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 *AMICUS CURIAE* DRI – THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

DRI – The Voice of the Defense Bar ("DRI") is an international membership organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to anticipating and addressing issues germane to defense attorneys and to improving the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. DRI members routinely defend clients in civil government penalty actions for alleged violations of federal law, and have extensive experience with statutes of limitations defenses.

To promote its objectives, DRI participates as *amicus curiae* in cases that raise issues of importance to its members, their clients, and the judicial system. This case is of critical importance to all three of these groups. The Second Circuit decision below, if not overruled, would have significant adverse consequences for defendants in federal civil penalty litigation, as well as for the justice system in general. By greatly expanding the government's ability to extract penalties years after alleged misconduct, the decision would undercut the very purpose of statutes of limitations. Statutes of limitations protect the truth-seeking and fairness principles of litigation, and provide businesses with the certainty necessary to

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[1] No counsel for a party authored 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 one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk of the Court.

efficiently manage litigation risk. Moreover, the impact of the Second Circuit's decision would be far-reaching; it would affect penalty actions filed by many different federal agencies, compelling defendants to spend time and resources to litigate stale claims. DRI submits this brief to emphasize these profoundly negative consequences that would flow from the decision below.

SUMMARY OF ARGUMENT

Section 2462 of Title 28 is a "general statute of limitations, applicable . . . to the entire federal government in all civil penalty cases, unless Congress specifically provides otherwise." *3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994). It states that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture . . . shall not be entertained unless commenced within five years from the date when the claim first accrued . . . ." 28 U.S.C. § 2462.

"In common parlance a right accrues when it comes into existence," not when it is discovered. *United States v. Lindsay*, 346 U.S. 568, 569 (1954). When legislatures have intended that a statute of limitations begin to run when the claim is discovered (or reasonably could be discovered), they have "written the word 'discovery,'" or similar language, "directly into the statute." *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1794 (2010). Such express discovery rules can be found in several federal penalty provisions relating to fraud. *See, e.g.*, 19 U.S.C. § 1621(1) (for government penalty action, limitations period of five years after date of alleged violation "or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud"). Section 2462 contains no such

language. Thus, "[a] plain reading of [Section] 2462 reveals no discovery rule . . . ." *S.E.C. v. Bartek*, No. 11-10594, 2012 WL 3205446, at *3 (5th Cir. Aug. 7, 2012).

Despite the statute's plain terms, the Second Circuit concluded that a discovery rule should nevertheless be grafted onto Section 2462 "for claims that sound in fraud." Pet. App. 20a. This novel reading of Section 2462 is unsupported by the statutory text and this Court's precedent. Permitting federal agencies to look years into the past to bring stale penalty claims would undermine the core legislative objectives of statutes of limitations—to protect the truth-seeking and fairness principles of litigation and to provide repose.

The Second Circuit's ruling has far-reaching implications for defendants in penalty actions. It would vastly expand the authority of many different federal agencies to pursue penalty actions by reaching into the past. It would mire defendants in costly litigation even when there is a claim that the government should have discovered the alleged misconduct earlier. It would leave defendants continuously vulnerable to suit even when there is no indication that they attempted to conceal their conduct. Contrary to the views of the Second Circuit and Respondent, these results cannot be countenanced in our justice system.

ARGUMENT

I. A DISCOVERY RULE FOR PENALTY ACTIONS SOUNDING IN FRAUD UNDERMINES THE CORE LEGISLATIVE OBJECTIVES OF STATUTES OF LIMITATIONS

The government typically discovers violations of federal laws through active investigations. Therefore, the Second Circuit's discovery rule would mean that the statute of limitations would not begin to run in a typical fraud case unless and until the government opened an investigation and collected evidence that it believed suggested that a violation occurred. Effectively, such a rule would provide little incentive for the government to launch timely investigations or to conclude them on a timely basis. Such a rule would also empower the government to investigate conduct that occurred many years in the past, without concern that a potential fraud claim would be time barred. This result is directly contrary to the core legislative objectives of statutes of limitations like Section 2462.

A. Statutes of Limitations Further Substantial Legislative Objectives

Statutes of limitations represent a "pervasive legislative judgment . . . that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (quoting *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944)). This judgment is well-grounded in significant policy objectives, frequently recognized by this Court.

