where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Merck*, 130 S. Ct. at 1793; *see also TRW*, 534 U.S. at 27 ("'where a *plaintiff has been injured* by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered'" (quoting *Holmberg,* 327 U.S. at 397) (emphasis added)). The rule is reflected in Section 2416, which explicitly suspends the running of the statute of limitations of a government claim for damages during the period that the government did not know and reasonably could not have known of its claim. 28 U.S.C. § 2416.

However, the discovery rule does not, as the government claims, give it open-ended license to

pursue a penalty claim without regard to when the violation occurred and whether the defendant took any action to deceive the government into not bringing its claim. Unlike a private claim by a fraud victim which cannot be sued on and does not arise until there is injury and where the deception of the victim that may be inherent in a particular violation would itself defeat timely filing, *see* Pet. App. 19a-20a, there is nothing in a statutory IAA claim—or any other statutory fraud claim—that makes such claim more difficult for the government to discover than any other statutory violation. *See, e.g.*, *SEC v. Obus*, 693 F.3d 276, 291 (2d Cir. 2012). It is just a matter of when and how the government chooses to investigate. Moreover, unlike a common law fraud claim or statutory claim that requires damages to be actionable, *cf*. Restatement (Second) of Torts §§ 525, 550 (1965) (noting damages as an element of fraudulent misrepresentation and fraudulent concealment), Congress did not require the SEC to prove it was defrauded or to prove damages or injury at all. Congress was silent: Congress gave the SEC the right to sue for a penalty as soon as an IAA violation took place, 15 U.S.C. § 80b-9(e)(1), and defined an IAA violation as a breach of the statute even if there never was any resulting injury. 15 U.S.C. § 80b-6 (elements of violation of IAA giving rise to civil penalty claim do not include injury); *see Capital Gains*, 375 U.S. at 191-92. Thus, both because Congress spoke to the issue and because the predicate for the discovery rule does not exist, the discovery rule cannot extend the time for the government to sue. *See 3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994) (rejecting application of the discovery rule to Section 2462 because "[t]he rationale underlying the discovery of injury rule—that a claim cannot realistically be said to

accrue until the claimant has suffered harm—is completely inapposite”).

Finally, like the fraudulent concealment doctrine, the “discovery” rule is a modern one that was not in place—much less uniformly or consistently—at the time of the passage of the original Section 2462. *See Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1082 (2011) (only when Congress adopts statutory language that “‘all (or nearly all) of the’ relevant judicial decisions have given . . . a consistent judicial gloss,” has the Court has been willing to “presume Congress intended the [language] to have that meaning” in the statute (quoting *Merck*, 130 S. Ct. at 1802)); *N. Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (judicial authority before enactment was both “longstanding” and “settled” (internal citations omitted)).[23] Even where it was

[23] At the time Section 2462’s predecessors were passed, courts of law in many states, including Virginia, North Carolina, New York, Kentucky, Tennessee and Vermont, refused to apply a discovery rule to statutes of limitations in the absence of explicit statutory text authorizing such a rule. *See, e.g.*, *Smith v. Bishop*, 9 Vt. 110, 116 (1837); *Pyle v. Beckwith*, 24 Ky. (1 J.J. Marsh.) 445 (1829); *Cocke v. McGinnis*, 8 Tenn. 361, 363-64 (1828); *Troup v. Smith*, 20 Johns. 33, 48-49 (N.Y. 1822); *Hamilton v. Shepperd*, 7 N.C. (3 Mur.) 115 (1819); *Callis v. Waddy*, 16 Va. (2 Munf.) 511, 511-12 (1811); *accord* John Francis Kelly, *A Treatise On The Code Limitations of Actions Under All State Codes* 277-79 (1903); J.B.G., Annotation, *When statutes of limitations commences to run against action to recover, or for conversion of, property stolen or otherwise wrongfully taken*, 136 A.L.R. 658 (1942) (“In the absence of a statutory provision suspending the statute of limitations where there is a concealment of the facts upon which a cause of action depends until the discovery of such facts by the person or persons entitled to bring suit, it was the early rule that although courts of

applied, courts historically did so based on the application of equitable principles and not as a matter of the interpretation of "accrue," and, even then, freely conceded that "much conflict of opinion" existed on the issue. *Kane v. Cook*, 8 Cal. 449, 458 (1857).[24]

