No. 22-15584

IN THE

United States Court of Appeals for the Ninth Circuit

FEDERAL ENERGY REGULATORY COMMISSION,
Plaintiff-Appellee,

v.

VITOL INC.; FEDERICO CORTEGGIANO,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of California
Case No. 20-cv-00040-KJM
Hon. Kimberly J. Mueller

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America ("Chamber") states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10 percent or greater ownership in the Chamber.

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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber and its members have a substantial interest in the appropriate and lawful exercise of agency enforcement powers, which help our markets function fairly and effectively. Congress has established that those powers must be checked by reasonable statutes of limitations, which promote swift, accurate, and final resolutions to enforcement actions. As investigations drag on, respondents can endure one-sided agency procedures while mounting costs and uncertain liabilities stifle business operations and investment activity. And long-belated enforcement actions, relying on stale evidence, are less likely to help or protect market participants.

[1] No counsel for any party authored any part of this brief, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution to fund its preparation. All parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Energy Regulatory Commission ("FERC") has broad powers to regulate electricity markets and to enforce its prerogatives by assessing civil penalties of over $1 million per day, per violation. The agency's concomitant investigative powers are substantial: FERC may investigate "any matter subject to its jurisdiction" by subpoenaing witnesses and compelling the production of any documents "relevant" to its investigation. 18 C.F.R. §§ 1b.3, 1b.13. The subjects of FERC investigations, by contrast, have no discovery rights—no right to cross-examine witnesses or subpoena documents. This asymmetry imposes severe burdens on investigative subjects, who face serious risks to their businesses, livelihoods, and reputations. It is no surprise, then, that most of FERC's investigative subjects choose to settle; even an innocent party must weigh the toll of a prolonged enforcement process.

This story is not unique to FERC. What is unique—and perhaps unprecedented in agency enforcement—is FERC's assertion that it is entitled to two, consecutive, five-year limitations periods, *double* the length, to bring its case to court. Moreover, under FERC's theory, between those two limitations periods lies an uncapped, one-sided investigation. FERC's interpretation finds no support in the text or design of the statute of limitations and is belied by the agency's earlier promise to "adhere to the five-year statute of limitations," which, FERC once

admitted, runs from "the date of the fraudulent or deceptive conduct." *Prohibition of Energy Market Manipulation*, Order No. 670, 114 FERC ¶ 61,047 at PP 62–63 & 62 n.124 (2006). The "plain directive" of the Supreme Court is that "the clock starts to tick when the underlying violations occurred." *FERC v. Barclays Bank PLC*, 105 F. Supp. 3d 1121, 1131 (E.D. Cal. 2015) (citing *Gabelli v. SEC*, 568 U.S. 442, 445 (2013)). Whether it is the Securities and Exchange Commission ("SEC") bringing an enforcement action under Rule 10b-5 or FERC under the analogous Section 824v, an agency must commence an adversarial and adjudicative proceeding within five years of the alleged conduct. 28 U.S.C. § 2462 ("Section 2462").

Nonetheless, FERC has claimed for itself—and by extension, any agency whose enforcement actions are subject to Section 2462—the unilateral power to toll the statute of limitations. According to the order below, FERC's self-imposed barriers to bringing suit somehow postpone the time to bring an action. Not only does this ruling unmoor the limitations period from the fixed and certain date of the alleged violation; it also rewards FERC for undue delay—precisely the opposite of the incentive structure that a statute of limitations should produce. While FERC enjoys an unlimited investigation, potentially exculpatory evidence for defendants goes stale. Although the decision below applies only to FERC, the rationale and its practical effects apply equally to other agencies: If the district court is right, agencies have no incentive to expedite their investigations. Indeed, the longer an agency takes

to investigate, paradoxically, the longer an agency has to build its case. That cannot be what Congress had in mind.

Worse still, the district court doubled the limitations period *only if* a respondent exercises the right to an Article III court and trial by jury. This interpretation severely penalizes the federal court option and tips the scale in favor of the Administrative Law Judge ("ALJ") option under which respondents would get their first opportunity to engage in discovery well in advance of any federal court discovery. Respondents should not be so unfairly taxed with another five years simply because they exercised their statutory and constitutional rights. Rather than granting administrative agencies even more leverage that would eviscerate the prospect of meaningful judicial review, the district court should have applied the conventional and textual approach—under which the statute of limitations expires five years from the fixed date of the alleged violation.

