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

REPLY BRIEF FOR PETITIONERS

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I. THE DISCOVERY RULE DOES NOT APPLY

The government starts from the wrong premise and thus reaches the wrong result. The government assumes—as did the Second Circuit—that a discovery rule applies to all federal statutes of limitations, including penal statutes that do not require evidence of injury, unless Congress otherwise provides, and then concludes that the discovery rule applies to Section 2462 because "Congress has [not] clearly displaced the usual rule." Opp. 10.[1] That argument cannot be squared with Section 2462's language, this Court's decisions, the relevant background law, or the statutory structure.

A. Under Section 2462's Plain Language, The Limitations Period Runs From When The Government's Claim Arises

The government concedes that, as a "general rule," "a claim accrues when a plaintiff has the right to bring suit." Opp. 28; *see also id.* at 21-22; Br. 12 (cases interpreting identical term). If "accrual" means arise, then, it means arise. Although the date a particular claim arises may vary depending on its elements, the meaning of the term "accrue" cannot vary. Br. 12-13. Interpreting a materially identical statute, this Court has held that "the fact that the limitation is made

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[1] Unless otherwise designated, all abbreviations are as defined in Petitioners' Brief on the Merits, Nov. 9, 2012, referred to herein as "Br." "Opp." refers to Brief for the Respondent, Dec. 10, 2012.

applicable equally to . . . [t]wo 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 the other. *Reading Co. v. Koons*, 271 U.S. 58, 64 (1926); *see also Bankamerica Corp. v. United States*, 462 U.S. 122, 129 (1983). It follows that a penalty claim for violation of a statute that addresses fraud, just like a penalty claim for violation of any other statute, accrues and the limitations period begins to run when the defendant's liability is fixed.

The remainder of the statutory language—when read as a whole, and not in isolation as the government would have this Court do, Opp. 36-38—confirms that common-sense interpretation. Congress "explicitly delineate[d] the exceptional case," *TRW Inc. v. Andrews*, 534 U.S. 19, 23 (2001), where the limitations period does not continue to run (when "the offender or the property is [not] found within the United States," 28 U.S.C. § 2462) and therefore under both modern and contemporaneous rules of statutory construction, the courts are not "at liberty" to create additional exceptions. *TRW*, 534 U.S. at 23; Br. 16-17; SIFMA Br. 8-10. Moreover, Congress prescribed that the start-with-accrual rule was to be followed "[e]xcept as otherwise provided by *Act of Congress*," 28 U.S.C. § 2462 (emphasis added), not—as the government would have it—"[e]xcept as otherwise provided by law." *United States v. Providence Journal Co.*, 485 U.S. 693, 704-05 & n.9 (1988); *see also* Opp. 36. Congress therefore specified the governmental organ from which exceptions must come.

The answer to when the SEC's claim accrued here is also a matter of plain language. Congress provided that the limitations period for certain claims under the federal securities laws—not the one at issue here—would begin to run upon discovery. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). It also provided, without using language of discovery, that the SEC's claim for a penalty was ripe and the defendant's liability was fixed when an alleged IAA violation occurred, without regard to whether there was injury or damage. Br. 15-16; *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191-92 (1963).[2] The *latest* date alleged in the complaint is mid-2002, well more than five years before the SEC sued. Under the plain language, the SEC's claim is time-barred.

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[2] The SEC quotes the Senate Report on the Remedies Act for the proposition that Congress intended to keep the limitations period open not just until discovery but for five years beyond. Opp. 50. The Report does not say a discovery rule should be applied to fraud penalty actions. To the extent it has any relevance, it says that the SEC should get access to grand jury information to ensure it can bring a claim within the statute of limitations. S. Rep. No. 337, 101st Cong., 2d Sess. 25 (1990).

B. The Settled Meaning Of Accrue And Record Of Statutory Usage Undermine The Government's Argument

1. The Settled Meaning Undermines The Government's Argument

The government ignores the statute's plain language. It argues, based largely on cases applying the fraudulent concealment doctrine, that Section 2462 should be interpreted categorically to "delay[] the running of a limitations period in cases of fraud," Opp. 18, because, despite the statute's plain language, there was a tradition at common law that "the limitations period in a suit for fraud does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying his claim," *id.* at 8, and Congress is presumed to "understand[] the state of existing law when it legislates." *Id.* at 27 (citation and quotation marks omitted). The government's argument is based on bad law and history. The history confirms the plain language.

