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 FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, in an enforcement action in which the government seeks civil penalties on a claim that "sounds in fraud," the five-year period established by 28 U.S.C. § 2462 begins to run when the government can first bring the action, or when the government has discovered, or reasonably could have discovered, the alleged fraud.

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BRIEF FOR THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE* [1]

The Association of the Bar of the City of New York is a voluntary association of lawyers and law students. Founded in 1870, it is one of the oldest bar associations in the United States. Its purposes include "cultivating the science of jurisprudence, promoting reforms in the law, [and] facilitating and improving the administration of justice."

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made any monetary contribution to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk.

Today the City Bar has more than 23,000 members. It also has 150 standing and special committees that focus on particular legal practice areas and issues, and through which the City Bar comments on legal issues and public policy. This brief was prepared by the City Bar's Special Committee on White-Collar Crime, which addresses issues concerning the administration, application, and interpretation of criminal laws addressing white-collar crime.

Although this case does not involve a criminal prosecution, the "[f]ines, penalties, and forfeitures" that may be imposed in civil enforcement cases such as this one "may be considered a form of punishment." *3M Co.* v. *Browner*, 17 F.3d 1453, 1460 (D.C. Cir. 1994). In addition, the type of regulatory enforcement proceeding that has given rise to the question at issue here frequently arises in tandem with criminal enforcement matters, and the correct determination of the lawful scope of such regulatory proceedings will have a direct bearing on those parallel criminal proceedings. Accordingly, the Special Committee in particular, and the City Bar as a whole, have a strong interest in the correct determination of the important question presented in this case—whether the general time limit for civil penalty actions brought by the government can in effect be extended indefinitely in cases involving allegations of fraud.

Certain members of the Special Committee, including all members employed by the Federal Government and its agencies, have recused themselves from any participation in the decision to submit, and the preparation of, this brief, and accordingly cannot be understood as joining in any position this brief may take.

SUMMARY OF ARGUMENT

The SEC's effort to impose a "discovery" rule on the applicable limitations period for fraud suits when it seeks civil penalties is both unsupportable and impractical. As the SEC would have this Court read 28 U.S.C. § 2462, "the limitations period in a suit for fraud does not begin to run until the [government] discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying [the government's] claim." SEC Br. in Opp. 7. Whether the statute bars an enforcement action would thus turn on what government employees knew or did not know, and upon whether they acted with reasonable diligence on what they knew.

How would the SEC's proposed standard work in practice? There are, at bottom, two alternatives. One is that application of the standard is taken seriously. Lower courts could thus allow extensive discovery and engage in exhaustive fact-finding, on what agency personnel knew, when they knew it, and how they acted on it. As we show below, this would be quite unlike how a discovery rule works in private civil cases, or when the government is suing as a defrauded transactor as opposed to a law enforcer; in those cases, there will typically be a single decision-maker whose knowledge and actions matter, law enforcement prerogatives will not be implicated, and the focus of judicial review is correspondingly narrow and disciplined. Examining the knowledge and activities of a sprawling and multifaceted agency like the SEC, by contrast, would raise factual questions far more complex—as we illustrate below with cautionary examples, the efforts to understand what SEC

lawyers first knew or could have known during the Madoff and Stanford investigations. Employing a discovery rule in the context of enforcement actions would greatly burden the lower courts, and would drag them into a quagmire of questions "more appropriate for a congressional oversight hearing" than a court of law. *3M*, 17 F.3d at 1461.

The other alternative is that trial judges could seek to extricate themselves from that quagmire by so curtailing the scope of factual inquiry that the discovery standard would become virtually impossible to meet. Courts could interpret the standard strictly, uphold agency privilege claims broadly, and limit pretrial discovery (as in document productions and depositions) inflexibly. If they do that, Section 2462's five-year rule would be gutted.

Neither alternative can be squared with the law. As for the first alternative, it is difficult to "understand why Congress would have wanted the running of § 2462's limitations period to depend on such considerations" as "the degree of difficulty an agency experiences in detecting violations." *3M*, 17 F.3d at 1461. Certainly nothing about the historic "background principle" upon which the SEC relies—the "discovery rule," SEC Br. in Opp. 12—requires it. That rule served to help *victims* of fraud in tort lawsuits, not the government in its capacity as the enforcer of laws. Again and again, this Court has made clear that the discovery rule applies in favor of "*the party injured by the fraud*," *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 348 (1875) (emphasis added). The rule has no place in the radically different circumstance in which the government is suing as law enforcer.

