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 OCCUPY THE SEC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Occupy the SEC ("OSEC") is a group within the New York-based Occupy Wall Street movement.[1] OSEC is comprised of concerned citizens, activists, and financial professionals with decades of collective experience working at many of the largest financial firms in the industry. OSEC seeks specific improvements to existing and pending financial services industry legislation and regulations, in addition to evaluating and recommending alternative approaches to banking and finance. Like much of the 99%, we have bank deposits and retirement accounts that are in need of protection through vigorous enforcement of antifraud law by the Securities and Exchange Commission ("SEC" or "Commission") and other federal agencies. OSEC files this amicus brief to express its support for the SEC's position seeking the application of the discovery rule to 28 U.S.C. § 2462, which defines the statute of limitations for antifraud laws like 15 U.S.C. § 80b-6.

The recent financial crisis has manifested the pernicious role that fraudulent practices in the banking and financial sectors played in destabilizing the global economy and jeopardizing the financial position of the average person. Unfortunately, enforcement agencies such as the SEC have been of limited effectiveness in adequately redressing these wrongs. The SEC is

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[1] Counsel of record for Petitioners and Respondent received timely notice of the intent to file this brief. Blanket letters consenting to the filing of amicus briefs have been filed with the Clerk of the Court by Petitioners and Respondent. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae or its members made a monetary contribution to the preparation or submission of this brief.

already hampered in its enforcement efforts by numerous impediments, including a limited budget, ever-increasing responsibilities under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), Pub. L. 111-203, 124 Stat. 1376 (2010) and other statutes, and overzealous scrutiny by pro-banking legislators.

The agency's inability to effectively root out fraud will only be exacerbated if this Court fails to recognize the applicability of the discovery rule to § 2462. Such a result would enable untold numbers of fraudsters to eschew liability simply because their frauds remain undiscovered for certain statutory periods of time. Simply put, the Court's endorsement of the discovery rule would greatly promote the interests of justice.

Our governmental system must protect our rights,[2] and we ask the Court to serve the best interests of the people by allowing federal agencies to effectively pursue fraud actions in a reasonable timeframe that takes into account the time necessary to actually discover punishable fraud.

SUMMARY OF ARGUMENT

This case turns on whether 28 U.S.C. § 2462 permits a perpetrator of fraud to eschew enforcement action by a regulatory agency for no reason other than that agency's failure to discover the fraud within a five year limitations period. The Court should hold that § 2462 does not permit such a fundamentally unfair result.

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[2] *See* Occupy Wall Street, Declaration of the Occupation of New York City (2011), *available at* http://www.nycga.net/resources/declaration/.

That is, the Court should uphold the Second Circuit's ruling, that a discovery rule delays the accrual of the limitations period under § 2462.

Petitioners and their *amici* have argued that only Congress may determine whether the discovery rule applies to § 2462. In making this argument, they ask the Court to place its imprimatur on an interpretation of § 2462 that would enervate the role of the judiciary in interpreting the unstated implications of statutory provisions, which is a function that has been ensconced in American jurisprudence since the nation's founding.

There are many practical reasons why enforcement agencies like the SEC may not discover fraud within a given limitations period, even despite exertion of the utmost diligence. The discovery rule should apply to § 2462 in recognition of these practical constraints.

Prior caselaw also favors the discovery rule. Under relevant precedent, the Court should determine the applicable accrual date for purposes of the § 2462 limitations period by balancing the interests of the government in enforcing the underlying law against the interests of fraud defendants in avoiding liability. The government's interest in promoting the public welfare greatly outweighs any inconveniences placed on fraud defendants, especially in light of the discovery rule's reasonableness component.

ARGUMENT

I. THE DISCOVERY RULE SHOULD APPLY ON JURISDICTIONAL GROUNDS

The Court should defer to principles of jurisdictional forbearance and determine that the discovery rule applies to 28 U.S.C. § 2462. Executive agencies such as the SEC serve important enforcement functions in protecting the public from fraud and manipulation. An unduly restrictive interpretation of § 2462 will infringe on agencies' executive authority and will ultimately hinder them from discharging their regulatory responsibilities in an effective manner.

The United States is not subject to statutes of limitations unless Congress explicitly provides otherwise. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132 (1938) (observing that this rule, also known as *quod nullum tempus occurrit regi*, dates back centuries to English common law). The motivation behind this rule is not merely to empower the government, but rather to "preserv[e] the public rights, revenues, and property from injury and loss [despite] the negligence of public officers." *Costello v. United States*, 365 U.S. 265, 281 (1961) (citation omitted). The basic principle that governmental failure to detect wrongs should not foreclose public rights is centuries old. Naturally then, courts have applied heavy presumptions against the imposition of statutes of limitations against the Government in its enforcement of the public interest. *See Badaracco v. United States*, 464 U.S. 386, 391 (1984). This Court must do the same.

The hallowed principle of Separation of Powers also militates in favor of allowing agencies in the executive branch to execute the law, promote the public interest, and in this case, protect investors from fraud. The Petitioners have argued that the actual wording of § 2462 does not explicitly contain a discovery rule component. Pet. Br. 11-14; Cert. Petn. 20-22; *see also SEC v. Bartek*, No. 11-10594, 2012 WL 3205446, at *6 (5th Cir. Aug 7, 2012). However, it can equally be said that § 2462 does not explicitly abrogate a discovery rule standard. The statute is completely silent on the matter one way or the other.