ARGUMENT

I. Like Any Other Agency Enforcement Action, FERC's Anti-Manipulation Claim Accrues at the Time of the Alleged Conduct.

There is no dispute that FERC's actions to penalize energy market manipulation, 16 U.S.C. § 824v, are subject to the default five-year limitations period. Section 2462 applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462; *see generally Gabelli*, 568 U.S. at 445 ("[Section 2462] governs many penalty

provisions throughout the U.S. Code."). Because this is an action to "affirm and enforce the Commission's penalty assessments and disgorgement order," ER-171, the action may be "entertained" only if it had been "commenced within five years from the date when the claim first accrued," 28 U.S.C. § 2462. Consequently, the timeliness of this matter turns on "when the claim first accrued."

The *Gabelli* Court unanimously answered this interpretive question: "[T]he most natural reading of the statute" is "that a claim . . . accrues—and the five-year clock begins to tick—when a defendant's allegedly fraudulent conduct occurs." *Gabelli*, 568 U.S. at 448. "This reading sets a fixed date when exposure to the specified Government enforcement efforts ends." *Id.* Without a fixed date, defendants could be liable "not only for five years after their misdeeds, *but for an additional uncertain period into the future*." *Id.* at 452 (emphasis added). In *Gabelli*, the claim accrued when the allegedly illegal and misleading trading conduct occurred, thereby giving rise to the securities fraud violation. *Id*. at 448.

Here, FERC's action pursuant to Section 824v of the Federal Power Act ("FPA") "is modeled on the Securities and Exchange Commission's Rule 10b-5," which also "prohibit[s] manipulative or deceptive devices or contrivances." ER-40; *see also* 114 FERC ¶ 61,047 at PP 2, 6–7. *Compare* 18 C.F.R. §§ 1c.1, 1c.2 *with* 17 C.F.R. § 240.10b-5. For that reason, the district court "consulted the extensive case law interpreting section 10(b)" to analyze issues presented by Defendants-

Appellants' Rule 12(b)(6) motion. ER-40. Finding that a Section 824v claim has the very same elements as a securities fraud claim, the district court rightly relied on securities law precedents. Importantly, it focused on the allegedly misleading trading conduct on October 25 and 28, 2013, ER-165–66, to determine that FERC had sufficiently alleged a statutory violation. ER-39–47. Having followed securities law precedent to evaluate FERC's substantive claims, however, the district court (at FERC's urging) ignored the securities laws and *Gabelli* when applying Section 2462 to FERC claims modeled after those same securities laws.

Instead, the district court largely followed the Fourth Circuit and held that whenever FERC seeks anti-manipulation penalties, there are really *two* claims, *two* proceedings, and *two* sequential five-year limitations periods. *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891, 901 (4th Cir. 2020). On this view, FERC has five years from the alleged conduct to investigate and notice its proposed penalty and then—after an indeterminate period to assess the penalty—another five years to bring an action in federal court. *Id.*; ER-34.

Needless to say, the holding that FERC has over ten years to bring enforcement actions in federal court is an anomaly that Congress did not contemplate. *See Rotella v. Wood*, 528 U.S. 549, 554 (2000). Neither did FERC,

until recently.[2] Nothing in the text or legislative history of Section 2462 supports two separate limitations periods for the same enforcement action. And nothing about FERC or the FPA is special: The five-year limitations period "is generally applicable to all federal agencies," *DLS Precision Fab LLC v. U.S. Immigr. & Customs Enf't*, 867 F.3d 1079, 1087 n.1 (9th Cir. 2017), including the SEC when it brings analogous 10b-5 actions.

In *Gabelli*, the Supreme Court specifically rejected arguments seeking to extend the Section 2462 time period for a securities enforcement claim, holding that there is "no mandate from Congress" to do so. 568 U.S. at 454. The Supreme Court also saw no reason why an agency, like the SEC, acting "as enforcer" should need more than five years to bring an enforcement action:

> The SEC, for example, is not like an individual victim who relies on apparent injury to learn of a wrong . . . [and] who has no reason to suspect fraud[.] [T]he SEC's very purpose is to root it out, and it has many legal tools at hand to aid in that pursuit. It can demand that securities brokers and dealers submit detailed trading information. It can require investment advisers to turn over their comprehensive books and records at any time. And even without filing suit, it can subpoena any documents and witnesses it deems relevant or material to an investigation.

[2] Rejecting a proposal to establish a "time limitation on *complaints or enforcement actions*" in 2006, FERC explicitly adopted Section 2462 as the default: "[We] will adhere to the five-year statute of limitations where we seek civil penalties." 114 FERC ¶ 61,047 at PP 62–63 (emphasis added). FERC also emphasized that "the claim first accrued . . . [on] the date of the fraudulent or deceptive conduct." *Id.* at P 62 n.124.

