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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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November 16, 2012

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QUESTION PRESENTED

Section 2462 of Title 28 of the U.S. Code provides that, "[e]xcept as otherwise provided by Act of Congress," *any* action for civil penalties brought by the U.S. Government must be "commenced within five years from the date when the claims first *accrued*." (emphasis added). This Court has explained that "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 a claim by the government for civil penalties first accrue for purposes of applying 28 U.S.C. § 2462's five-year limitations period when the government can first bring such an action?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual Cato Supreme Court Review, and files amicus briefs. This case concerns Cato because the government's position that courts should recognize and exception to the traditional definition of when a claim accrues implicates constitutional principles of separation of powers and risks an expansion of federal enforcement power at the expense of individual liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

The SEC alleges that Gabelli Funds, LLC, a mutual fund managed by Petitioners, defrauded investors in violation of the Investor Advisers Act of 1940 by failing to disclose that it was allowing a favored investor to engage in "market timing"—*i.e.*, "buying and selling mutual fund shares in a manner

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[1] No counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this briefs preparation or submission. Counsel of record for both petitioner and respondents received timely notice of *amicus*'s intent to file the brief, and consented to it.

designed to exploit short-term pricing inefficiencies"—and that Petitioners aided and abetted this violation. Pet. App. 3a. "Although market timing is not itself illegal," the SEC's theory is that the market timing here "unfairly favored" one investor in a manner that should have been disclosed to other investors in the fund. *Id.* 5a, 7a.

Taking this theory at face value, every element necessary for the SEC to bring its claims existed as soon as Petitioners allowed, but did not disclose, the market timing at issue, from 1999 to August 2002. U.S. Opp. 5. The SEC did not file its claim for civil penalties until April 2008. Pet. App. 9a.

Because the Investor Advisers Act does not contain a specific statute of limitations for government enforcement actions, the SEC's suit is subject to 28 U.S.C. § 2462. That provision states:

> 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.

When the operative language of § 2462 was adopted in 1839, it was well-established that a "claim first accrued" as soon as the elements necessary for suit came into existence, not when those elements were actually discovered by a claimant. *See Wilcox v. Plummer*, 29 U.S. (4 Pet.) 172, 181 (1830). Thus, the

SEC's claims in this case accrued from 1999 to late 2002, and were time-barred when the SEC brought them more than five years later in 2008.

The Second Circuit, however, concluded that the SEC's claims were not time-barred. To so conclude, the court read into § 2462 an exception to the traditional and well-established definition of "accrue," under which a government claim that "sounds in fraud" does not accrue until the government discovers the existence of the elements of the claim. Pet. App. 18a Such a discovery rule, however, finds no basis in the statutory text and was not established in case law predating § 2462. Instead, both the Second Circuit and the government rely on supposedly favorable authority that *postdates* the key language of § 2462. This extrapolation from post-enactment case law involving private claims reflects a flawed method of statutory interpretation that undermines core principles of separation powers—and, even if taken on its own terms, ignores key distinctions between government enforcement actions and ordinary civil suits.

The Second Circuit effectively treated the text of § 2462 as an empty vessel into which it could pour new and evolving notions of when particular types of claims "accrue." Such a common law approach has no place in the interpretation of a federal statute, where meaning is fixed by legislative enactment rather than judicial mood. Where Congress employs a term of art that has been given a well-established meaning by case law, it is presumed to have adopted and codified that prior definition. That definition must be given effect by courts unless and until it is legislatively changed. Judicial changes to that definition after the

fact usurp the role of the legislature and impermissibly arrogate it to the courts.

Nor is there any basis to assume Congress's failure to respond to later changes in the judicial interpretation of a term was an implicit endorsement of that evolution. Congressional inaction is simply that: inaction. That is particularly true where, as here, later judicial decisions arise in a materially different context, and the statutory history makes clear that Congress had no intention to incorporate them.