And the second alternative, where the rule is essentially made impossible for defendants to meet, is utterly unsupportable as well. The five-year period specified in Section 2462 was clearly intended to "serve as a cutoff," *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991), and to construe it otherwise would repudiate the salutary purposes this Court long has recognized underlie statutes of limitation and repose. "[I]t 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) (Marshall, C.J.), but that is the result the SEC asks this Court to bless here.

ARGUMENT

I. THE DISCOVERY RULE PROPOSED BY THE SEC IS UNWORKABLE AND UNWARRANTED.

1. The "discovery rule" invoked by the SEC has no application to cases in which the government, as law enforcer, is the plaintiff. The "background principle" upon which the SEC relies, SEC Br. in Opp. 12, implicates a narrow inquiry which courts long have administered: whether a plaintiff—the party to the particular transaction at issue—knew or could have known that he or she was being defrauded. By contrast, the discovery rule historically has never been applied by courts—and would be completely unworkable—in the context of a government enforcement action in which Congress did not require proof of fraud, damages, or any injury at all to the plaintiff.

The discovery rule thus served to help persons to sue for fraud who were *themselves victims* of an

alleged fraud. This Court explained the point in the nineteenth century: "the bar of the statute does not commence to run until the fraud is discovered or becomes known *to the party injured by it*"; it applied "where *the party injured by the fraud* remains in ignorance of it," and turned upon "the knowledge of *the other party*" to an allegedly fraudulent transaction. *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 347, 348 (1875) (emphasis added). Even well before *Bailey*, the Court said that "if a party has perpetrated a fraud which has not been discovered till the statutable bar may apply to it in law, courts of equity will interpose and remove the bar out of the way of *the injured party*." *Stearns* v. *Page*, 48 U.S. (7 How.) 819, 829 (1849) (emphasis added).

And this Court has repeated the point in its more modern cases. "[T]he old chancery rule" described in *Bailey*, the Court has since explained, governs "where *a plaintiff has been injured by fraud.*" *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946) (emphasis added), *quoted in TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001). "This Court long ago recognized that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent *a plaintiff* from even knowing that *he or she has been defrauded*." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010) (emphasis added and omitted).

Limiting the discovery rule to the traditional situation addressed in the case law, where plaintiffs were *themselves victims* of an alleged fraud, makes perfect sense. The relevant inquiry in such cases is narrow and discrete: what did the plaintiff know, and when, about a transaction or contract to which the plaintiff *itself* was a party? Even when the government is bringing suit as a victim of fraud, the inquiry is much

the same: the question becomes what did the responsible official know, and when, about the transaction or contract she was handling on behalf of the government?

By contrast, if a discovery rule were applied to a government *enforcement* action for a claim that "sounds in fraud," Pet. App. 18a, the "discovery" inquiry—apart from not being grounded in any judicial experience—would become many times more complex, and virtually impossible for courts to administer. Information about a particular alleged fraud may not be limited to a particular individual, or a particular office location, or even a particular division, of a government agency. And to apply a discovery rule in favor of a government agency would require courts to answer questions about how the agency, as a whole and through its various interacting parts, should properly operate. "An agency may experience problems in detecting statutory violations because its enforcement effort is not sufficiently funded; or because the agency has not devoted an adequate number of trained personnel to the task; or because the agency's enforcement program is ill-designed or inefficient; or because the nature of the statute makes it difficult to uncover violations; or because of some combination of these factors and others." *3M Co.* v. *Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994).

2. The multidimensional work of the independent agency involved here, the SEC, illustrates these points. Charged by Congress to address an array of important and challenging problems, *see, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), the SEC organizes its activities into multiple

divisions with particular areas of expertise that frequently overlap and intersect. This is reflected in the SEC's current organizational chart, reprinted in the appendix to this brief.[2] Broker-dealers, investment advisers, securities issuers, and others subject to SEC regulation regularly interact with various offices and divisions reflected on that chart.

If a company issues securities, it will make filings that are reviewed by the SEC's Division of Corporation Finance.[3] If it is a broker-dealer, it will be overseen by the Division of Trading and Markets.[4] If it is an investment company or investment adviser, it will be regulated by the Division of Investment Management.[5] If it is a registered entity of any sort (say, a broker-dealer, transfer agent, investment company or adviser, national securities exchange, among others), it will be subjected to regular examinations and inspections conducted by the Office of Compliance Inspections and Examinations, which has personnel at each of the SEC's 11 regional offices.[6]

And if a company or individual is ever investigated for possible violations of the federal securities laws, yet another arm of the agency, the Division of

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[2] The chart comes from the SEC's annual report for 2011. U.S. Securities and Exchange Commission, FY 2011 Performance and Accountability Report at 9 ("SEC 2011 Annual Report"), which may be found at http://1.usa.gov/U5pJR7.