Id. at 451 (citations omitted). In light of *Gabelli*, the insistence that FERC needs over ten years to bring a claim because market manipulation is "highly technical" and involves "sophisticated traders in complex markets" rings hollow. *Powhatan*, 949 F.3d at 904; *see also* FERC's Consol. Opp'n to Mot. to Dismiss at 17 n.8, *FERC v. Vitol Inc.*, No. 2:20-cv-00040 (E.D. Cal. Apr. 21, 2020), ECF No. 38 (suggesting "Enron's massive abuses" are the reason FERC needs double the time) ("ECF No. 38"). There is no evidence to support the unreasonable notion that securities trading is less complicated than energy trading or that FERC cannot properly manage and conduct its own investigations in as timely a manner as the SEC. Nor is there any evidence to suggest that FERC investigations cabined by the default five-year period would be "slipshod" and "hastily undertaken." 949 F.3d at 900–01.

For its part, the district court afforded FERC special treatment based on the mistaken premise that the SEC, in contrast, "could file its claim in a district court without first completing any administrative process." ER-35. Not so. For one, the SEC's "Wells notice" process is a prerequisite to enforcement actions. The Wells notice informs the subject of SEC staff's allegations and preliminary recommendation to which the subject may respond. *See* SEC Enforcement Manual § 2.4 (last updated Nov. 28, 2017). SEC staff must obtain supervisory approval to issue a Wells notice or to proceed without one, *id.*, and any responses must be

forwarded to the Commission. 17 C.F.R. § 202.5(c).[3] A second prerequisite to SEC enforcement is "authoriz[ation] by the Commission," which can occur only after staff provide a detailed "action memo." SEC Enforcement Manual § 2.5.1. Upon receipt of the memo, "the Commission will consider the recommendation and vote on whether to approve or reject [it]." *Id.* § 2.5.2. In short, the SEC has internal procedures—complete with notice, paper briefing, and Commission approval—just as FERC does. *Gabelli*'s application cannot be resisted here on the ground that the enforcing agency was the SEC.

It makes sense that federal agencies bringing substantially similar claims of market manipulation would have the same limitations period. Importantly, FERC is not the only agency to model its regulations after SEC Rule 10b-5.[4] Yet the district court's reasoning implies that these similar claims should have vastly different

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[3] In some ways, the SEC's Wells notice may be even more "robust and meaningful" than the analogous FERC process, which practitioners have criticized as "a mere formality." William S. Scherman, Brandon C. Johnson & Jason J. Fleischer, *The FERC Enforcement Process: Time for Structural Due Process and Substantive Reforms*, 35 ENERGY L.J. 101, 111 (2014) ("*Scherman et al.*"); *see also* William Scherman, John Shepherd & Jason Fleischer, *The New FERC Enforcement: Due Process Issues in the Post-EPAct 2005 Enforcement Cases*, 31 ENERGY L.J. 55, 73–76 (2010).

[4] Agencies administering anti-fraud or manipulation provisions like the SEC's (or expressly modeled on them) include the Commodity Futures Trading Commission, 7 U.S.C. § 6(c)(1); 17 C.F.R. §§ 180.1, 23.410; the Consumer Financial Protection Bureau, 12 U.S.C. §§ 5531, 5536; the Federal Deposit Insurance Corporation, 12 C.F.R. § 390.419(a); the Federal Reserve System, 12 C.F.R. §§ 239.24(c)(3), 239.59(e); the Federal Trade Commission, 15 U.S.C. § 45; 16 C.F.R. § 317.3; and the Department of the Treasury, 12 C.F.R. §§ 16.32, 192.340.

limitations periods simply because the enforcing agencies adopted subtly different informal procedures for initiating an enforcement action. This incongruous result cannot be what Congress meant when it enacted Section 2462.

Attempting to distinguish *Gabelli*, the district court also erred in treating FERC's single claim as two—an administrative claim "seeking the penalty" and the present claim "to enforce" the penalty. ER-30–31. An agency's internal process prior to bringing suit does not involve a separate "claim" and a separate "action, suit or proceeding" to be "entertained." 28 U.S.C. § 2462. The "two claims" are one and the same: they derive from the same underlying conduct and have the same elements—*viz.*, the elements of a cause of action for market manipulation. *See* 16 U.S.C. § 824v; 18 C.F.R. § 1c.2; ER-40–47; ER-171. "In an action for a civil penalty, the government's burden is to prove the violation." *3M Co. (Minn. Min. & Mfg.) v. Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994). The procedural hurdles at the agency occurred *after* the alleged violation; they "are not part of the cause of action." *Id.* Any distinction between the "two claims" is artificial because it would mean adding arbitrary components of the agency process as elements to a cause of action that does not reference or require them. *See Unexcelled Chem. Corp. v. United States*, 345 U.S. 59, 66 (1953); *FERC v. Powhatan Energy Fund, LLC*, 345