Thus, even assuming that a fraud discovery rule could be read into the statute without language expressly providing it, the discovery rule would have no place in this case because Congress defined when the government's claim accrued and that definition does not require there to have been any damage or injury in the first place. The government must bring its suit within five years of when it had the right to file that suit; it had the right to sue when a violation occurred; and it is not permitted to delay on the basis of a rule that relates to injury or harm the government is never required to prove and is not even an element of its claim.

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equity might suspend the running of the statute during the period of concealment, courts of law were without authority so to do.").

[24] *See, e.g.*, *Bricker v. Lightner*, 40 Pa. 199, 204 (1861) ("If Bricker did indeed commit the grievous fraud imputed to him, we hold him estopped from setting up the Statute of Limitations in defence of himself."); *First Mass. Tpk. Corp. v. Field*, 3 Mass. 201, 208 (1807) ("[A]lthough the plaintiffs' cause of action mentioned in the first count literally accrued at the time when the contract was to have been executed . . . the fraud of the defendants, disclosed in the replications of the plaintiffs, is sufficient in law to avoid the statute of limitations pleaded in the defendants' bars . . . .").

C. The Presumption Against Perpetual Penalties Applies

To the extent there were any remaining ambiguity, it should be removed by a different presumption that applies in this case—the presumption against perpetual penalties.

The purpose of a penalty is to punish. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 422 (1987) ("A civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."). The "'penalty or forfeiture' in [predecessor Section 2462] refer[s] to something imposed in a punitive way for an infraction of a public law, and does not include a liability imposed solely for the purpose of redressing a private injury, even though the wrongful act be a public offense, and punishable as such." *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 412, 423 (1915). In the case of SEC penalties, a defendant who has violated the law is not immune from punishment because he has returned (or never received) any benefit or ill-gotten gains. 15 U.S.C. § 80b-9(e)(3)(C); *see also* 15 U.S.C. § 80b-6 (elements of violation of IAA giving rise to civil penalty claim here does not include injury). Nor is he relieved from the threat of punishment, or its imposition, because he has settled with and made peace with his alleged victim or no longer poses a risk of violating the securities laws. *Cf. Obus*, 693 F.3d at 291 (alleged victim did not believe there was a violation). The penalty is based on a past violation that cannot be purged through return of funds or the

cessation of illegal activity. Indeed, SEC penalties are based on the number of violations and the defendant's intent, and not the injury caused.[25] As the SEC itself has acknowledged, civil monetary penalties "might be seen as standing at the border between civil and criminal sanctions." Speech by SEC Staff: The Advantages of a Dual System: Parallel Streams of Civil and Criminal Enforcement of the U.S. Securities Laws (Sept. 19, 1998).[26]

Accordingly, the controlling principle in this case is that which has been in place since before the founding of the Republic: that the law abhors a perpetual penalty and that an individual cannot "remain forever liable to a pecuniary forfeiture." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805) (Marshall, C.J.).[27] In *Adams*, this Court forcefully rejected the government's argument that no statute of limitations was applicable

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[25] The SEC can seek penalties on a natural person in the amount of $7,500 for each violation; or $75,000 if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement"; or $150,000 if the violation "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and the violation resulted in "substantial losses or created a significant risk of substantial losses." 15 U.S.C. § 80b-9(e)(2); 17 C.F.R. § 201.1004. The penalties authorized to be imposed on defendants other than natural persons are even greater. *Id.*

[26] *Available at* http://sec.gov/news/speech/speecharchive/1998/spch222.htm.