1. From the perspective of the defense bar, protection of the truth-seeking and fairness principles of litigation is one of the most salient objectives achieved through statutes of limitations. Limitations provisions "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise." *Id.* They also ensure fairness for defendants, who ought to be put "on notice to defend within a specified period of time," *id.*, and preserve the resources of courts, which "ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

2. Even beyond the confines of litigation, however, statutes of limitations promote "repose . . . and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *see also Wood v. Carpenter*, 101 U.S. 135, 139 (1879) (statutes of limitations "giv[e] security and stability to human affairs"). This certainty has significant real world consequences.

For example, statutes of limitations assist corporate defendants in accurately calculating their contingent liabilities. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 150 (1987) ("Defendants cannot calculate their contingent liabilities, not knowing with confidence when their delicts lie in repose." (quoting *Wilson v. Garcia*, 471 U.S. 261, 275 n.34 (1985))). As an American Bar Association Task Force has explained, "with no specific maximum cutoff" for timely suits, "managements of publicly held companies, as well as their auditors

and attorneys, are frequently unable to assess the impact of possible litigation," which "deprives investors of information adequate for informed evaluation of [the] companies' potential liabilities." James W. Beasley, Jr., Comm. on Fed. Reg. of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 647 (1986).

3. Statutes of limitations also allow businesses to establish manageable document retention policies, calibrated to the length of time in which claims might be brought against them. The defense bar has counseled that statutes of limitations are an "important consideration for an organization seeking to formulate a records retention policy." Thomas M. Jones et al., *Formulating a Records Retention Policy*, 50 No. 1 DRI For Def. 42 (2008). The government has naturally looked to applicable statutes of limitations in developing document retention rules and regulations. *See, e.g.*, 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Senator Leahy) ("[I]t is intended that the SEC promulgate rules and regulations that require the retention of such substantive material . . . for such a period as is reasonable and necessary for effective enforcement of the securities laws and the criminal laws, most of which have a five-year statute of limitations."); 54 Fed. Reg. 18716, 18765 (May 2, 1989) ("EPA chose to require a five-year period [for record retention] because the Federal statute of limitations for [Clean Water Act] violations is five years."). Absent meaningful limitations periods, businesses must choose to either absorb the costs of retaining their documents indefinitely or run a significant risk that they will not be able to marshal relevant evidence in defending against late-filed actions.

B. The Second Circuit's Decision Is An Unwarranted Departure From Statutes Of Limitations Objectives

There is no support for the Second Circuit's view that Congress intended to cast aside these substantial legislative objectives by providing the government with the authority to reach deep into the past and bring penalty actions "sound[ing] in fraud" many years after the alleged misconduct.

Long ago, this Court characterized the absence of a limitations period for penalty actions as "utterly repugnant to the genius of our laws," since "[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). Other circuit courts that have refused to read a discovery rule into Section 2462 have similarly held that such a rule would be incompatible with basic statutes of limitations principles. *See 3M*, 17 F.3d at 1462-63 (D.C. Cir. 1994) ("We reject the discovery of violation rule . . . as . . . incompatible with the functions served by a statute of limitations in penalty cases."); *United States v. Core Labs., Inc.*, 759 F.2d 480, 483 (5th Cir. 1985) ("The interpretation of § 2462 [that would prevent the statute from running from the date of the violation] . . . is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them.").

On its face, Section 2462 contains no discovery rule. Congress chose to begin the five-year limitations period "when the claim first accrue[s]," 28 U.S.C. § 2462, a phrase that is universally under-

stood to mean the point at which a claim arises. *See, e.g.*, *Lindsay*, 346 U.S. at 569 ("In common parlance a right accrues when it comes into existence . . . ."). In other words, in a fraud case, the period would begin to run upon the commission of the act that constitutes the alleged fraud. In contrast, when Congress has intended to impose a discovery rule, it has explicitly written the rule into the law.[2]

Circumventing this plain statutory language, the Second Circuit reasoned that in government penalty cases there is a background "presumption that the discovery rule applies to [fraud] claims unless Congress directs otherwise." Pet. App. 20a. As detailed above, however, courts have consistently recognized the importance of imposing time limits on the government's ability to impose penalties. And each of the cases on which the Second Circuit relied to reach a contrary conclusion, *id.* at 18a-20a, addressed a very different question—whether a discovery rule should be implied in a remedial action filed by a victim seeking compensation for an injury that is diffi-