F. Supp. 3d 682, 702 (E.D. Va. 2018), *aff'd and remanded*, 949 F.3d 891 (4th Cir. 2020).[5]

Likewise, FERC enforcement involves only one "action, suit or proceeding" within the meaning of Section 2462—either an agency hearing before an ALJ, 16 U.S.C. § 823b(d)(2), or an action in a federal district court, *id.* § 823b(d)(3). When a respondent elects federal court, there is no "adjudicatory and adversarial" process; rather, FERC renders a "perfunctory and prosecutorial" decision to assess a penalty. ER-28–29; *see also 3M Co.*, 17 F.3d at 1459 n.11; *Capozzi v. United States*, 980 F.2d 872, 874 (2d Cir. 1992).[6]

Because there is only one claim and only one proceeding, the *Gabelli* rule—that the claim accrues when the conduct occurs—applies here. Otherwise, if the

[5] The district court's rationale for the existence of "two claims" and "two proceedings" rests on a faulty premise—this case is not a collection action following a prior "action, suit or proceeding." This case is the only "action, suit or proceeding" thus far. Liability has not been "determined" as the district court suggested; rather, a liability determination is the purpose of this action. ER-31; *cf. DLS*, 867 F.3d at 1086; *3M Co.*, 17 F.3d at 1459. Any "later collection action[]" for an "unpaid civil penalty," ER-31, arises under 16 U.S.C. § 823b(d)(5), *not* under *id.* § 823b(d)(3)(B), and can be pursued only after the entry of a final non-appealable judgment of liability—something that has not yet occurred and may never occur.

[6] Despite recognizing that FERC's penalty assessment "bears little resemblance to an adjudication," the district court decided that it is a "proceeding" because "an alleged violator has only itself to blame" if choosing federal court causes FERC to act "like a prosecutor." ER-29. Of course, that fact is irrelevant: Either FERC's penalty assessment is a "proceeding," or it is not. What matters is the adjudicative or prosecutorial nature of the process that actually "commenced . . . within five years," 28 U.S.C. § 2462, not that of an ALJ hearing that never occurred.

claim accrued at some later date tied to agency action, then FERC (or any other agency) would have plenary power to toll its own limitations period. FERC could delay accrual by investigating *ad infinitum* or by enacting new procedures, complicating what the district court described as "King Minos's labyrinth." ER-34 (quoting *United States v. Meyer*, 808 F.2d 912, 919 (1st Cir. 1987)). Affording such latitude to the enforcer creates unfairness and raises serious constitutional concerns; it also completely nullifies Section 2462. Neither the statutory text nor the Supreme Court permits this result. *See Gabelli*, 568 U.S. at 452 (citing *Rotella*, 528 U.S. at 554, for the proposition that Section 2462 cannot be read to "extend[] the limitations period to many decades").

II. Doubling the Limitations Period Based on Differences in Agency Procedure Creates Arbitrary and Unfair Results That Thwart the Purposes of Section 2462.

FERC already maintains "near-exclusive control over the speed with which the penalty assessment order issues." *Powhatan*, 345 F. Supp. 3d at 696. As to timing, the FPA contains just one instruction: FERC must issue a penalty "promptly" after a respondent elects federal court. 16 U.S.C. § 823b(d)(3). But because no other "statute or regulation dictate[s] the speed" of the process, "the intended 'prompt[ ]' penalty assessment might not be prompt after all." *Powhatan*,

345 F. Supp. 3d at 696 & n.23.[7] As a result, the statute of limitations is the *only* meaningful restraint on the timing of FERC's enforcement actions. Loosening this restraint by giving FERC over ten years to file a federal action, the decision below prolongs one-sided investigations, impedes the fact-finding process (to FERC's advantage), and delays justice for those seeking vindication in court.

In an anti-manipulation or fraud case like this one, key evidence often lies outside the defendant's possession.[8] For example, allegations of misleading trades or artificial market prices are typically assessed through market evidence that proves or disproves certain price effects—records typically held by third parties, such as the California Independent System Operator ("CAISO") in this case. Such allegations may also require evaluating third-party reactions to the defendant's conduct, which may be reflected in third-party communications or proven by the testimony of former employees or counterparties who observed or participated in the trading.