The Court has stated that when Congress uses a "term of art" that "had at the time a well-known meaning at common law or in the law of this country, [that term is] presumed to have been used in that sense unless the context compels . . . the contrary." *Lorillard v. Pons*, 434 U.S. 575, 583 (1978) (citation and quotation marks omitted); *see also Bowen v. Massachusetts*, 487 U.S. 879, 895 (1988). It also occasionally presumes that when Congress reenacts a statute that has received a settled judicial interpretation, "Congress [is] aware of these earlier

judicial interpretations and, in effect, adopt[s] them." *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993); *see also Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185 (1994).

Both those canons support the plain language. "Accrue" is a term of art, but its meaning "at common law [and] in the law of this country," *Lorillard*, 434 U.S. at 583 (citation and quotation marks omitted), is the moment a cause of action arises, *i.e.*, when the defendant's liability is fixed and complete. Br. 14, 50-53. The question of when any particular claim accrues is then a matter of the substantive law of that claim. Br. 15-16. Congress thus was not silent about when the limitations period began. *TRW*, 534 U.S. at 27.

Moreover, the only cases interpreting Section 2462 before its various reenactments uniformly concluded, as the language of the statute says, that a penalty, fine or forfeiture accrued under that statute "when the offence was committed," *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871), or at "the time of . . . the doing of the act by which the penalty or forfeiture was incurred," *Smith v. United States*, 143 F.2d 228, 229 (9th Cir. 1944).[3]

Indeed, to the extent there was any "background principle" that would have been in the forefront of Congress's mind, it is the principle that Chief Justice

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[3] The government calls *Maillard* an "outlier . . . decision" and rejects *Smith* as not involving fraud, Opp. 28, but it does not identify any other decision interpreting Section 2462 or its predecessors that say otherwise.

Marshall expressed in *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 338 (1805). The Court concluded that a statute of limitations addressed to the "punishment of certain crimes" and directed to the time by which an "indictment or information" had to be filed reached civil penalties not prosecuted by indictment or information and sought for violations that could not as a practical matter have been prosecuted within the limitations period. *Id*. (emphases omitted). As the Chief Justice put it: if the statute "does not limit actions . . . for penalties, those actions might, in many cases, be brought at any distance of time," a result that "would be utterly repugnant to the genius of our laws." *Id*. at 342.[4]

The government's history is not to the contrary. The government refers to what this Court has called "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." *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (citation and quotation marks omitted); Opp. 17.[5] At the time of Section 2462's passage, the

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[4] *Adams* disposes of the government's argument regarding the antecedent to Section 2462. Opp. 27 & n.7. Although the statute spoke in terms of crimes chargeable by indictment or information, the fact it did so is irrelevant. The Court applied it to civil penalties on the basis that "it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture." *Adams*, 6 U.S. (2 Cranch) at 342.

[5] *Holmberg* does not "establish a general presumption applicable across all contexts." *TRW*, 534 U.S. at 27. The law in *Holmberg*

"decided weight of authority" "in equity" applied that principle to do justice between wrongdoer and victim "*in mitigation* of the strict letter of general statutes of limitation." *Bailey v. Glover*, 88 U.S. 342, 347-48 (1874) (emphasis added); *see also Amy v. City of Watertown*, 130 U.S. 320, 324 (1889) (principle applied in "courts of equity . . . where one person has been injured by the fraud of another"); *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (C.C.N.H. 1828) (No. 12, 782) (applying doctrine where state courts were of concurrent jurisdiction and recognizing there was a "conflict of American decisions" in cases at law). In 1839, and indeed as late as 1889, that principle was not "consistently," Opp. 24, or uniformly adopted in the courts of law. *See also Amy*, 130 U.S. at 324; *Bailey*, 88 U.S. at 348. It did not "obtain[] the force of law in the English courts." *Amy*, 130 U.S. at 324. Nor did this Court suggest that it applied to a court of law until its 1875 decision in *Bailey*.[6] *See Holmberg*, 327 U.S. at 397. When state legislatures wanted the rule to apply

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created an equitable remedy but did not have an explicit statute of limitations. 327 U.S. at 395. Thus, the Court applied settled equitable principles to fill in the gap—leading to its sweeping statement about what "is read into every federal statute of limitation." *Id.* at 397.