Finally, to the extent there is any ambiguity regarding the definition of "accrued" under § 2462, numerous factors counsel against the government's interpretation here.

First, the central rationale for applying a discovery rule in fraud actions by private plaintiffs does not apply to actions for civil penalties brought by the government. The law recognizes that, although private parties will generally be directly impacted by, and hence aware of, most injuries that give them a legal claim, those harmed by fraudulent statements or omissions are less likely to be immediately aware of the accrual of their claim. Moreover, private individuals cannot reasonably be expected to affirmatively police all wrongdoing of which they are unaware. Thus, in contrast to other types of claims, fraud claims are unusually difficult for a private party to bring immediately upon accrual. For that reason, statutes of limitations for private fraud claims are often subject to a discovery rule, permitting a party to bring claims within a fixed period after discovering certain elements of the claim.

Government enforcement actions, on the other hand, by their very nature reflect the active role taken by the state in searching out and policing regulatory requirements, including fraud. The government, moreover, has considerable investigatory resources that it uses to identify wrongdoing, and, rather than suing as a victim, it may bring an enforcement action without awaiting any injury. Like enforcement of the criminal law, policing civil violations does present certain challenges; violators rarely self-report everything they may consider wrongdoing, especially where, as here, the government's theory is novel. But there is nothing about fraud-related activities that makes them inherently less susceptible to government enforcement than any other civil violation, such as the improper discharge of pollutants or discrimination in housing—all of which are subject to § 2462's limitations period of five years after accrual.

Second, reading a discovery exception into § 2462 would create an indefinite threat of potential government enforcement action, which would undermine the core purpose of the provision and impose far greater chill and unfairness on innocent parties than the mere threat of private liability. This effect would be particularly significant given the increasing breadth and uncertainty of federal regulation.

Finally, any ambiguity in the scope of § 2462 should be resolved in favor of lenity in light of the long-established rule that penal statutes are to be strictly construed.

ARGUMENT

I. WHEN THE OPERATIVE LANGUAGE OF 28 U.S.C. § 2462 WAS ENACTED, A CLAIM "ACCRUED" WHEN EACH ELEMENT HAD COME INTO EXISTENCE.

The operative language of § 2462 first appeared in an 1839 version of the statute, which provided that a government suit for a penalty had to be "commenced within five years from the time when the penalty or forfeiture accrued." Act of Feb. 28, 1839, ch. 36, § 4, 5 Stat. 321, 322. Congress carried over this language into the 1874 version (Rev. Stat. § 1047, 18 Stat. 193, 193 (1874), later codified at 28 U.S.C. § 791 (1911)), and modified it only slightly in the 1948 revision to read, as it does today, "unless commenced within five years from the date when the claim first accrued," (28 U.S.C. § 2462). *See also 3M Co. v. Browner*, 17 F.3d 1453, 1458 & n.7, 1462 (D.C. Cir. 1994) (tracing in detail various versions of the statute).

When determining the meaning of a statutory term, the meaning sought ought to be the meaning of the term at the time of the statute's enactment. Congress cannot intend a term to have a meaning with which it is unfamiliar. "In 1839, when Congress used the word 'accrued,' it could not possibly have intended the word to incorporate any discovery of violation rule [because o]nly nine years earlier, the Supreme Court had rejected a discovery rule and held that a claim accrues at the moment a violation occurs." *Id.* at 1462. Specifically, in *Wilcox*, 29 U.S. (4 Pet.) 172, the Court explained that "[t]he cases are numerous and conclusive" that, unless a party pleads that his discovery of the claim was "suppressed by fraud," "the statute [is] held to run from the time of

the injury, that being the cause of action, and not from the time of damage or discovery of the injury." *Id.* at 181-82.