The statutes of limitations exist, in part, to promote the timely collection and preservation of third-party evidence. Documents may be destroyed or lost; witnesses

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[7] Originally, FERC committed to providing an "immediate penalty assessment." FERC, *Statement of Administrative Policy Regarding the Process for Assessing Civil Penalties*, Docket No. AD07-4-000 (Dec. 21, 2006). More recently, the process "typically takes at least six months." Todd Mullins & Chris McEachran, *Adjudication of FERC Enforcement Cases: "See You in Court?"*, 36 ENERGY L.J. 261, 268 (2015) ("*Mullins & McEachran*").

[8] This is particularly true with respect to individual respondents who may not even have access to their own communications or records at their former employer.

may be unreachable or have forgotten key facts. When "the search for truth may be seriously impaired by the loss of evidence," a ticking clock should spur the plaintiff to act. *United States v. Kubrick*, 444 U.S. 111, 117 (1979); *see also Bd. of Regents of Univ. of State of N. Y. v. Tomanio*, 446 U.S. 478, 487 (1980) ("The process of discovery and trial . . . is obviously more reliable if the witness or testimony in question is relatively fresh."). A *criminal* prosecutor is motivated to bring a case before "[t]he passage of time may make it difficult or impossible" to prove beyond a reasonable doubt. *United States v. Loud Hawk*, 474 U.S. 302, 315 (1986). But a federal agency seeking *civil* penalties carries a much lighter evidentiary burden. For instance, FERC never needs to show more than a mere "preponderance of the evidence." *In the Matter of Brian Hunter*, 135 FERC ¶ 61,054 at P 29 (2011). And FERC faces virtually no evidentiary hurdles to progressing its case. *See Enforcement of Statutes, Regulations and Orders*, 123 FERC ¶ 61,156 at P 36 (2008).

Moreover, enforcement agencies conduct one-sided investigations that give them a tremendous head start while the evidence is still fresh. FERC's process exemplifies an agency acting "as an *enforcer*, not as a neutral arbiter." *FERC v. Powhatan Energy Fund LLC*, 286 F. Supp. 3d 751, 766 (E.D. Va. 2017) (emphasis in original). Like other agencies, FERC is fully empowered to compel the production of documents and testimony, 18 C.F.R. § 1b.13, and has no obligation to

share the information gathered with respondents. In contrast, FERC respondents have no discovery rights, no ability to subpoena third-party evidence, and no right even to attend FERC interviews or testimony of third parties or otherwise inspect the evidence. *See FERC v. Barclays Bank PLC*, 247 F. Supp. 3d 1118, 1129 (E.D. Cal. 2017). Thus, respondents are left to build a defense from their own records (if any) and from volunteers (who rarely want to get involved and often have good reasons not to participate).[9]

Even the FERC penalty assessment is a paper process in which there is no public evidence or testimony taken and no rights of cross-examination. *Cf. Perry v. Leeke*, 488 U.S. 272, 282 (1989) ("[T]he truth-seeking function . . . depends . . . on the ability of counsel to punch holes in a witness'[s] testimony at just the right time, in just the right way."). The Order to Show Cause ("OSC") attaches a Staff Enforcement Report, which recommends enforcement findings, conclusions, and penalties (much like the SEC Staff "action memo"). FERC treats the Staff Report as "a prima facie case" that shifts the burden to respondents to rebut it (often restricted to just 30–60 days). Order Assessing Civil Penalties, *In the Matter of Barclays Bank PLC, Daniel Brin, Scott Connelly, Karen Levine, and Ryan Smith*, 144 FERC ¶ 61,041 at P 17 (2013). But the underlying investigative record and

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[9] Many relevant third parties involved in market manipulation investigations also are regulated by FERC and may be reluctant to volunteer documents or information that could create friction with their regulator.

witnesses are not subjected to the give and take of an adversarial evidentiary hearing, so there is nothing to suggest that Enforcement Staff actually has to "prove" at this stage that the respondent broke the law.

In sum, the investigation phase is one-sided and controlled by the agency. It is misleading, then, for FERC to describe its process as one in which defendants "avail[] themselves of the Commission's investigative rigor." ECF No. 38 at 5. Put more accurately: Defendants are "*forced* to rely upon [FERC's] investigation . . . to convince FERC not to file." *Barclays*, 247 F. Supp. 3d at 1129 (emphasis added).

These asymmetries are especially troubling because an agency may delay the production of exculpatory material unknown to respondents. According to practitioners before FERC, the agency "denies, in case after case, the existence of exculpatory or exonerating materials, only to belatedly produce a subset of those materials too late in the process to be of use to subjects in raising defenses or presenting their case to the Commission." *Scherman et al.*, at 103; *see also id.* at 117–18; *Mullins & McEachran*, at 279–80 ("Staff claims that it does turn over *Brady* material . . . [but] Staff gets to make that determination in the first instance and it does so in a way that no investigative subject can review.").