[6] *Willison v. Watkins*, 28 U.S. (3 Pet.) 43, 48-49 (1830), *see, e.g.*, Opp. 26-27, a real property case, held if a tenant disclaims a tenancy with knowledge of the landlord, the statute of limitations begins to run and the landlord may sue to recover possession. *See also Merryman v. Bourne*, 76 U.S. 592, 601 (1869). It was not cited by the Court or any parties in *Bailey*, and this Court has never cited it in any case involving the discovery rule or fraudulent concealment.

in the courts, they said so expressly by statute. *Amy*, 130 U.S. at 324-25; *Bailey*, 88 U.S. at 347.

The government does not identify a single case where the rule was applied where the claim required no proof of injury whatsoever. The government also fails to identify a single case in the 200 years Section 2462 has been on the books in which a court on either "side[] of the Atlantic," Opp. 25-26, applied a discovery rule to a governmental penalty claim in the absence of statutory language expressly prescribing discovery.[7] Even in the context of claims by injured victims, there was no settled understanding that a fraud claim accrued when discovered. *See Sherwood*, 21 F. Cas. at 1307; *see also* H.G. Wood, *A Treatise on the Limitations of Actions at Law and in Equity* § 274 (1893) ("The cause of action, except where the statute otherwise provides, in cases of fraud, arises from the time of its commission . . . ."); Br. 32-33 nn.23 & 24.

The "old chancery rule" thus was not, and could not have been, a "long-settled background understanding" that "Congress . . . relied on" in drafting Section 2462. Opp. 35. That law established a statute of limitations for a type of remedy—penalties—that "at common law

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[7] *Exploration Co. v. United States* is based on the principle that "the rule . . . that statutes of limitations to set aside fraudulent transactions shall not begin to run until the discovery of the fraud . . . appl[ies] in favor of the government as well as a private individual." 247 U.S. 435, 449 (1918); Opp. 41. It involved a government suit to recover from the wrongdoer lands "obtained by grant from the United States by means of fraud." *Exploration Co.*, 247 U.S. at 446. It does not support the extension of the rule to a remedy not available to a private party.

. . . could only be enforced in courts of law." *Tull v. United States*, 481 U.S. 412, 422 (1987). Unlike the remedies in the government's cases, those at issue here are "intended to punish culpable individuals, [not] simply to extract compensation or restore the status quo." *Id.* And, unlike in the government's cases, the limitations statute here applies to claims by persons who have not "been injured by the fraud of another," *Amy*, 130 U.S. at 324, and where injury is not an element of the violation. The history thus does not support the claim that in enacting a law that the limitations period for "any" penalty begins at the time of accrual, Congress nonetheless meant that it began with discovery.

2. The Record of Statutory Usage Undermines The Government's Argument

The "record of statutory usage" further supports the plain language and undermines the government's arguments. *See W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88 (1991). Throughout history, when Congress intended a limitations period to run from discovery, it expressly said so. Br. 18-24.[8] From that history alone, the Court can "presume" that if Congress had intended the limitations period in Section 2462 to run from discovery, "it would have used the word[discovery] in the statutory text." *Cent. Bank*, 511 U.S. at 177; *id*. at 176, 181 (rejecting argument that "general principles of tort law" regarding aiding and abetting should attach to all federal civil statutes because Congress "knew

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[8] *See also, e.g.*, 5 U.S.C. § 552a(g)(5); 12 U.S.C. § 2277a-6(b)(2).

how to impose aiding and abetting liability when it chose to do so").

The government concedes—as it must—that Congress uses "discovery" and "accrual" to mean two different things. When it meant discovery, it said "discovery." Opp. 40-41. Likewise, when it meant accrue, it said "accrue." The government admits that "accrue" and "discovery" must be given different meanings when both terms are used in the same statute. Opp. 40 n.10. Otherwise, the limitations statute for Section 18 of the Exchange Act, 15 U.S.C. § 78r, and Section 323 of the Trust Indenture Act, 15 U.S.C. § 77www(a) (both of which address claims of fraud), would be nonsensical in requiring actions to be brought "within one year after . . . discovery . . . and within three years after" discovery. If Congress meant accrue to be different than discovery in these other contexts, there is no reason to believe Congress meant accrue to be the same thing as discovery in Section 2462.