[27] The principle of limiting the sovereign's time to sue for a penalty or forfeiture dates back to the Elizabeth I. *See* 31 Eliz. c. 5, § 5 (1588).

to the government's claim for a civil penalty because it was not sought in a criminal prosecution, reasoning that the penalty sought was a "punish[ment]" within the meaning of the statute. *Id.* at 340-41. The Court emphatically stated:

> In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.

Id. at 342.

Answering the hypothetical that there could be "no act limiting the time [for the government to bring a 'pecuniary penalty']," Justice Story enunciated the same principle, riding circuit, less than a decade later:

> If there had been no act limiting the time, within which prosecutions on penal statutes should generally be brought, there would have been considerable force in the argument, that the limitation of the act of 1799 was intended to be embraced in the 6th section of the act of 1808, for the reason stated by the court in *Adams v. Woods* . . . , that it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence.

United States v. Mayo, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813).

The same principle applies here where the plaintiff is the government seeking a punishment, not a private party seeking damages. Accordingly, to the extent there is any ambiguity, it must be resolved in favor of repose and not—as the government has argued—in favor of a perpetual penalty.

D. Reading A Discovery Rule Into Section 2462 Would Violate The Core Objectives Of Statutes Of Limitations And The Separation Of Powers

1. The Second Circuit's Discovery Rule Conflicts With The Purposes Of Statutes Of Limitations

This Court has long construed statutes of limitations to avoid interpretations that would be "at odds with the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555; *see also Simmonds*, 132 S. Ct. at 1420 ("Allowing tolling to continue beyond the point at which a §16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be *inequitable* and inconsistent with the general purpose of statutes of limitations: to protect defendants against stale or unduly delayed claims.") (citation and internal quotation marks omitted)); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (interpreting a statute of

limitations to avoid "conflict[] with a basic objective—repose—that underlies limitations periods"); *Campbell v. Haverhill*, 155 U.S. 610, 617 (1895) ("[I]t is a cardinal principle of modern law and of this court . . . [that statutes of limitations] are not to be construed to defeat their obvious intent to secure the prompt enforcement of claims during the lives of witnesses, and when their recollection may be presumed to be still unimpaired.").

The Second Circuit's rule runs afoul of that fundamental principle. The discovery rule for common law fraud claims has a natural end date within the control of the defendant, and in any event, where Congress has included a discovery rule, it has also generally included a statute of repose. At some point, if a person has been injured by a fraud, that injury will manifest itself. *See Rotella*, 528 U.S. at 556; *3M*, 17 F.3d at 1460. In addition, the defendant can satisfy or moot a claim by paying for the damage it has caused or returning any ill-gotten gains whether the party injured is the government or not. By contrast, under the Second Circuit's rule, there is no ready way that an individual could ensure herself repose from a penalty claim. Our society is a free one. In the absence of statute, individuals are not required to self-report their own conduct, much less to do so to enjoy repose. *Cf. Grunewald v. United States,* 353 U.S. 391, 402 (1957); *Krulewitch v. United States,* 336 U.S. 440, 456 (1949) (Jackson, J., concurring). Even if they were, the statute of limitations protects against false claims as well as meritorious claims. The rule adopted by the Second Circuit would require a person to anticipate every accusation that might be made against her sometime in the future and then disclose those false

accusations to start the clock running herself. A potential defendant would not only need to be a self (and, perhaps, false) confessor but a soothsayer.

In the Second Circuit, then, when the clock starts to tick is entirely within the government's control. If the government chooses not to investigate, it will not—except in unusual circumstances—discover a violation and thus will not start the clock running. If the government chooses, for whatever reason, not to investigate, it will have no pressure to investigate: the clock will not start to run until it has not only started an investigation but substantially concluded it.