FERC credits itself for inviting respondents to submit written explanations. ECF No. 38 at 16. But in light of the lopsided discovery process, the invitation offers little hope. Defendants-Appellants here, for example, had at least three opportunities

to address the charges against them. ER-25–26; ER-158–60. Having lacked the tools to discover new facts or subpoena unwilling witnesses, they failed at each stage to change FERC's mind. To respondents, FERC's various procedural offerings may seem more like redundant formalities than real opportunities. *See* Michael Asimow, *Greenlighting Administrative Prosecution: Checks and Balances on Charging Decisions* (Jan. 21, 2022) (report to the Admin. Conf. of the U.S.) at 10, 27–28. As a matter of fact, the Commission has *never* decided that no violation occurred after a respondent elected the federal court option under 16 U.S.C. § 823b(d)(3). *See* FERC, *Orders to Show Cause Proceedings*, https://www.ferc.gov/orders-show-cause-proceedings (last updated June 7, 2022); *see also* Michael L. Spafford, Daren F. Stanaway, & Brian Wilmot, *Prosecutorial Deference Versus Due Process: The Federal Power Act and Perpetual Statutes of Limitations*, 41 ENERGY L.J. 71, 81 n.83 (2020).

Consequently, a doubly long limitations period is unfair because any decay in the quality or availability of evidence does not impair the prosecution and the defense equally. Every day that FERC continues to amass evidence—unsupervised by a federal judge and unrestrained by the federal rules of procedure and evidence—is a day respondents find themselves buried deeper. And the playing field is never truly leveled once a matter reaches federal court. FERC has developed its case for years while respondents lacked basic discovery devices, leaving respondents to play

catch-up as they race to uncover evidence that may have become stale or disappeared altogether.

This is the fundamental reason why statutes of limitations exist: "Fairness to the defendant requires that a case be brought when memories have not been affected by time, when all pertinent witnesses can still be called, and when physical evidence has not been destroyed or dispersed." *Jones v. Blanas*, 393 F.3d 918, 928 (9th Cir. 2004). Giving FERC another five years to hold cases at the agency will only make matters worse.

FERC already has a wealth of discovery and enforcement tools to help it bring a case to court within five years. And FERC has near total control over the timing of its investigation. Nonetheless, the district court ruled based on a mistaken concern that respondents at FERC would somehow "misuse the statute of limitations." ER-34. In doing so, the court gave FERC the power to spend more than a *full decade* investigating (so long as it issues a show cause order in the middle). While staff "may determine to close the investigation" at any time (e.g., when the OSC issues), nothing requires that they do so. 123 FERC ¶ 61,156 at P 31. Indeed, FERC has already taken the position that, even after the OSC issues, "the Commission[] [has] authority to continue its investigation." *See* 144 FERC ¶ 61,041 at P 22. Armed with a second five-year period, FERC might add additional charges or take new

depositions. Or it might devise some new, more tortuous procedures to make use of the bonus time.

Nominally, the district court's holding applies only to FERC. In practice, the decision would create perverse incentives for every other enforcement agency to revise their procedures to exploit the opportunity to double the statute of limitations. Agencies may provide new but ersatz "opportunities to respond" and "notice" to respondents (whose livelihoods and reputations remain in limbo), all in an effort to fashion a "proceeding." Worse, this new interpretation potentially invites arbitrary decision-making and gamesmanship; the longer an agency's internal process takes, the longer it has to build its case.

This result—limitations periods engineered by enforcement agencies to grant the enforcer more time and leverage—is at odds with every rationale for Section 2462. A statute of limitations is a "balance struck by Congress" that courts "are not free to construe[] so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *Kubrick*, 444 U.S. at 117. In turn, prompt presentation of evidence aids the search for truth and preserves the accused's right to repose. These ends are best served by a limitations period that is permanently fixed by an event outside either party's control, not one that can be manipulated by the wending of an agency investigation and review process.