The government does not dispute that when statutes penalize lies to the government and Congress wanted the limitations period to run from discovery, and not the date the claim "first accrued," Congress felt the need to "otherwise provide[]." *See, e.g.*, Tariff Act, 19 U.S.C. § 1621(1); Federal Credit Union Act, 12 U.S.C. § 1782; Opp. 40-41. The inference is inescapable. Congress understood unless it otherwise provided, the limitations period would run from when the claim arose and not from when it was discovered. *See TRW*, 534 U.S. at 28.

Finally, the government agrees that when Congress expressly uses the term "discovery," it commonly combines that rule "with an absolute period of repose." Opp. 40. But if that is so, the government offers the Court no reason to believe that when Congress does not use the word "discovery" at all, it means discovery without repose.[9]

C. Implication Of A Discovery Rule In Section 2462 Is Inconsistent With The Purposes Of Statutes Of Limitations And The Separation Of Powers

The government argues that application of the discovery rule to a governmental penalty action is administrable and consistent with the purposes of the statutes of limitations because "[f]or centuries, courts have applied the traditional fraud discovery rule, and . . . have not found it difficult to determine . . . when a plaintiff . . . actually or constructively discovered th[e] fraud." Opp. 11. When it comes to how a defendant could ever discover the relevant facts in the SEC's possession or how a jury could ever determine what a

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[9] The government's proposed rule cannot be squared with Congress's establishment of a firm "cutoff" of three years for private claims for damages under the securities laws. *Lampf*, 501 U.S. at 363. Even when Congress later extended the limitations period for private plaintiffs, it kept a "cutoff" of five years. *See* 28 U.S.C. § 1658(b). The government's proposed rule asks the Court to believe that Congress was sufficiently concerned with repose to bar a fraud remedy by injured victims who lack the tools for discovering fraud within the limitations period, but then cast aside that concern only for civil penalties brought by the government, where it is not defrauded and not injured.

reasonably diligent SEC would have known and done under the circumstances, the government tellingly offers only this: "[i]f defendants want to eliminate stale claims and uncertainty about their liabilities, they need only make public whatever they have previously concealed" or disclose it to the SEC. *Id.* at 46.[10] The government's argument is doubly mistaken.

Before the decision below, no court had ever held that a discovery rule applies to a government claim where the government is not the victim and no proof of injury is required. *See Rotella v. Wood*, 528 U.S. 549, 555 (2000) ("[I]n applying a discovery accrual rule, we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock."). "[M]ost of the cases in which the fraud discovery rule has been applied" involved "plaintiffs [who] were private parties that had been injured by the defendants' fraud." Opp. 44. The only other circumstance cited by the government is the limited one where it was a victim that was injured by a defendant's fraud. Br. 28 n.22; *Exploration Co.*, 247 U.S. at 446.

Moreover, although application of a discovery of injury rule when injury is an element may be consistent with a statute of limitations, the rule makes no sense in a government enforcement action where the

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[10] The government also asserts that it is easy to identify whether a claim involves "fraud." Opp. 49. But it does not dispute that the Second Circuit's test would potentially implicate a wide range of statutes, Br. 47, or identify a legal standard by which a court could determine which of these "sound[] in fraud," and thereby are governed by discovery, and which do not. Opp. 21.

government is not a defrauded victim and injury is not an element. Br. 38, 44. Where the plaintiff is a defrauded victim, the tort's objectives would be defeated if the law required the plaintiff both to "prove injury," Opp. 44, and bring her claim within a time period where, given the nature of the tort, she could not reasonably have known she was injured. *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1793 (2010); Br. 30-31. Also, "the traditional [fraud] discovery rule accounts for . . . repose by providing that the limitations period . . . begins to run when a reasonably diligent plaintiff *could have* discovered the relevant facts." Opp. 48. The government concedes, in those circumstances, delay is a function of the defendant's "misconduct in causing that delay." *Id.* at 10. If a reasonably diligent plaintiff would have known she was defrauded, the clock will begin to run; the timing will not be dictated by when the victim chooses to look. Br. 38-39; *Merck*, 130 S. Ct. at 1796. The defendant can take discovery of the facts that put the plaintiff "on notice . . . in a particular case." Opp. 11, 50. And courts and juries can determine whether the plaintiff has been "reasonably diligent" in discovering the necessary facts. *Merck*, 130 S. Ct. at 1798.