Thus, the rule below would undermine the central principles behind the statute of limitations. This Court has recognized that a statute of limitations embodies a principle of repose that is "vital to the welfare of society" and to "giv[e] security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). The principle does not just protect those who violate the law, but also society generally by permitting both the person who violated the law and the person who may be falsely accused—and all persons dealing with them—to order their affairs safe in the notion that, at some point, "bygones [will] be bygones." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearing on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before the H. Comm. on the Judiciary*, 89th Cong. 6-7 (1966) (statement of John W. Douglas, Assistant Att'y Gen., Civil Division, Department of Justice). It has particular force with respect to the securities laws where this Court has emphasized that business transactions "demand[]

certainty and predictability." *Cent. Bank*, 511 U.S. at 188 (citation and internal quotation marks omitted).

Statutes of limitations reflect a balance between the interests in law enforcement and in repose. The SEC has extensive powers and the five-year statute of limitations gives it sufficient time to fulfill the interest in law enforcement. It has the power "at any time, or from time to time, to [conduct] reasonable periodic, special, or other examinations . . . as the Commission deems necessary or appropriate," 15 U.S.C. § 80b-4, including of the books and records that registered investment advisers, such as Gabelli Funds and GGGF, must maintain; federal regulation requires those advisers to maintain and preserve "[a]ll books and records . . . in an easily accessible place for a period of not less than five years." 17 C.F.R. § 275.204-2(e)(1) & (2). The SEC can demand access to these advisory records, including detailed business, client, and account information, for any reason or no reason at all. *See* 15 U.S.C. § 80b-4. Unlike a private party, the SEC can take evidence, subpoena documents, and compel testimony before filing, and can do so merely on suspicion. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950); *see* 15 U.S.C. § 80b-4; 15 U.S.C. § 80b-9(b); 15 U.S.C. § 77s(c); 15 U.S.C. §§ 78u(a)-(b); 17 C.F.R. § 202.5.[28] The SEC requires that investment

[28] The SEC may also make both voluntary and involuntary requests for information and data on a host of regulated entities, including investment advisers, without serving an investigative subpoena. 17 C.F.R. § 202.5; 15 U.S.C. §§ 78q(a)-(b); 15 U.S.C. § 80b-4; Office of Chief Counsel, Securities and Exchange Commission, *Enforcement Manual* 46 (March 9, 2012), *available at* http://www.sec.gov/divisions/enforce/ enforcementmanual.pdf.

advisors file periodic reports listing the monthly sales and repurchases of the shares of a mutual fund such as GGGF and would have the ability—should it choose to use it—to require by regulation the reporting of additional information. *See* SEC Form N-SAR, Item 28, *available at* http://www.sec.gov/about/forms/formn-sar.pdf (current form substantially the same as when adopted by Release No. 34-21633, IC-14299, 32 SEC Docket 170, 1985 WL 58871, at *26 (Jan. 4, 1985)).[29] Petitioners—and those with whom they did business—were entitled to assume, when the SEC chose not to bring a penalty action within the limitations period, that the SEC would not bring a penalty action. If, despite its ample powers, the SEC believes it has insufficient time to investigate particular categories of violations, the answer is for the SEC to request more time from Congress. It is not to punish individuals like petitioners with tardy claims.

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[29] In 2004, the SEC adopted a new rule requiring that mutual funds disclose their policies and procedures with respect to frequent purchases and redemptions of fund shares and the circumstances under which restrictions on such purchases and redemptions will not be imposed. SEC Form N-1A, Item 11(e), *available at* http://www.sec.gov/about/forms/formn-1a.pdf; *see also* Disclosure Regarding Market Timing and Selective Disclosure of Portfolio Holdings, SEC Release No. 33-8408, IC-26418, 69 F. Reg. 22303, 2004 WL 865628, at *22302 (Apr. 23, 2004) (mutual funds must disclose "the identity of the persons permitted to engage in frequent purchases and redemptions and any compensation or other consideration received by the fund, its investment advisor, or any other party pursuant to such arrangements"); *cf. 3M*, 17 F.3d at 1461 n.15 (holding that violations were not "inherently undiscoverable" because regulator could pass a regulation requiring their disclosure (internal citation omitted)).