III. Doubling the Limitations Period Undermines the Constitutional Right to a Jury Trial.

When FERC brings penalty actions for market manipulation in violation of the FPA, a defendant has a right to a jury trial in federal court. This right is conferred by statute, 16 U.S.C. § 823b(d)(3), and by the Seventh Amendment to the United States Constitution, *Tull v. United States*, 481 U.S. 412, 417–25 (1987). In *Tull*, the Supreme Court held that Seventh Amendment protections extended to money penalty enforcement actions brought in federal court. *Id*. at 414. This Court and others have consistently applied *Tull* to agency enforcement actions seeking civil money penalties. *See, e.g.*, *Jarkesy v. SEC*, 34 F.4th 446, 452–55 (5th Cir. 2022); *SEC v. Jensen*, 835 F.3d 1100, 1106 (9th Cir. 2016); *SEC v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002); *United States v. Nordbrock*, 941 F.2d 947, 949 (9th Cir. 1991); *see also Calcutt v. FDIC*, 37 F.4th 293, 349 (6th Cir. 2022) (Murphy, J., dissenting). As the district court acknowledged, ER-29, the majority of those facing a FERC enforcement action—when no settlement is reached—elect adjudication before an Article III court, and by extension a jury, rather than an ALJ.

While defendants theoretically retain this choice, the decision below levies a tremendous tax on one of the two options: Choose federal court, and FERC gets five more years in "King Minos's labyrinth" to build its case while the defense languishes. ER-34 (quoting *Meyer*, 808 F.2d at 919). The price for exercising a constitutional right to a jury trial should not be so steep. Nor is there indication in

text or legislative history that Congress imposed such a price, and courts should not take it upon themselves to create one now. *See* Opening Br. at 47–49. The district court should have construed the statute of limitations to protect, rather than burden, the right to an Article III hearing. *See United States v. Jackson*, 390 U.S. 570, 583 (1968) (finding unconstitutional a provision that did not "necessarily coerce[] guilty pleas and jury waivers but . . . needlessly encourage[d] them"); *Palmer v. Valdez*, 560 F.3d 965, 966 (9th Cir. 2009) (considering whether a procedure could "impose[] an unconstitutional condition" on the Seventh Amendment right to a jury trial).

Not only are defendants entitled to a federal forum and jury trial; they have good reasons—namely, due process concerns—to reject FERC's brand of agency adjudication. FERC serves as prosecutor, judge, and jury when it investigates wrongdoing, recommends sanctions, conducts its penalty assessment and issues a penalty—all in the same case. The Supreme Court has said that this "combination of investigative and adjudicative functions does not, without more, constitute a due process violation." *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). But due process *is* implicated where the agency's "initial view of the facts based on the evidence derived from nonadversarial processes . . . foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision." *Id.*

FERC's in-house penalty assessment may not provide "fair and effective consideration" before the final decision. *Id.* Although FERC insists that the

Commission transforms from zealous prosecutor into "neutral decision-maker" upon issuance of the OSC, ECF No. 38 at 6, several features of FERC procedure give pause. At a high level, the Commission decides whether to assess a penalty after having already decided (and publicly ordered) that enforcement proceedings are "appropriate." 123 FERC ¶ 61,156. In any other context, a judge's prior commentary on the merits of a matter—let alone prior participation in it—would cast doubt on the court's impartiality and warrant recusal. *See Williams v. Pennsylvania*, 579 U.S. 1, 9 (2016) ("[A] former prosecutor [cannot] sit[] in judgment of a prosecution in which he or she had made a critical decision."); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 266 (D.C. Cir. 1962); *see also* Code of Conduct for United States Judges, Canon 3(A)(6) (2019); 28 U.S.C. § 455.

For this reason, FERC adopted its "separation of functions" rule, which seeks to ensure the integrity and fairness of the Commission's decision-making. 18 C.F.R. § 385.2202. Once the OSC issues, Section 2202 "governs contacts between Commission decisional and non-decisional employees." *In the Matter of Shell Energy N. Am. (US), L.P.*, 175 FERC ¶ 61,025 at P 42 (2021). In particular, trial staff may not "participate or advise as to the findings, conclusion or decision." *Id.* § 385.2202.

The trouble is that by the time the "separations of functions" rule takes effect, FERC's "non-decisional" enforcement staff have already had years of *ex parte*

contacts with the Commission and its staff. Indeed, the Commission's hands-on involvement in the case goes well beyond "mere exposure to evidence." *Cf. Withrow*, 421 U.S. at 55. From the very beginning, the choice to open an investigation may rely upon "input from Commission staff" who will later become decisional. 123 FERC ¶ 61,156 at P 24. At this stage, staff might consult Commissioners as to whether enforcement would "advance Commission policy objectives." *Id.* at P 25. During the investigation, staff may speak with Commissioners off-the-record about possible charges, deposition testimony, witness credibility, the merits of certain defenses, or any number of other topics, thus exposing the Commission to evidence and investigative materials unavailable to respondents. At a certain point, staff must present their views to the Commission so that "the Commission, not staff, [can] determine[] the appropriate range of remedies for purposes of settlement." *Id.* at P 34. If the case does not settle, staff report their "recommended findings of fact and conclusions of law" to the Commission so that it can decide whether to issue an OSC. *Id.* at PP 35–36.