Nor was *Wilcox* an innovation. Numerous other cases, both before and shortly after 1839, "consistently used the phrase 'claim accrued' to mean the time at which a cause of action first existed, not the time when the violation was first discovered." *3M*, 17 F.3d at 1462 (collecting cases); *see also United States v. Lindsay*, 346 U.S. 568, 569 (1954) ("In common parlance a right accrues when it comes into existence."); *Meredith v. United States*, 38 U.S. (13 Pet.) 486, 493-94 (1839) (duties accrue to government when goods arrive at their port of entry, not when government learns they have arrived); *Bank of the U.S. v. Daniel*, 37 U.S. (12 Pet.) 32, 56 (1838) ("cause of action to recover the money, (had it been well founded) accrued at the time the mistaken payment was made"); *Evans v. Gee*, 36 U.S. (11 Pet.) 80, 84 (1837) ("A refusal to accept [a good in exchange for payment] is, then, a breach of the contract, upon the happening of which, a right of action instantly accrues to the payee.").

To be sure, *Wilcox* suggests that a cause of action will not be barred despite the expiration of a limitations period where a plaintiff"s knowledge of the claim was "suppressed by fraud." *Wilcox*, 29 U.S. at 182. As the Second Circuit itself recognized, however, this "fraudulent concealment doctrine" is a distinct "equitable tolling doctrine, not an accrual doctrine." Pet. App. 19a. That is, where applicable, the doctrine of fraudulent concealment does not alter the definition of when a claim "accrues," but rather "toll[s] the limitations period . . . where the plaintiff

is able to establish that the defendant took affirmative steps beyond the allegedly wrongful activity itself to conceal her activity from the plaintiff." *Id.*[2]

Thus, when Congress first enacted the precursor to § 2462, extensive authority confirmed that the phrase "claim accrued" referred to the point in time at which each element of the claim existed, not the time at which the claim was discovered. Moreover, the government has pointed to no evidence of any alternative definition of accrual that existed for enforcement actions prior to 1839 for cases of mere fraud, rather than fraudulent concealment.

That Congress did not see the concept of accrual as incorporating a general discovery rule is further confirmed by the numerous statutes, including those sounding in fraud, that expressly provide for a discovery rule. For example, 28 U.S.C. § 1658 provides a general default rule that any "civil action arising under an Act of Congress" must be brought within "4 years after the cause of action accrues," but allows a private claim based on a violation of a regulatory requirement concerning the securities laws to be brought "2 years after the discovery of the facts constituting the violation." *See also* Federal Trade Commission Act, 15 U.S.C. § 1679i (action by the government "to enforce any liability under this

[2] The doctrine of fraudulent concealment is not implicated in this case. Although the SEC initially alleged fraudulent concealment in its complaint, the district court held that the SEC failed to plead concealment with sufficient particularity, and the SEC dropped its fraudulent concealment argument before the Court of Appeals. *See* Pet. 9 & n.3.

subchapter may be brought before the later of . . . the end of the 5-year period beginning on the date of the occurrence of the violation involved; or . . . the end of the 5-year period beginning on the date of the discovery by the consumer of the misrepresentation."); False Claims Act, 31 U.S.C. § 3731(b) (explaining that an FCA suit must be brought within six years of the date from which the fraudulent act occurred, or within three years of the date when the government official, responsible to act, knew or reasonably should have known the claim was false, but that the suit must in all events be within 10 years after the date of occurrence.). If Congress believed that a discovery rule in fraud cases was already a background assumption built into a general statute of limitations provision, these additional provisions would have been largely superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)); *id.* at 29 ("[I]ncorporating a general discovery rule into § 1681p would not merely supplement the explicit exception contrary to Congress' apparent intent; it would in practical effect render that exception entirely superfluous in all but the most unusual circumstances.").

II. THE GOVERNMENT'S ATTEMPT TO READ AN EXCEPTION INTO THE ESTABLISHED DEFINITION OF ACCRUAL UNDER § 2462 IS INCONSISTENT WITH SEPARATION OF POWERS.