The Court has also recognized a related objective of statutes of limitations in bringing legislative "pressure" to bear on parties to assert their claims when they are fresh and have the greatest value. *See Klehr*, 521 U.S. at 187; *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143, 149, 151 (1987). That principle has special force for alleged securities fraud violations. If the SEC brings a penalty claim more than five years after the violation has occurred, a private party injured by the conduct alleged in the complaint cannot use the claim to recover damages. *See* 28 U.S.C. § 1658(b). Here, the SEC knew for years that market timers "timed" global funds, yet waited to investigate. *See* Mark T. Roche, Sean C. Adams & Scott H. Frewing, *Will the SEC Have Forever to Pursue Securities Violations?* SEC v. Gabelli, BNA Securities Regulation & Law Report, July 23, 2012, at n.3 and accompanying text (quoting SEC stipulation that "[b]eginning in the mid 1990s, the SEC knew about the practice of market timing in mutual funds, and the decision was to let the marketplace regulate itself"). The Second Circuit rule frustrates that objective by permitting the prosecuting agency to set its own dates for pursuing an investigation and, thereby, its own deadline for filing a claim rather than requiring it to abide by the congressionally-set deadline.

Statutes of limitations also protect persons—both the guilty and innocent alike—from the risk that between the time of an alleged violation and the time of a charge "evidence has been lost, memories have faded, and witnesses have disappeared." *See Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). That is why there is a five-year period from date of accrual. They are not generally concerned with

the time period between the government's decision to sue and its actual lawsuit. When a defendant is facing as serious a matter as a governmental penalty action, she has every right to defend herself. She is not required to rely on the government to collect evidence supporting her defenses. Here, the government seeks a penalty based exclusively on emails and documents, dating from 1999 to 2002. J.A. 80-83, 84. On its theory, however, it could have brought the action after the participants in those emails—whose testimony would be critical both to establishing that there was no violation and to the lack of wrongful intent that is an important element to the penalty determination—had vanished or expired. That clearly was not the intent of Congress in passing Section 2462 and in providing that the limitations period began when the claim accrued and expired five years thereafter.

2. The Second Circuit's Rule Is Unworkable

Congress has based the running of a governmental statute of limitations on the discovery rule in the limited circumstances when a false claim or submission is made to the government, or the government itself is the victim of a tort or breach of contract. *See, e.g.*, False Claims Act, 31 U.S.C. §§ 3729–33; Tariff Act of 1930, 19 U.S.C. ch. 4; 28 U.S.C. §§ 2415–16. Even then, Congress generally specified what it meant by discovery or whose knowledge was at issue. 31 U.S.C. § 3731 ("facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"); 19 U.S.C. § 1621 ("discovery of [the] fraud"); 28 U.S.C. § 2416 ("facts material to the

right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances").

The inquiry those statutes call for is judicially administrable and workable in practice. Where a party has victimized the government, it is a relatively easy matter to determine when the official charged with the responsibility to act in the circumstances knew or should have known of the "facts material to the right of action." 28 U.S.C. § 2416. The inquiry into the government's affairs is relatively discrete—what did the relevant individual know about the performance of a contract to which the government itself was a party, or a violation in which the government was victim, and some (or all) of that information will be in the possession of the defendant herself. Moreover, information regarding when the government knew a contract with it was breached or it suffered a tort would not be subject to any law enforcement privileges. And there will be a standard against which the government's diligence can be measured—what should a reasonable person in similar circumstances have known. The statute of limitations can operate as a real defense.