[3] *See* "About the Division of Corporate Finance," http://1.usa.gov/WsixpJ.

[4] *See* "About the Division of Trading and Markets," http://1.usa.gov/SPxoHn.

[5] *See* "Division of Investment Management," http://1.usa.gov/RC1xZT.

[6] *See* "National Exam Program," http://1.usa.gov/SuYyjC; *see also* Appendix at 1a.

Enforcement, will conduct the investigation.[7] That division consists of personnel in various branches at the SEC's headquarters in Washington, as well as personnel at each of the 11 regional offices. Indeed, as a matter of internal practice, when the Enforcement Division commences a complex inquiry, it frequently consults with other divisions that may have relevant expertise.

Figuring out who knew what, and when, in such a large, multifaceted organization, with intersecting responsibilities and expertise across its nearly 4,000 employees and with an annual budget of nearly $1.7 billion[8]—and to do so for a period of many years—would be a daunting task, to say the least. Consider, for example, the many interactions that the SEC had with Bernard L. Madoff Investment Securities in the 16 years preceding the revelation of Madoff's Ponzi scheme, as recounted in a report of the SEC's Inspector General.[9] That fraud did not involve any limitations question, as it continued until the day it collapsed in 2008. Yet the work involved in the investigation and analysis that led to the Inspector General's Madoff report—which, at bottom, was an effort to determine who knew what, and when, within the SEC—illustrates the unworkability of the rule proposed by the SEC.

The SEC Inspector General's report reflects an examination of events that, over almost two decades,

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[7] *See* "About the Division of Enforcement," http://1.usa.gov/U5mRns.

[8] *See* SEC 2011 Annual Report at 9.

[9] U.S. Securities and Exchange Commission, Office of Investigations, Investigation of Failure of the SEC to Uncover Bernard Madoff's Ponzi Scheme (Aug. 31, 2009), available at http://1.usa.gov/VNfGq2.

implicated in distinct ways work by the agency's different divisions and offices. The Inspector General examined actions by the SEC Enforcement Division's staff in the New York office in response to an external complaint in 1992; in the Boston office in response to an external complaint in 2000; in the Boston and New York offices in response to an external complaint in 2001; and in the Boston and New York offices in response to an external complaint in 2005. The Inspector General also reviewed actions of the SEC's Office of Compliance Inspections and Examinations staff, both in the Washington, D.C. office on the basis of an external complaint received in 2003 and in the New York office on the basis of e-mails reviewed in a separate examination around the same time.[10]

The SEC Inspector General issued a 457-page report based upon his year-long review of a massive evidentiary record. This record included 140 depositions and interviews of 122 individuals; testimony given in a 2009 congressional hearing; and staff e-mails and other documents from the SEC Office of Compliance Inspections and Examinations, the SEC Headquarters, the SEC New York and Boston offices, the Department of Justice, and a variety of independent third-parties.[11]

Similarly illustrative are the SEC Inspector General's reports on Robert Allen Stanford's Ponzi scheme that, over more than a decade, also implicated the SEC's different divisions and offices. After issuing a June 2009 report concerning the SEC Fort Worth

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[10] *See id.* at 21-41.

[11] *See id.* at 3-20.

Regional Office's investigation of Stanford,[12] the Inspector General conducted a further investigation and issued another report in response to a request from certain Members of Congress for "a more comprehensive and complete investigation of the handling of the investigation into" Stanford.[13] The Inspector General's 151-page report, issued in March 2010, was based on an evidentiary record that included 51 depositions and 48 interviews with current and former members of the examination and enforcement staff of the SEC Fort Worth Regional Office; and staff e-mails and other documents from the Fort Worth office, the SEC Headquarters Office of Compliance Inspections and Examinations, the SEC Headquarters Division of Trading and Markets, the SEC Headquarters Division of Enforcement, the SEC Headquarters Ethics office, the SEC Office of Economic Analysis, the Financial Industry Regulatory Authority, and various independent third-parties.[14]

3. The SEC Inspector General's reports illustrate how the task of determining when "the Commission discovered, or reasonably could have discovered," "the relevant facts," SEC Br. in Opp. 7, 9, may necessarily involve agency personnel in more than one division, and more than one office, of the agency. And it

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[12] U.S. Securities and Exchange Commission, Office of Investigations, Investigation of Fort Worth Regional Office's Conduct of the Stanford Investigation (June 19, 2009), available at http://1.usa.gov/QEqZj2.