Neither the government nor the Second Circuit has indentified a single case predating the original § 2462 that recognizes the rule they now seek. Nor has either identified any textual change in § 2462 that even hints that Congress intended to alter the definition of when a claim "accrued" to include a discovery rule. Instead, both have relied on cases that both arise in materially different contexts and *post-date* the original § 2462. U.S. Opp. 8 (citing *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946); *Exploration Co. v. United States*, 247 U.S. 435, 445-446 (1918); *Bailey v. Glover*, 88 U.S. (21 Wall) 342, 348-349 (1875)).

As an initial matter, none of these cases actually held that a simple claim of fraud does not accrue until discovery. Rather, in each case the defendant had affirmatively concealed the wrongdoing. *See Holmberg*, 327 U.S. at 393 (defendant "concealed his ownership of one hundred shares of the Bank stock under [another name]"); *Exploration Co.*, 247 U.S. at 449-50 (defendants "added to the fraud by which [titles to lands] were obtained, artifices which enabled them to conceal the fraudulent manner in which they were secured until the action was supposed to be barred by the lapse of six years"); *Bailey*, 88 U.S. at 348-49 (defendant "concealed from the parties interested the fraud which [was] sought to be redressed").

Even more importantly, though, all of the cases cited by the government and the Second Circuit post-date the initial enactment of the operative language of § 2462. Whatever the merits of those decisions, any attempt to read the decisions into § 2462 would be inconsistent with important rules of statutory interpretation and the principles of separation of powers that animate them.

When Congress enacts a law, it is "presume[d to] act with case law in mind." *Abuelhawa v. United States*, 556 U.S. 816, 821 (2009). Particularly where a statute employs a legal term of art that has been subject to extensive judicial interpretation, it is reasonable to infer that Congress intended to incorporate prior judicial interpretation. *See Williams v. Taylor*, 529 U.S. 362, 380–381, and n.12 (2000).

Once such a law is enacted, it reflects a legislative judgment that has been agreed to by both houses of Congress and signed by the president. At that point, judges are not free to alter the meaning of the statute; any change must come from a further act of Congress. A contrary approach would result in a law with a meaning that has never gone through the critical constitutional processes of bicameralism and presentment required by Article I. *See INS v. Chadha*, 462 U.S. 919, 957-58 (1983). Indeed, because such a process would produce a law with a meaning set by the courts, and never agreed to by Congress, it would result in courts making rather than enforcing legislation. That would be anathema to the constitutional structure established by the Framers. *See* The Federalist No. 78, at 425 (Alexander Hamilton) ("The judiciary. . . may truly be

said to have neither *force* nor *will* but merely judgment.")

Nor is it appropriate to assume that, when Congress recodified the predecessor versions of § 2462, its failure to change the statute's key language in reaction to later judicial interpretations reflected an implicit acquiescence to the approach to accrual taken in such cases. That approach would place an affirmative burden on Congress to respond to judicial decisions with which it disagrees. Yet, as recent experience confirms all too clearly, "Congressional inaction frequently betokens unawareness, preoccupation, or paralysis. 'It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)). That is why, "absent . . . *overwhelming evidence* of acquiescence, [the Court is properly] loath to replace the plain text and original understanding of a statute with an amended . . . interpretation." *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (emphasis in original).

Besides, any inference that Congress's failure to change the operative language of § 2462 implicitly adopted later judicial acceptance of a discovery rule for fraud-based claims seeking civil penalties is particularly inappropriate here, for four reasons.