By contrast, except in the rarest of circumstances (those in which the defendant self-reported), information regarding when the government knew or should have known of a violation will be exclusively in the hands of the government and its discovery presents issues of enormous difficulty. The government alone knows all the tips it received, witnesses it interviewed, and documents it analyzed—and when it received that information. The documents and testimony which

would reveal that information also traditionally has been subject to a myriad of governmental privileges. "[I]nformation pertaining to law enforcement techniques and procedures, information that would undermine the confidentiality of sources, information that would endanger witness and law enforcement personnel [or] the privacy of individuals involved in an investigation, and information that would otherwise . . . interfere[ ] with an investigation" is protected by the law enforcement privilege. *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (internal quotations omitted; brackets in original). Communications between government employees and their counsel made for the purpose of obtaining legal advice regarding government investigations and enforcement decisions are protected by the attorney client privilege. *In re Cnty. of Erie*, 473 F.3d 413, 418 (2d Cir. 2007). "[A] document [prepared by law enforcement] in the course of an investigation that was undertaken with litigation in mind" is protected from disclosure by the work-product doctrine. *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991); *see Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). "[D]ocuments reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" is protected by the deliberative process privilege. NLRB *v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (internal quotation omitted). Assuming any of those doctrines apply, the government could assert that it recently discovered a claim—but the defense would have no way to test that assertion or to discover the evidence that would contradict it.

Moreover, even assuming a court were willing to tolerate the intrusion into law-enforcement necessary for a defendant to discover who knew what when, the discovery rule asks the wrong question. An agency may not "know" of a violation because it has allocated resources elsewhere, because it has placed a higher law enforcement priority on other conduct, because its enforcement program is ill-designed or inefficient, or because it does not have the appropriate personnel for the task. *See 3M*, 17 F.3d at 1461. It may not "know" because one person somewhere in a vast agency with one piece of information fails to speak to another with a different piece of information or because, having the evidence, the government did not realize that there was a violation. The questions regarding why the government chose to collect certain evidence and not other evidence, and what it knew when, are matters for Congress or the ballot box; they historically have been considered "particularly ill-suited to judicial review." *Wayte v. United States*, 470 U.S. 598, 607-08 (1985). The agency's failure to detect violations, for whatever reasons, does not avoid for the defense the problems of faded memories and lost documents and witnesses. *3M*, 17 F.3d at 1461.

3. The Second Circuit's Discovery Rule Conflicts With The Separation Of Powers

The court of appeals' decision will inevitably involve the courts in intractable—and constitutionally inappropriate—case-by-case policymaking in determining which statutes "sound in fraud" and fall within the scope of its judicially fashioned discovery rule, and which do not.

This Court should hesitate before embracing a "sound in fraud" test that is not susceptible of ready application. Our modern administrative state includes many provisions that, like Section 206 of the IAA, could be seen as authorizing a federal agency to impose penalties for violation of a statute that "sounds in fraud." There are statutes authorizing penalties for the manipulation or attempted manipulation of the price of any commodity in interstate commerce or manipulation or attempted manipulation in violation of certain provisions of the Commodity Exchange Act (7 U.S.C. § 9(10)(c)(ii); 7 U.S.C. §§ 13a, 13a-1); for the alteration or defacement of a permit or other document provided for under the Plant Protection Act (7 U.S.C. § 7734(b)); for knowingly distributing or exhibiting a film which bears the seal of the National Film Registry if such film is not included in the National Film Registry or a sound recording which bears the seal of the National Recording Registry if such recording is not included in the National Recording Registry (2 U.S.C. § 179r(b)(2); 2 U.S.C. § 1703(e)(2)(B)); and for presenting a claim for a service that such person knows or should know is for a service for which payment may not be made under the Social Security Act (42 U.S.C. § 1395nn(g)). Some of these statutes are limited to intentional violations; others reach more broadly. Some statutes might be considered to "sound in fraud" or be an "antifraud" statute; others not.