[13] U.S. Securities and Exchange Commission, Office of Investigations, Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme at 1-2 (Mar. 31, 2010), available at http://1.usa.gov/UATTly.

[14] *See id.* at 1-9, 16-28.

illustrates the sorts of issues that, in situations involving allegations of noncontinuing and less egregious frauds, district judges—not to mention juries—would find themselves embroiled in if the SEC's proposed discovery rule is accepted.

For example: Which branches, groups, offices, and divisions had knowledge of relevant facts, whether obtained from a tipster, or from a complainant, or from the press, or from an investigation or examination of the defendant, or from an investigation or examination of someone else? Did staffers "exercise … reasonable diligence" in following up on what they learned? SEC Br. in Opp. 7. If investigators or examiners failed to follow up because, for want of adequate technical knowledge, training, or experience, they failed to understand the information they possessed, does that amount to lack of "reasonable diligence"?

If agency supervisors fail to assign examinations or investigations to sufficiently knowledgeable, trained, and experienced staffers, is that lack of reasonable diligence? What if one group of examiners and investigators fails to coordinate with another group within the agency? Or what if the examiners or investigators fail to follow up because they are told to put a matter on the back burner, or to drop it altogether, and to devote their attention to something else? Does that count as lack of reasonable diligence? Finally, if reasonable diligence is lacking, there comes next an equally difficult—and inherently speculative—factual inquiry: whether, if "reasonable diligence" had been exercised by government employees, "could [they] have discovered[] the facts underlying [the government's] claim"? *Id*.

A discovery rule would thus require courts to decide how well an agency's various personnel, offices, and divisions individually and collectively did their job. That will be hard enough for a district judge to determine, but in cases in which the relief sought is legal, one or the other party may insist the relevant factual questions be resolved by jurors, who will be even more at sea. Either way, triers of fact will be forced to decide whether government employees did their jobs competently in investigating matters, staffing them, and coordinating them among themselves. And either way, whether they are preparing or reviewing findings of fact or jury instructions, lower courts will be forced to flesh out the SEC's proposed discovery standard by developing a body of law that sets standards for the conduct of government employees doing their jobs. As a result, this Court should "seriously doubt that conducting … judicial hearings to determine whether an agency's enforcement branch adequately lived up to its responsibilities would be a workable or sensible method of administering any statute of limitations." *3M*, 17 F.3d at 1461.

And the burden that a discovery rule would place on the courts, government agencies, and private parties would be immense. Securities litigation generally, and securities enforcement cases in particular, rank among the most complex types of matters faced by the lower federal courts today. Creating a limitations standard in enforcement cases that turns on the knowledge and diligence of government investigators and examiners would only add to the difficulty of those cases. It would not only add complexity to the merits, but would also foster knotty and protracted disputes over the production of documents and other evidence by agencies

before trial. It would place federal courts in the uncomfortable position, moreover, of second-guessing the competence, industriousness, and priorities of executive and independent agencies—a task "more appropriate for a congressional oversight hearing" or an agency inspector general than an Article III judge. *3M*, 17 F.3d at 1461. To say the least, it is difficult to "understand why Congress would have wanted the running of § 2462's limitations period to depend on such considerations." *Id.*

* * *

In short, superimposing a discovery rule on Section 2462 in cases brought by the government *as law enforcer* would drag agencies, defendants, judges, and juries into a morass—a morass that could not possibly have been contemplated by the chancellors who first developed that rule solely to benefit actual *victims* of fraud.

II. PRONOUNCEMENT OF A DISCOVERY RULE HERE WOULD VITIATE THE PURPOSE OF THE STATUTE.

One way out of the morass would be to construe and to apply a discovery rule under Section 2462 very strictly against defendants. This would be easy for district judges to do. The Second Circuit has already made clear that that it is the "*defendants* [who must] me[e]t *their* burden of demonstrating" the SEC's knowledge or "that [the SEC] would have discovered th[e] fraud" had it been "reasonably diligent." Pet. App. 22a (emphasis added). As for the agency's knowledge, this placement of burden will require defendants to develop and prove facts that, in most cases, will be uniquely within the *agency's*

possession. And as for the issue of reasonable diligence, defendants will find themselves in the unenviable position of establishing a hypothetical and counterfactual state of affairs: what *would* have happened *if* the government had acted differently, with the diligence deemed appropriate by the court.