First, although the government claims later cases adopted a fraud-based discovery rule, *see supra* at 10-11, *all* of these cases involved *private* civil claims not subject to § 2462. *See Holmberg*, 327 U.S. at 393;

Exploration Co., 247 U.S. at 449-50;[3] *Bailey*, 88 U.S. at 348-49. Section 2462, however, deals exclusively with civil penalty actions brought by the government. As explained below, *infra* at 15-17, this distinction is a critical one; the government's ability to prosecute civil penalty actions is not impacted by simple fraud in the same manner as private civil actions. Thus, there is no basis to infer that Congress would have wanted to insert a discovery rule into § 2462 simply because intervening cases had applied equitable tolling to private fraud claims.[4]

Second, Congress made no significant changes to the 1839 version of the statute until 1948, when the provision was transferred to its current position as part of a "comprehensive revision of the Judicial Code." *3M*, 17 F.3d at 1458. Moreover, the Reviser's Notes describing the recodified § 2462 simply state that "[c]hanges were made in phraseology." *Id.* (quoting H.R. Rep. No. 308, 80th Cong., 1st Sess. A191 (1947)). "A long line of Supreme Court decisions compels the conclusion that the rewording did not render the new statute different in substance from the old. When the Reviser's Notes describe the alterations as changes in phraseology, the well-established canon of construction is that the revised

[3] Although the plaintiff in *Exploration Co.* was the government, the government was suing in its proprietary capacity as a defrauded landowner.

[4] For that matter, there is also no reason to assume that a fraudulent concealment exception could be read into § 2462. The plain text of the statute forecloses such an exception and there is no reason to assume that Congress would have wanted a rule that is sometimes applied in the context of private civil suits to be extended to the context of penal statutes.

statute means only what it meant before 1948." *Id.* (collecting cases).

Third, Congress included two express exceptions in the current version of § 2462; namely, that the 5-year limitation does not apply where "otherwise provided by Act of Congress" or if "the offender or the property is [not] found within the United States in order that proper service may be made thereon." As this Court has made clear, "[w]hen Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference . . . is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth." *United States v. Johnson*, 529 U.S. 53, 58 (2000).

This inference is particularly compelling here, where the two exceptions would arguably have been implied even absent an express provision. That is, even absent the express language in § 2462, an alternative statute of limitations under a specific "Act of Congress" would likely trump the general provision of § 2462, *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932), and statutes of limitations have traditionally been tolled during the time a defendant is outside the jurisdiction. *Banister v. Solomon*, 126 F.2d 740, 743 (2d Cir. 1942) (Hand, J.). The fact that Congress went out of its way to make even these readily assumed exceptions explicit makes abundantly clear that it did not contemplate any additional exceptions.

Fourth, to the extent any inference is to be drawn from Congress's failure to amend § 2462, the post-enactment case law in fact suggests that Congress knew of and accepted the *absence* of any discovery

rule. Although the government cites case law interpreting *other* statutes of limitations, the cases interpreting § 2462 itself had (prior to the decision below) consistently rejected a discovery rule, even in cases of fraud. *See, e.g.*, *United States v. Witherspoon*, 211 F.2d 858, 861 (6th Cir. 1954); *see also 3M*, 17 F.3d at 1461; *FEC v. Williams*, 104 F.3d 237, 240 (9th Cir. 1996); *United States v. Core Labs., Inc.*, 759 F.2d 480, 482 (5th Cir. 1985); *Smith v. United States,* 143 F.2d 228, 229 (9th Cir. 1944), *United States v. Maillard*, 26 F. Cas. 1140, 1143 (S.D.N.Y. 1871); *see also* Brief for Petitioners 51-53. Thus, if congressional inaction is indeed relevant, the failure to amend § 2462 is most plausibly interpreted to show that Congress was aware of, and accepted, precedent holding that § 2462 does *not* include any fraud-based discovery rule. If these rulings had failed to recognize an exception to that rule that Congress intended to be recognized, Congress would have simply amended the statute to make its intentions clear.

III. EVEN IF COURTS WERE FREE TO ALTER THE MEANING OF "ACCRUE" IN § 2462, THERE WOULD BE NO BASIS TO CREATE A DISCOVERY RULE FOR GOVERNMENT FRAUD ACTIONS.

Even if courts were free to interpret § 2462 using the sort of common law approach urged by the government, several factors would counsel strongly against importing any fraud-based discovery rule into § 2462.