The same can be said about the federal securities laws specifically. Those laws address and authorize the imposition of civil penalties (15 U.S.C. §§ 77t(d), 78u(d)(3)) for conduct ranging from the failure to keep records which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the

assets of an issuer (15 U.S.C. § 78m(b)(2)(A)); the sale of a security without a registration statement in effect or with a registration statement in effect that contains an untrue statement of a material fact (15 U.S.C. §§ 77e(a), 77k); the use or employment of any manipulative or deceptive device or contrivance in connection with a sale of a security or the making of an untrue statement of fact in connection with a tender offer (15 U.S.C. §§ 77q(a), 78j, 78n(e)); and the filing of forms reflecting the beneficial ownership of shares by directors, officers and principal stockholders (15 U.S.C. § 78p(a)); and a breach of fiduciary duty involving personal misconduct in respect of any registered investment company (15 U.S.C. § 80a-35(a)); to the conduct at issue here (15 U.S.C. § 80b-6). This Court has directed that these laws are "to be construed . . . not technically and restrictively, but flexibly to effectuate [their] remedial purposes." *Capital Gains*, 375 U.S. at 195.[30] Once again, some of these statutes require proof of deception or intent; others reach more broadly. Section 206(2), one of the provisions at issue here, does not require proof of intent or deception. 15 U.S.C. § 80b-6; *Capital Gains*, 375 U.S. at 191-92.

Section 2462, like other statutes, "'reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes.'"

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[30] *See also SEC v. Zandford*, 535 U.S. 813, 819 (2002); *Pinter v. Dahl*, 486 U.S. 622, 653 (1988); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386-87 (1983); *Aaron v. SEC*, 446 U.S. 680, 693-95 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 748 (1975); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972).

Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 165 (2008) (quoting *Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990)). It also charges that such determination must be reflected in an "Act of Congress" and not in the mere title assigned to a statute. *TRW*, 534 U.S. at 38 (Scalia, J., concurring) (questions regarding how "to strike the balance between remediation of all injuries and a policy of repose" are "properly directed not to us, but to Congress"). It may be that the conduct addressed by certain of these statutes is more difficult to detect than the conduct addressed by others, or that the value of repose is lesser with respect to some activities versus others. But that is a distinctively legislative judgment for Congress. It cannot be resolved, as the Second Circuit held, by having courts determine which statutes "sound in fraud" and which do not.

IV. SECTION 2462'S HISTORY DOES NOT SUPPORT THE GOVERNMENT'S CLAIM

Finally, the history of Section 2462 does not support, but rather refutes, the government's reading of the statute.

From the beginning of the Republic, Congress has limited the government's ability to impose a penalty, fine or forfeiture. The current version of Section 2462 traces back to a 1790 statute passed by the First Congress which made clear that the limitations period ran from the date the violation took place, and not later: no person should be "tried or punished" for "*any* fine or forfeiture" more than two years "from the time of committing the offense" "[*p*]*rovided*, That nothing herein contained shall extend to any person or persons

fleeing from justice." Act of Apr. 30, 1790, ch. 9, § 32, 1 Stat. 112, 119 (emphasis added).[31]

In 1839, Congress enacted a version of the statute that was similar to both the 1790 law and the current Section 2462 in the sense of being a statute of general applicability. That law used the term "accrue" several times:

> That no suit or prosecution shall be maintained, for any penalty or forfeiture, pecuniary or otherwise, *accruing* under the laws of the United States, unless the same suit or prosecution shall be commenced within five years from the time when the penalty or forfeiture *accrued*: *Provided*, The person of the offender or the property liable for such penalty or forfeiture shall, within the same period, be found within the United States; so that the proper process may be instituted and served against such person or property therefor.

Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 321, 322 (emphases added). A different section of the same law provided for venue "where such penalties or forfeitures have accrued." Act of Feb. 28, 1839, ch. 36, § 3, 5 Stat. 321, 322. At the time, a claim was understood to accrue when it could be sued on. *See Montgomery v.*

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[31] Some courts have also traced Section 2462 to a 1799 act "to regulate the collection of duties on imports and tonnage." Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695-96; *3M*, 17 F.3d at 1458 n.7 (D.C. Cir. 1994). That act also made clear that the statute ran from the date "the penalty or forfeiture was incurred." Act of Mar. 2, 1799, ch. 22, § 89, 1 Stat. 627, 695-96.