Where the government is not a defrauded victim, the accrual rule does not "effectively foreclose[]" the government from asserting a penalty claim or threaten its deterrent impact. Opp. 46. Many violations for which penalties are available may be "complex, concealed, or fraudulent," but that is not justification for applying a discovery rule. *Rotella*, 528 U.S. at 556; Br. 31. Where the government is seeking a penalty and injury is not an element, the delay is not a function of the nature of the defendant's "misconduct," but of when

the government chooses to "enquir[e]." *Rotella*, 528 U.S. at 556. If the government does not look, there may never be a time when it (not the putative victim) "discover[s] the facts underlying its claim, or could have discovered those facts by exercising reasonable diligence." Opp. 12.

Short of a public confession, Opp. 46, the government also offers no response for how, given the various privileges, a defendant could take discovery of the facts that "place the SEC on notice of the need to exercise [its investigative] powers." Opp. 11; *cf. Lindsey v. Normet*, 405 U.S. 56, 66 (1972). Nor does the government offer any standard by which—assuming a defendant obtained discovery of confidential tips—a jury could determine "what a reasonably diligent [SEC] would have known and done" after it received a tip, or the time period within which it would have done it. *Merck*, 130 S. Ct. at 1798; Brief of the United States as *Amicus Curiae* at 17-18, 24, *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2009); *Rotella*, 528 U.S. at 559. Nor does it address how that question is conceivably appropriate for judicial review or the problems of faded memories and lost evidence. Br. 46; *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

The government's interpretation is inimical to the purposes of repose that are "vital to the welfare of society" and "giv[e] security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879); Br. 39. The government let its claim lapse here because it inexcusably delayed bringing suit after petitioners, having already twice signed tolling agreements, desired repose and refused to sign a third

time. Br. 3-4. The rule for which it argues, however, would reach far beyond that situation. Vast areas of our lives are subject to federal regulation and involve the exercise of judgment and discretion where regulatory requirements could later "be subject to new and unpredictable interpretations." Cato Br. 20. Individuals and those with whom they transact rely on the notion that the legal system at some point grants repose and protects their decisions from second-guessing. *See* SIFMA Br. 27-29; NACDL Br. 17-20. The government's argument would leave individuals and businesses in a state of perpetual uncertainty, leaving open all that conduct "for that portion of eternity concurrent with the [defendant's] life, whether he lives three score and ten or as long as Methuselah." Pet. 16 (citation and quotation marks omitted).

The government's interpretation is also inconsistent with the objective of every statute of limitations to protect all persons—innocent, guilty, or wrongfully accused—from the risk that they will be charged long after "evidence has been lost, memories have faded, and witnesses have disappeared." Br. 42-43 (citation and quotation marks omitted); NACDL Br. 6-9; SIFMA Br. 20. Not everyone the government accuses of engaging in "deceptive conduct" has engaged in misconduct. Opp. 46. Nor, in the absence of government regulation, is one who violates the law necessarily required to report that violation to the government. And, even for the guilty, if the only way to enjoy repose would be to publicly confess, a statute of limitations would have little purpose.

The government's rule is likewise inconsistent with Congress's objective to focus the government's penal power where it has the most force. Br. 42. The government contends it pursues prosecutions with zeal. Opp. 11-12. But the standard for which it argues would permit it to function with lassitude. Section 2462's purpose is to limit the government's penal authority to those violations that are most fresh and where the deterrent value of a penalty is greatest;[11] it is not to "plac[e] a . . . limit" on the time between the government's (presumably secret) conclusion that a defendant committed fraud and the government suit for that fraud. Opp. 48.[12] Enforcement of the statute of limitations will naturally result in some—whose conduct is dated—avoiding prosecution for a penalty. The enforcement resources that will be freed up can be focused on fresh cases. That is the natural and ordinary effect of a statute of limitations. *United States v. Kubrick*, 444 U.S. 111, 125 (1979). Though extending a cause of action "no doubt makes the civil remedy more far reaching," "it does not follow that the objectives of the statute are better served." *Cent. Bank*, 511 U.S. at 188. Section 2462's plain language does not permit a defendant to benefit "from his own wrongdoing," Opp. 47, or prevent the SEC from deterring misconduct. *Id.* at 45-46. If there are ill-

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[11] *See* SEC Comm'rs Br. 4-9 (explaining lost deterrence value in pursuing stale claims); NACDL Br. 11-13 (same).