A. The Core Rationale For Applying A Discovery Rule In Private Fraud Actions Does Not Apply To Government Enforcement Actions.

The discovery rule, by "rest[ing] on the idea[s] that plaintiffs cannot have a tenable claim for the recovery of damages unless and until they have been harmed" and that "hidden injuries . . . are viewed as not accruing until the harm becomes apparent," is a sort of "discovery of injury" rule. *3M*, 17 F.3d at 1460. Fraud-based discovery rules for private claims reflect an assessment that fraud claims are unusually difficult for private parties to bring promptly upon accrual. A private party must generally be directly injured by a fraud before bringing suit, and like claims involving "latent disease and medical malpractice," the injury to an individual from fraud is often not self-apparent for some time. *TRW Inc.*, 534 U.S. at 27. Relatedly, fraud-based discovery rules implicitly recognize that private parties cannot fairly be expected to continually and proactively investigate all the relationships in their lives for potential fraud.

In stark contrast to private civil plaintiffs, however, the government generally need not suffer any injury itself before bringing a civil enforcement action. *E.g.*, 15 U.S.C. § 80b–9(e) (authorizing civil penalties under Investment Advisers Act without showing of injury). Moreover, government agencies such as the SEC have extensive investigatory staff, with broad investigatory powers, whose very purpose is to seek out and police potential civil violations. *E.g.*, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 744-45 (1984) (describing breadth of SEC investigatory

powers). What the government seeks here is not an application of the discovery of injury rule, but rather the creation of a "'discovery of violation' rule having nothing whatever to do with the problem of latent injuries" that the discovery rule is meant to address and which undermines the purpose of having an agency actively monitoring for regulatory violations. *3M*, 17 F.3d at 1460.

Within the class of claims for civil penalties that the government can bring, there is nothing unique about the subset based on fraud that would support reading § 2462 to contain a discovery rule for just that subset. To the contrary, whether the government is pursuing claims for civil penalties for fraud, or for the unlawful discharge of air pollutants under 42 U.S.C. § 7413, or for discrimination in rental housing under 42 U.S.C. § 3614, it must seek out any violations without direct injury or notice. Indeed, actively ensuring compliance with the laws is an essential purpose of government agencies. Thus, "[t]he rationale underlying the discovery of injury rule . . . is completely inapposite [where t]he statute of limitations [at issue] is aimed exclusively at restricting the time within which actions may be brought to recover fines, penalties and forfeitures." *3M*, 17 F.3d at 1460; *see also Trawinski v. United Technologies*, 313 F.3d 1295, 1298 (11th Cir. 2002) (per curiam) ("Th[e] discovery rule, which might be applicable to statutes of limitations in state tort actions, has no place in a proceeding to enforce a civil penalty under a federal statute.").

B. The Government's Approach Would Undermine The Central Purpose Of § 2462 By Creating An Indefinite Threat Of Government Enforcement Actions.

The government's proposed discovery exception to the conventional definition of accrual subjects a private party to the threat of an enforcement action forever. The government rarely receives notice of potential regulatory violations unless it chooses to look for them. Accordingly, under the government's rule, an agency can target a disfavored company or individual at any time, review decades of past conduct for potential regulatory violations, and bring stale claims long after the relevant events have passed. The Court should be loath to infer that Congress intended to impliedly produce this risk, for two key reasons.

First, such a result would undermine the well-established and long-respected purposes of statute of limitations to "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *see also United States v. Kubrick*, 444 U.S. 111, 125 (1979) ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable."). By subjecting individuals and businesses to the indefinite threat of stale claims at any time, the government's rule would

both chill innocent and valuable activities and impose an unacceptable risk that innocent parties will be subjected to old claims due to the loss of exculpatory evidence.

These policies of repose and certainty are particularly significant where a defendant will not only be liable for compensatory damages in a private civil suit, but also may be subject to the additional reputational and financial costs of civil punishment. Civil penalties carry additional stigma and damages, and, indeed, can have many of the characteristics of criminal punishment. *United States v. Ward*, 448 U.S. 242, 252-53 (1980). Accordingly, as Chief Justice Marshall observed long ago, "[i]n 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." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805).