Hernandez, 25 U.S. (12 Wheat.) 129, 133-34 (1827); *Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172, 181-82 (1830); *Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838); *Evans v. Gee*, 36 U.S. (11 Pet.) 80, 84 (1837); *Meredith v. United States*, 38 U.S. (13 Pet.) 486, 493-94 (1839); *accord* John Francis Kelly, *A Treatise On The Code Limitations of Actions Under All State Codes* 91 (1903) ("The cause of action accrues at the time the party is entitled to sue, demand relief, or make the entry."). Congress used "accrue" to mean where the claim arose—it would be nonsensical for venue to be assigned where the claim was discovered, or for the venue test to differ depending on whether the underlying claim was brought under a statute that sounded in fraud or not. The word "accrue" as used for the start date of the limitations period thus must have the same meaning. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) (presumption that "identical words used in different parts of the same act are intended to have the same meaning." (citation and internal quotation marks omitted)).

Moreover, between the initial enactment of the first predecessor to Section 2462 in 1790 and the last enactment of the modern statute in 1948, the courts on any number of occasions held that the term "accrue" means what it says—when a right becomes full and complete—and rejected the argument that "accrue" in Section 2462 or any of its predecessors carries with it a discovery rule. *See*, *e.g.*, *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871) ("the 'forfeiture,' *accrued* when the offense was committed" (emphasis added)); *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944) ("the phrase 'time when the penalty or forfeiture *accrued*' refers merely to the time of the

commission of the offense or the doing of the act by which the penalty or forfeiture was incurred" (emphasis added)). Congress changed some of the language of Section 2462, but not the critical language regarding when the statute of limitations would start to run.[32] It is presumed to have been aware of those decisions and to have adopted them. *See, e.g.*, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-240 (2009).

In 1874, three years after the District Court for the Southern District of New York in *United States v. Maillard*, 26 F. Cas. at 1143, rejected inserting a discovery rule into the statute, Congress amended it to make clear that the five years from accrual rule was subject to a single exception—except as "otherwise specially provided." It left untouched the language of "accrued" and the parallel reference to a suit or prosecution "accruing" under the laws of the United States. Revised Statutes § 1047, 18 Stat. 193, 193 (1874). In 1948, having the opportunity to reconsider the statute in light of the Ninth Circuit's interpretation in *Smith v. United States*, 143 F.2d at 229, that a claim accrued when the offense was committed, Congress also did not change the critical language of Section 2462; it reaffirmed it. Just four years after *Smith*, Congress affirmatively reenacted that language in the current incarnation of Section 2462. Act of June 25, 1948, Pub. L. No. 80-7773, 61 Stat. 869, 974, *codified at* 28 U.S.C. § 2462. This current version of the statute measures the limitations period from when the claim

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[32] No court held that any of the predecessor statutes incorporated a discovery rule or that the statute began to run on anything other than the date of the violation.

"first accrued"—language that at the time the statute was passed, the Supreme Court had recently interpreted to mean the "happening of the events which fix the defendant's liability." *Reading*, 271 U.S. at 64.

Finally, for decades thereafter, no court believed that Section 2462 itself incorporated a fraud discovery rule. Indeed, it was not until the past decade that the SEC advocated the position that Section 2462 itself incorporated a fraud discovery rule. Pet. App. 13a-18a. And, it was not until 2009 that a court of appeals even suggested—against the weight of other circuit decisions uniformly rejecting the fraud discovery rule—that a fraud discovery rule *may apply* to claims subject to Section 2462. *SEC v. Koenig*, 557 F.3d 736 (7th Cir. 2009).[33] This settled understanding of Section 2462 by those subject to its limitations further confirms that Section 2462 does not incorporate a fraud discovery rule.

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[33] It is notable that in *Koenig*, 557 F.3d at 739-40, the SEC argued and the court agreed that the individual defendant deliberately concealed his wrongdoing.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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