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[2] *See, e.g.*, 28 U.S.C. §§ 2415(b), 2416(c) (for government tort action seeking money damages, three-year limitations period running from when "right of action first accrues" excluding, *inter alia*, "all periods during which . . . facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"); 31 U.S.C. § 3731(b) (for civil action under False Claims Act, limitations period of six years after date of violation "or . . . 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official . . . charged with responsibility to act in the circumstances"); 19 U.S.C. § 1621(1) (for government penalty action, limitations period of five years after date of alleged violation "or, if such violation arises out of fraud, within 5 years after the date of discovery of fraud").

cult to detect. None of the cases relied on below involves claims by the government seeking to impose a penalty.

In *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874), for example, the court described the "proposition that where *the party injured by the fraud* remains in ignorance of it . . . the bar of the statute does not begin to run until the fraud is discovered . . . ." (emphasis added).[3] The discovery rule as applied to cases involving injured parties reflects an attempt "to strike the balance between remediation of all injuries and a policy of repose." *TRW*, 534 U.S. at 38 (Scalia, J., concurring). That balancing has no application in a penalty action, where injury is not an element of the claim. *See 3M*, 17 F.3d at 107 ("In an action for a civil penalty . . . injuries or damages resulting from the violation are not part of the cause of action . . . .").

Reading an extra-textual discovery rule into the unqualified plain language of Section 2462 thus conflicts with clear and well-grounded legislative judgments about the need for limits on the government's ability to extract penalties for conduct deep in the past.

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[3] *See also TRW Inc. v. Andrews*, 534 U.S. 19, 37 (2001) (Scalia, J., concurring) ("The *injury-discovery* rule . . . [is a] historical exception for suits based on fraud . . . ." (emphasis added)); *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946) ("[W]here *a plaintiff has been injured* by fraud . . . the bar of the statute does not begin to run until the fraud is discovered . . . ." (emphasis added) (internal quotation marks omitted)); *Dabney v. Levy*, 191 F.2d 201, 205 (2d Cir. 1951) ("[T]he period of limitation . . . begins to run after *the injured party* has discovered . . . the wrong." (emphasis added) (internal quotation marks omitted)); *Merck*, 130 S. Ct. at 1793-94 (citing *Holmberg* and *Bailey* in case involving codified discovery rule).

II. A DISCOVERY RULE FOR PENALTY ACTIONS SOUNDING IN FRAUD WOULD IMPOSE SUBSTANTIAL BURDENS ON DEFENDANTS

The Second Circuit's reading of Section 2462—imposing a discovery rule notwithstanding the plain language of the statute—has far-reaching implications for defendants in penalty actions. Section 2462 is a catch-all provision that applies to numerous actions brought by different federal agencies, not simply the Respondent here. *See, e.g.*, *3M*, 17 F.3d at 1454 (suit by EPA to enforce Toxic Substances Control Act); *FEC v. Williams*, 104 F.3d 237, 238 (9th Cir. 1996) (suit by FEC to enforce Federal Election Campaign Act); *Core Labs.*, 759 F.2d at 481 (suit by Commerce Department to enforce antiboycott provision of The Export Administration Act). As Petitioners correctly note, many of these penalty actions sound in fraud and accordingly would be affected by the Second Circuit's novel reading of the law. *See* Pet. Br. at 47-48.

Respondent has argued that the Second Circuit's creation of a discovery rule has no practical significance because, absent a discovery rule, the government could still rely on equitable tolling for fraudulent concealment to bring stale penalty actions in fraud cases. *See* Opp. Pet. Cert. at 10-11 ("[I]t is 'unimportant in practice' '[w]hether a court says that a claim for fraud accrues only on its discovery . . . or instead says that the claim accrues with the wrong, but that the statute of limitations is tolled until the fraud's discovery.'" (quoting *SEC v. Koenig*, 557 F.3d 736, 739 (7th Cir. 2009))). This Court has never held that equitable tolling applies to Section 2462 or any penalty provision. *Cf. Holmberg*, 327 U.S. at 395

("Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications."). Even assuming *arguendo* that equitable tolling is available to the government in penalty actions covered by Section 2462, Respondent's argument is still wrong. The Second Circuit's discovery rule would invariably impose substantial new burdens on the defense in penalty actions that sound in fraud.