[12] The Dodd-Frank Act performs that function by requiring the SEC to "either file an action . . . or provide notice . . . of its intent to not file an action" "[n]ot later than 180 days after the date on which Commission staff provide a written Wells notification to any person" suspected of a violation. 15 U.S.C. § 78d-5(a).

gotten gains or a defendant is likely to violate the securities laws, the SEC can seek equitable remedies such as disgorgement or an injunction. *See SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006); *SEC v. Commonwealth Chem. Sec., Inc.*, 574 F.2d 90, 99-100 (2d Cir. 1978). If, however, the SEC wants to punish, it must obey Congress's words or ask Congress to change them.[13]

II. THE GOVERNMENT'S ALTERNATIVE EQUITABLE TOLLING ARGUMENT SHOULD BE REJECTED

Unable to defend the decision below on the basis of the statute's language, history, or purpose, the government asks this Court to disregard the language and suggests equitable tolling for fraudulent concealment applies. Opp. 8, 21. It argues that, regardless of statutory language, courts have applied a discovery rule "for more than two centuries" and since "the earliest days of the Republic." *Id*. at 48, 9. The difference between the discovery rule and fraudulent concealment is not "unimportant in practice." *Id*. at 21 (citation and quotation marks omitted); *see also Rotella*, 528 U.S. at 561; DRI Br. 10-14. The decisions the government cites are not based on a categorical

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[13] The government also suggests that Fed. R. Civ. P. 9(b) requires it to plead fraud with particularity, Opp. 51, but that rule would be applicable even if a claim were untimely and thus cannot stand in for the statute of limitations. *See Rotella*, 528 U.S. at 560. Congress also did not specify the date of a violation as a factor the courts should consider in setting a penalty and therefore the government cannot use the penalty factors to support its argument that Congress intended the discovery rule to apply.

discovery rule for fraud. Opp. 16. They are founded on the notion that, in a particular case, a defendant who engaged in fraud that "has been concealed, or is of such character as to conceal itself" from the victim, *Bailey*, 88 U.S. at 349-50, could not "as a matter of equity" "unfairly rely[] on a statute of limitations" to complain that the victim's claim was untimely. Opp. 13; *see also* Br. 26-27.

The government waived this argument both orally and in writing, and the Second Circuit explicitly did not rely on it. Br. 27. Therefore, it is not properly before the Court. *See, e.g.*, *Baldwin v. Reese*, 541 U.S. 27, 34 (2004).

In any event, the claim is meritless, largely for the reasons the discovery accrual claim is meritless. The government did not allege and does not identify any "extraordinary circumstances [that] stood in [its] way," *Credit Suisse Sec. (USA) LLC v. Simmonds*, 132 S. Ct. 1414, 1419-20 (2012) (citation and quotation marks omitted), or any conduct by either petitioner that "effectively foreclosed" the SEC "from seeking redress." Opp. 46. Every piece of evidence it relied upon in framing its complaint indisputably was a document from the files of the investment adviser that must be preserved "in an easily accessible place," subject to examination by the SEC at any time. Br. 40 (citation and quotation marks omitted). The SEC knew about market-timing generally; if it wanted to know more, it could have asked. Br. 40-42; *cf. Brogan v. United States*, 522 U.S. 398, 408-18 (1998) (Ginsberg, J., concurring); *3M*, 17 F.3d at 1461 n.15. The court of appeals held, and the government argues, that "the discovery rule defines when the claim accrues," because

as a *categorical* matter it was able to state a claim for aiding and abetting a violation of the IAA and "'the Advisers Act claim is made under the antifraud provisions of that Act.'" Opp. 20 (quoting Pet. App. 19a).

Moreover, were the Court to reach the issue, it should hold that fraudulent concealment and equitable tolling are not available under Section 2462. The Court has stated, "[i]f Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." *Holmberg*, 327 U.S. at 395. The Court has applied equitable tolling only when consistent with the text and structure of the statute, *see TRW*, 534 U.S. at 28; *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *United States v. Brockamp*, 519 U.S. 347, 349-54 (1997); *Lampf*, 501 U.S. at 363, and never to a "penal" statute or when the government seeks to use its police powers to punish.[14]

Here, not only is Congress's language emphatic, but the government cannot explain how tolling can be reconciled with the statute's structure or purpose. The Court has held that fraudulent concealment does not apply to securities fraud claims brought by injured plaintiffs who might not be able to discover them within the time allowed for bringing a damages action.