The Commission and its staff work hand in hand to produce a successful settlement or enforcement proceeding. In other words, the prosecution and the judges have already spoken about the case for years. So it provides little solace that *during* the penalty assessment phase, enforcement staff may not "advise as to the findings, conclusion or decision." 18 C.F.R. § 385.2202.

These procedures undermine due process in three ways. First, by the time of the penalty assessment, the Commission appears to have pre-decided the case. Members certainly can change their minds, but they might be "psychologically wedded" to their earlier views or seek to "avoid the appearance of having erred." *Williams*, 579 U.S. at 9. "In addition, the [Commission's] own personal knowledge and impression of the case, acquired through [its] role in the prosecution, may carry far more weight . . . than the parties' arguments . . . ." *Id.* at 9–10 (internal citation omitted); *see also Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966).

Second, FERC staff enjoy years of *ex parte* discussion with the Commission out of earshot of the defense. This fact compounds the risks of prejudgment because the defense has no way to know if has been prejudiced. *Cf. Withrow*, 421 U.S. at 54–55 (finding no bias where the accused was "present throughout" the investigative proceedings and "knew the facts presented to the [agency]"). Moreover, agency staff can tailor their arguments to match the Commission's private views while the defense is left in the dark.

Third, Commissioners and their "decisional" staff may be prejudiced by their preexisting relationships with the "non-decisional" trial staff who present the case. In a recent concurrence, FERC Commissioner Danly described his "grave doubts" about the FERC's separation-of-functions regime, which he called "self-evident[ly]" "fraught with conflict of interest." Order Dismissing the Request for Rehearing and,

in the Alternative, Addressing Arguments Raised on Rehearing, *In the Matter of Rover Pipeline LLC & Energy Transfer Partners, L.P.*, 179 FERC ¶ 61,090, at PP 3–4 (2022) (Danly, Comm'r, concurring). Put simply, Commissioners are tasked with "judg[ing] who is right: their own staff or the alleged wrongdoers." *Id.* at P 3. Even with separated functions, Commissioners are "more likely to trust[] [t]heir own staff, whom [they] consult[] on a regular basis" than they are to trust a company under investigation for serious misconduct. *Id.* at P 4.

None of these three risks are remedied by FERC's "separation of functions" rule, which does too little too late. Although typical of agency investigations, these risks make clear that the penalty assessment stage is not an independent proceeding separate from the investigation.

* * *

Respondents, well-aware of the potential for unfair prejudgment in FERC's in-house adjudications, may reasonably prefer an Article III court where their constitutional right to a jury and the federal rules of procedure and evidence govern the proceedings. And FERC is statutorily required to allow respondents the "opportunity to elect" the Article III court path, thereby affording respondents the opportunity to exercise their constitutional right to a jury trial. 16 U.S.C. § 823b(d)(1). But if the cost to exercise that right is to *double* FERC's time to bring an action, the "opportunity" is illusory: Respondents will be forced to choose the

lesser of two evils, FERC's ALJ track, to avoid a decade of unfair investigation and exposure to liability without any discovery rights. Nothing in the FPA elevates agency adjudication or denigrates judicial review in this way. Yet, by placing a heavy thumb on the scale, FERC's position on the FPA and Section 2462 has effectively "assign[ed] to agency adjudication matters traditionally at home in Article III courts." *Jarkesy*, 34 F.4th at 461. That power is legislative and not FERC's to exercise. *Id.* Rather than interpret Section 2462 to implicate these thorny questions, *see Clark v. Martinez*, 543 U.S. 371, 384–85 (2005), the district court should have applied "the most natural reading of the statute": "the five-year clock begins to tick[ ]when a defendant's allegedly fraudulent conduct occurs." *Gabelli*, 568 U.S. at 448.

CONCLUSION

For the reasons above, this Court should decide that FERC's complaint was untimely and reverse the district court's order denying Defendants-Appellants' motion to dismiss.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limitations of Federal Rule of Appellate Procedure 29(a)(5) and Ninth Circuit Rule 32-1 because this brief, excluding the portions excepted by the rules, contains 6464 words, according to the word-count feature of the software used to generate this brief.

I certify that this brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6).

/s/ Michael L. Spafford
Michael L. Spafford

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2022, I electronically filed the foregoing brief and attached addendum with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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