To invoke the discovery rule in a suit under Section 2462, the government would only need to demonstrate that it "did [not] discover [and] a reasonably diligent plaintiff would [not] have discovered the facts constituting the violation" at least five years prior to filing suit. *Merck*, 130 S. Ct. at 1798 (internal quotation marks and alterations omitted); *see also* Pet. App. 19a ("[S]ince the Advisers Act claim is made under the antifraud provisions of that Act and alleges that the defendants aided and abetted Gabelli Funds' fraudulent scheme, we hold that the discovery rule defines when the claim accrues . . . ."). As demonstrated by the ruling below, this is a low hurdle for the government to clear. Under the Second Circuit's ruling, the government does not need to plead reasonable diligence. *See* Pet. App. 21a. It is sufficient that "the complaint expressly alleges that the SEC first discovered the facts of defendants' fraudulent scheme" less than five years before filing suit. *Id.*

Even in cases where the government arguably should have discovered a violation earlier, it will be difficult for defendants to invoke the statute of limitations to seek dismissal of a penalty action. As the Second Circuit held, the "lapse of a limitations period is an affirmative defense that a defendant must plead

and prove and dismissing claims on statute of limitations grounds at the complaint stage is appropriate only if a complaint clearly shows the claim is out of time." Pet. App. 21a (internal quotation marks and citation omitted). The relevant evidence is the government's own knowledge and diligence, facts which the government need not plead. It is therefore unlikely that a defendant would have the necessary information to challenge the timeliness of an action until after significant pre-trial discovery. *See, e.g.*, *Merck*, 130 S. Ct. at 1790, 1792, 1799 (affirming denial of motion dismiss complaint as untimely under express discovery rule because, based on the pleadings, "the plaintiffs did not discover, and [defendant] has not shown that a reasonably diligent plaintiff would have discovered, the facts constituting the violation" prior to relevant date (internal quotation marks omitted)). By that time, a defendant would have already suffered substantial financial and reputational costs from the litigation irrespective of the final outcome.

In contrast, to invoke equitable tolling for fraudulent concealment, the government would have to plead an additional element: that the defendant actively concealed the fraud or committed a fraud "of such character as to conceal itself" from the victim. *Bailey*, 88 U.S. (21 Wall.) at 349-50. As this Court noted: "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." *Wood,* 101 U.S. at 143. Federal courts have also required that a plaintiff plead fraudulent concealment with particularity as to each defendant under Rule 9(b) of the Federal Rules of Civil Procedure. *See, e.g.*, *J. Geils Band Emp. Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1255 (1st Cir. 1996), *cert. denied*,

519 U.S. 823 (1996); *Ballen v. Prudential Bache Sec., Inc.*, 23 F.3d 335, 337 (10th Cir. 1994).

Because fraudulent concealment requires additional evidence of misconduct, and must be pled with particularity, it is not an option for the government in many cases (including here, where there are no indications that Petitioners attempted to frustrate the filing of a timely claim). Moreover, a defendant is far better situated to challenge an allegation of fraudulent concealment early in the litigation, by motion. *See, e.g.*, *Bartek*, 2012 WL 3205446, at *1 n.2, *5 n.7 (noting district court had granted summary judgment for defendant despite fraudulent concealment claim because it found "no conduct concealing fraud"); *J. Geils Band*, 76 F.3d at 1255-60 (affirming grant of summary judgment for defendant despite fraudulent concealment claim); *Ballen*, 23 F.3d at 337 (affirming grant of motion to dismiss despite fraudulent concealment claim for failure to plead "any basis for believing that [defendant] had attempted to keep any information from [plaintiff]").

For defendants in penalty actions, the difference between a discovery rule and equitable tolling for fraudulent concealment is much more than a matter of semantics. The discovery rule focuses only on the nature of the underlying violation and when the government knew or should have known about it. Under the Second Circuit's ruling, a defendant who engages in no effort to conceal his or her conduct from the government (but simply declines to self-report it) may be subject to an extended statute of limitations simply because the government did not open an investigation earlier. Additionally, the discovery rule's lenient pleading requirements greatly increase the risk that a defendant will have to spend time and

money, and suffer reputational damage, in extended litigation. For defendants, the certainty and repose afforded by Section 2462 is very much at stake.

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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