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[14] The government cites only two appellate cases from the last two centuries for equitable tolling applying to Section 2462—both from the last five years and both simply assuming equitable tolling applies to Section 2462. Opp. 23 & nn.4-5, 32; *SEC v. Koenig,* 557 F.3d 736 (7th Cir. 2009); *SEC v. Tambone*, 550 F.3d 106 (1st Cir. 2008).

Lampf, 501 U.S. at 363. It would be incongruous for it to apply to penalty claims brought by the government, which has tools to discover those violations. The Court also has stated that it has the power to formulate "remedial details" only "[a]part from penal enactments." *Holmberg*, 327 U.S. at 395. The "old chancery rule" applicable to "a plaintiff [who] has been injured by fraud," *id.* at 397 (citation and quotation marks omitted), however, has no place in the penalty/enforcement context where the government seeks to impose "official punishment because of acts in the far-distant past." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970)*; see also Tull*, 481 U.S. at 422. Petitioners' conduct here was no more difficult to detect, and in fact far easier to detect, than the violations of the Toxic Substances Control Act in *3M*, 17 F.3d at 1461, the Export Administration Act in *United States v. Core Labs., Inc.*, 759 F.2d 480, 482-83 (5th Cir. 1985), the Federal Election Campaign Act in *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996), the Surplus Property Act in *United States v. Witherspoon*, 211 F.2d 858, 860 (6th Cir. 1954), or the conduct in *Adams v. Woods*, 6 U.S. (2 Cranch) 336, for that matter.[15]

When a potential defendant obstructs or wrongfully prevents the government from discovering conduct that could support a penalty action, the government does not need equity to lend a hand. The positive law itself

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[15] The government chides petitioners for not citing in their merits brief the circuit court cases they cited in the petition for certiorari. Opp. 22. Petitioners maintain those decisions are inconsistent with the decision of the court below.

contains a slew of statutes and regulations that require regulated parties to make disclosure and that make it unlawful for a defendant to obstruct an investigation or wrongfully conceal his unlawful activities and prescribe serious sanctions for such conduct, but do not include the revival or preservation of old claims. If the government had wanted petitioners to disclose their conduct to "the fund's investors or to the Commission," Opp. 46, it could have required it—as it did years later; it need not have the courts do its bidding by a kind of federal common law.

Nor do the courts need to make up additional sanctions beyond those Congress establishes to deter a person from engaging in such conduct; if an individual has obstructed an investigation in violation of law, the government can charge him.[16] Nor, where Congress has not provided a penalty or sanction for "concealing" conduct is there warrant for a court of law to substitute its views for those of Congress as to what kinds of concealing conduct are wrongful and what are not.[17] Even a person who engages in illegal conduct need not make that conduct transparent or easy to discover.

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[16] *See, e.g.*, *United States v. Blackwell*, 459 F.3d 739, 761-62 (6th Cir. 2006); *United States v. Stewart*, 433 F.3d 273 (2d Cir. 2006); *In the Matter of EM Capital Mgmt., LLC and Seth Richard Freeman*, Order Instituting Administrative and Cease-and-Desist Proceedings, Investment Advisors Act of 1940 Release No. 3502 (Nov. 20, 2012); *see also, e.g.*, 15 U.S.C. § 80b-4(a); 15 U.S.C. § 80b-7; 18 U.S.C. § 1001; 18 U.S.C. §§ 1501-21 (obstruction of justice); 18 U.S.C. § 1621.

[17] Or for determining whether the government exercised "reasonable diligence." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997).

"Indeed, [even] persuad[ing] a person with intent to . . . cause that person to withhold testimony or documents from a Government proceeding or Government official is not inherently malign." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005) (citation and quotation marks omitted).

Thus, the government enforcement context is singularly distinct from the private civil damages context where the courts have implied principles of equity: unlike a private party seeking damages, the government need not rely on equity to obtain relief from inequitable conduct. And, unlike the private civil damages context, the body of positive law already defines what conduct is wrongfully obstructive and should not be tolerated—and what should be—and defines the penalties Congress thought appropriate for wrongful conduct.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully Submitted,

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