These burdens on defendants will be difficult enough. But some judges will apply the standard more strictly than others. And surely any agency will vigorously resist efforts by defendants to get the evidence they need to meet their burden under the discovery rule. There will no doubt be assertions of privilege—law enforcement privilege, attorney-client privilege, deliberative process privilege.[15] And even apart from determining the scope of privileges, trial judges of course will have considerable discretion to limit the extent of evidence-gathering using their authority under the Federal Rules of Civil Procedure. So if a discovery rule were engrafted upon Section 2462, lower courts could, and some certainly *will*, make it virtually impossible to show that the statute has begun to run.

And that would utterly vitiate the obvious purpose of Section 2462. To begin with, Section 2462 was clearly meant to be a firm period of repose. Its plain language provides a simple and clear outside time limit, subject only to a single qualification: "Except as otherwise provided by Act of Congress."

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[15] *See, e.g.*, *In re City of New York*, 607 F.3d 923, 944 (2d Cir. 2010) (law enforcement privilege); *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) (attorney-client privilege); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (deliberative process privilege).

28 U.S.C. § 2462. That time limit—five years—is a relatively generous one, also suggesting a period of repose. In *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 363 (1991), this Court construed the shorter three-year time limits contained in various provisions of the 1933 and 1934 Acts as "period[s] of repose inconsistent with tolling." The Court also described a five-year limit established in another section of the 1934 Act—a provision that, like Section 2462, succinctly consists of a time limit with no exceptions—as a "statute of repose." *Id.* at 355.[16] It would be utterly incongruous to conclude that Section 2462 does not similarly "serve as a cutoff." *Id.* at 363.

To treat Section 2462 as anything but the clear cutoff Congress meant it to be, moreover, would undermine the important purposes underlying limitations periods generally. As this Court has well explained, statutes of limitations "assure fairness to defendants." *Burnett* v. *N.Y. Central R. Co.*, 380 U.S. 424, 428 (1965). They "promote repose by giving security and stability to human affairs," *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879), and "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." *Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). And they free 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, disap-

[16] *See* 15 U.S.C. § 78t-1(b)(4) ("No action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation.").

pearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979).

There is a flip-side purpose as well. Another "important public policy" "at the[] foundation" of statutes of limitation is that "[t]hey stimulate to activity and punish negligence." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879). They improve efficiency by "encouraging law enforcement officials promptly to investigate suspected [illegal] activity." *Toussie* v. *United States*, 397 U.S. 112, 115 (1970).

Indeed, the respondent agency here has itself emphasized the importance of promptly investigating violations of the federal securities laws. In the words of its current Director of Enforcement, a foundational principle of the SEC's enforcement regime is "to be as *swift* as possible."[17] This "sense of urgency is critical. *Long gaps between conduct and atonement undermine the deterrent impact of our cases*, and result in missed opportunities to achieve a permanent change in behavior and culture." *Id.* (emphasis added). In the same spirit, the SEC's Chairman recently told Congress that the agency would "[i]ncreas[e] the resources dedicated to the enforcement program" in order to "help improve our ability to … act quickly to halt misconduct … and maximize the deterrent impact of our efforts."[18]

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[17] Robert Khuzami, Dir., Div. of Enforcement, U.S. Securities and Exchange Commission, *Remarks Before the N.Y. City Bar: My First 100 Days as Director of Enforcement* (Aug. 5, 2009), available at http://1.usa.gov/SjRdCE.

[18] Mary L. Schapiro, Chairman, U.S. Securities and Exchange Commission, *Testimony Before the Subcomm. On Fin. Servs. and Gen. Gov't Comm. on Appropriations, U.S. House of Representatives* (Mar. 6, 2012), available at http://1.usa.gov/RRAgmf.

Finally, undermining Section 2462 and its salutary purposes would directly contravene a rule for construing statutes of limitation that this Court has recognized since nearly the Republic's founding: the rule against perpetual liability. In an opinion written by Chief Justice Marshall more than two centuries ago, this Court examined the applicability of a statute of limitations concerned with "punish[ments]" to the government's claim for a civil penalty. In "expounding this law" to find the statute of limitations applicable, Chief Justice Marshall emphatically warned against allowing actions to be commenced "at any distance of time," for such endless liability "would be utterly repugnant to the genius of our laws." *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). As the Chief Justice declared:

> In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain *forever liable* to a pecuniary forfeiture.

Id. (emphasis added).