Second, the government's approach is particularly problematic given the breadth and vagueness of federal punishments. Although it has become commonplace for Congress to respond to perceived market failures by creating additional layers of federal regulation, few regulatory requirements are ever repealed. The result is an unprecedented and ever-growing array of potential claims by the government for civil penalties. *See, e.g.*, Clyde Wayne Crews, *Ten Thousand Commandments 2012: An Annual Snapshot of the Federal Regulatory State* at 5 (estimating that, from 2002 to 2011, the number of "economically significant" final rules completed increased by 165% and the aggregate enforcement

budget of federal agencies increased by 40% (to a total of $54 billion).[5]

Worse, many regulatory requirements, including the provision at issue in this case, are based on vague language that can be subject to new and unpredictable interpretations. Given the breadth and uncertainty or regulatory requirements, numerous activities that do not appear unlawful at one time, may later become the focus of government enforcement actions. This case aptly illustrates that phenomenon, as the SEC has sought penalties based on conduct that, a decade ago (during the time of the defendants' alleged conduct), it was well aware of but chose not to pursue. *See* Mark Roche, Sean Adams, and Scott Frewing, *Will the SEC Have Forever to Pursue Securities Violations? SEC v. Gabelli*, 44 SRLR 1415, 1418 n.3 (2012) (describing that "the government stipulated in a separate case 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.'") (quoting Trial Tr. at 2186-87, *SEC v. O'Meally*, No. 06-cv-06483 (LTS) (S.D.N.Y. 2011)); *cf. also Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010) (holding that the government responded to the Enron scandal by prosecuting executives based on a definition of "honest services fraud" that exceeded historical parameters and created grave constitutional concerns).

Accordingly, eliminating any time bar on government enforcement actions would expose individuals and businesses not only to an

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[5] *Available at* http://cei.org/sites/default/files/Wayne Crews - 10,000 Commandments 2012_0.pdf.

unacceptable risk of lost evidence or recollection, but also to a far greater risk of government enforcement actions based on novel theories that are pursued in response to shifting political winds.

Nor is this indefinite and unpredictable risk of civil enforcement actions adequately mitigated by the possibility that a litigant could show that the relevant agency failed to diligently pursue its claims. Litigating and proving such a defense would be far more costly and burdensome than simply showing that a claim accrued outside the relevant statute of limitations. Besides, the mere fact that a government agency has *filed* an enforcement action can harm or even destroy a business in a manner that is seldom caused by the filing of a private lawsuit. Earning the dismissal of an enforcement action after extensive discovery, litigation, and reputational harm is cold comfort at best.[6]

C. Any Ambiguity Should Be Resolved In Favor Of Lenity As Penal Laws Must Be Narrowly Construed.

Finally, were there any remaining doubt about the meaning of "accrued" in § 2462, such ambiguity should be resolved in favor of defendants.

"The law is settled that 'penal statutes are to be construed strictly." *Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (quoting *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U. S. 284, 296 (1954)). Accordingly, "a penalty is not to be readily implied, and on the contrary . . . a person or

[6] Such a rule would also place extreme importance on how an agency investigates potential violations, which would pull the courts into lengthy, disputed, and contentious discovery regarding agency investigation methods.

corporation is not to be subjected to a penalty unless the words of the statute plainly impose it." *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362 (1905); *see also Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409, 410 (1873) ("In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction.").

The foregoing presumption squarely applies to § 2462, which regulates solely civil penalties. Even if § 2462 could arguably be read to allow the expanded application of civil penalties based on a fraud-discovery rule, it certainly cannot be said that "the words of the statute plainly impose" such a rule. *Keppel*, 197 U.S. at 362. The availability of civil penalties should therefore not be "readily implied." *Id.*

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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November 16, 2012

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