Time and again, this Court has invoked this venerable admonition in construing statutes of limitations. It is thus "a *cardinal principle*" that statutes of limitations "are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired." *Campbell* v. *Haverhill*, 155 U.S. 610, 616-17 (1895) (emphasis added); *see also Pendergast* v. *United States*, 317 U.S. 412, 418 (1943) (quoting *Adams* v. *Woods*).

* * *

Here as well, "it would be utterly repugnant to the genius of our laws[] to allow" penalty claims "a perpetuity of existence." *United States* v. *Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) (Story, J.). And Congress did not intend such perpetuity here. Congress has pronounced its balanced judgment about when "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railway Express Agency*, 321 U.S. at 349. That judgment is five years, period—as set forth in the unambiguous and unqualified text of Section 2462.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

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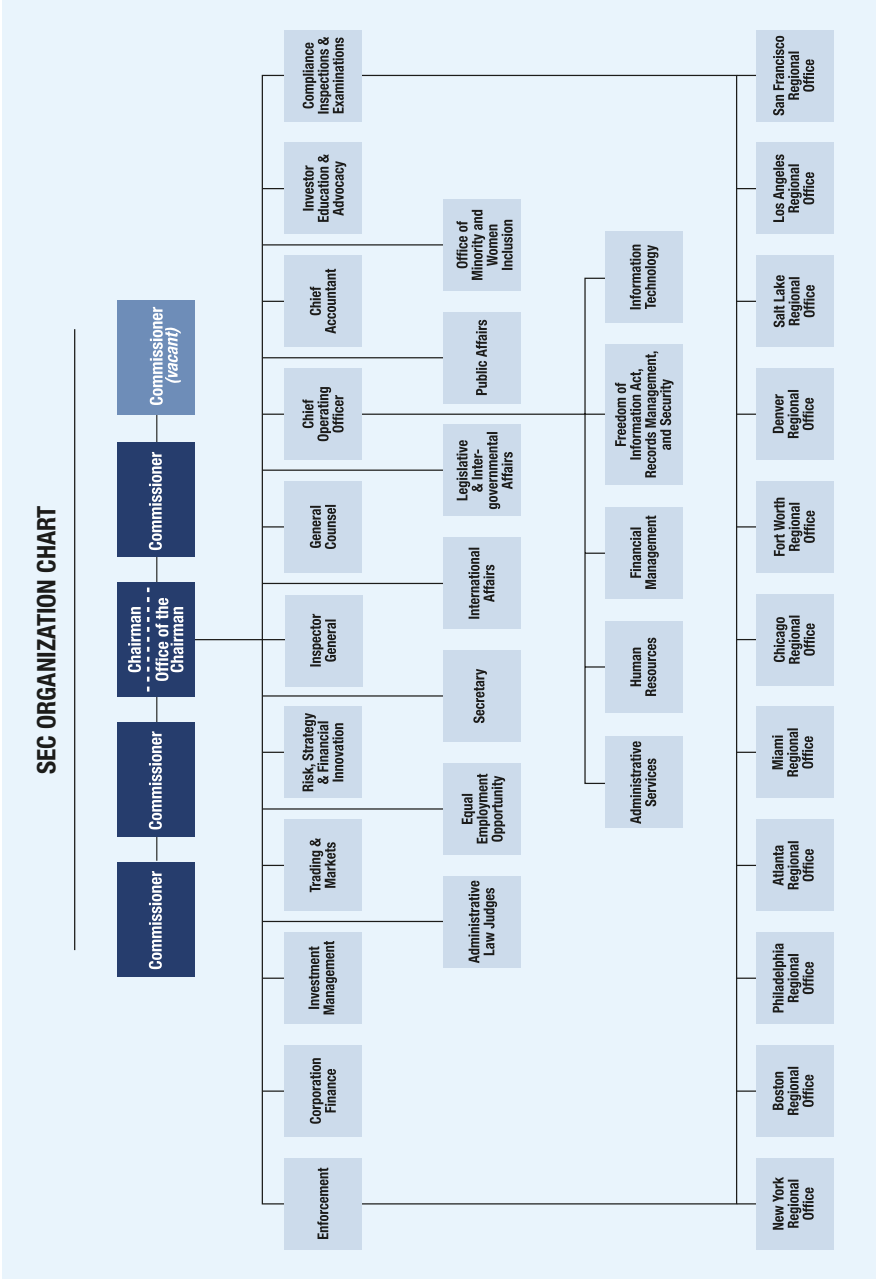
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