Petitioners have argued that the judicial recognition of a discovery rule in § 2462 would "arrogate[] to the judiciary a power – defining the statute of limitations – that Congress expressly has reserved to itself." Cert. Petn. 10; *see also 3M Co. v. Browner*, 17 F.3d 1453, 1461 (D.C. Cir. 1994) (opining that the issue of a discovery rule is "more appropriate for a congressional oversight hearing" because of "the limited role of the court.") However, there would be no such arrogation here for the simple reason that Congress has failed to address the specific contours of a discovery rule in § 2462, as it has in other contexts. *See, e.g.*, Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514(A)(b)(2)(D) (2012) (applying a discovery rule to a 180 day statute of limitation, but without an explicit diligence requirement); Exchange Act, 15 U.S.C. § 78(i)(f) (2012) (confining lawsuits to within one year of discovery, subject to an overarching three-year restriction); Exchange Act, 15 U.S.C. § 78u-6(h)(1)(B)(iii) (confining lawsuits to within three years of discovery, with a reasonable diligence requirement, and subject to an overarching six-year restriction).

In areas of ambiguity such as this, it is the aegis of the judiciary to fill in missing terms in the interests of justice. Petitioners' reasoning would render the judiciary a superfluity (not to mention a brittle mechanism for protecting the guilty behind mere technicalities). The role of the judiciary is to promote the public interest by interpreting statutes, and not to mechanically regurgitate legislative syntax. "It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Whether the discovery rule applies to § 2462 is an open question. The Court should expound on § 2462 by finding a discovery component within it, in recognition of the general presumption against statutes of limitations as applied to the government and in deference to executive agencies' enforcement authority.

II. THE DISCOVERY RULE SHOULD APPLY FROM A PUBLIC POLICY PERSPECTIVE, IN VIEW OF THE FACT THAT FRAUD CAN EASILY REMAIN UNDETECTED BY THE GOVERNMENT

The public interest requires the application of the discovery rule to § 2462. Many fraud violations, particularly in the areas of finance and banking, involve sophisticated transactions and elaborate, multi-party deals. Consequently, any misrepresentations in these areas may not be either obvious or easily detectable by the regulatory agency in charge with enforcing anti-fraud laws. That is, fraud may be difficult to detect

even where there is no active concealment by the offender and despite the application of the utmost diligence by the governmental enforcement agency. Thus, public policy favors the application of the discovery rule to enforcement actions under § 2462. Perpetrators of fraud should not benefit from immunity under the statute of limitation simply because of the sophistication or inscrutability of their malfeasance. The example of the SEC is highly illuminative of the difficulties that government agencies can face in detecting fraud in today's complex business world.

The SEC's capacity to detect fraud in the marketplace has been severely hampered by a combination of spending cuts and expanding responsibility. Even before the passage of the Dodd-Frank Act, the SEC was charged with regulating a panoply of financial activities. The SEC's ambit has now been significantly broadened by the Dodd-Frank Act, which required the Commission to conduct over 100 new rulemakings, create five new offices, and prepare over 20 studies and reports. Mary Schapiro, Testimony on the President's FY 2012 Budget Request for the SEC Before the United States Senate Subcommittee on Financial Services and General Government, Committee on Appropriations (May 4, 2011), *available at* http://www.sec.gov/news/testimony/2011/ts050411mls.htm. The SEC has been tasked with

> considerable new responsibilities that will have a significant long-term impact on the agency's workload, including oversight of the over-the-counter (OTC) derivatives market and hedge fund advisers; registration of municipal advisors and security-based swap market participants;

> enhanced supervision of nationally recognized statistical rating organizations (NRSROs) and clearing agencies; heightened regulation of asset-backed securities (ABS); and creation of a new whistleblower program

Id.

Concomitantly, the financial services industry has rapidly expanded in the last two decades, creating an alphabet soup of esoteric products with acronyms like CDO, RMBS, CDS, CLN and TROR. Indeed, due to increased sophistication of the financial markets, fraud can be hard to detect even if the fraudster does not actively conceal her activities. Financial services firms typically maintain voluminous legal documentation in connection with their regulatory and compliance responsibilities. Thus, markers of fraudulent activity may be buried deep within mountains of filings and documents, hidden from ready discovery.

To make matters worse, the SEC's budget has not increased in lockstep with its burgeoning regulatory mandate.[3] The SEC's budget of $1.32 billion is 99.99% smaller than the $18.93 trillion U.S. financial market

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[3] James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. Times, July 15, 2011, *available at* http://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html. The Commission's expanded regulatory footprint under the Dodd-Frank Act will not yield greater operational revenue for the agency. The SEC, like some other agencies, is limited to an annual budget that is predetermined by Congress, even where the agency collects fees and penalties greatly in excess of that budget. Those excess earnings are redirected to the U.S. Treasury. Thus, as a result of the Dodd-Frank Act, the SEC's budget has actually contracted relative to its responsibilities.

that it oversees. Jason Voss, *Fact File: Annual Budget of the U.S. Securities And Exchange Commission*, Seeking Alpha, Apr. 29, 2012, *available at* http://seekingalpha.com/article/540601-fact-file-annual-budget-of-the-u-s-securities-and-exchange-commission. In fact, three individuals whose activities fall under the agency's purview actually earn more than the entire agency's budget: in 2011 Ray Dalio of Bridgewater Associates earned $3.9 billion, Carl Icahn of Icahn Capital Management earned $2.5 billion, and James Simons of Renaissance Technologies earned $2.0 billion. *Id.* The consequence of this mismatch between funding and responsibility is that the SEC is severely overburdened, and as such is ever less capable of discovering fraud in the marketplace. Unfortunately, this also means that perpetrators of financial fraud are more likely than before to escape punishment by mere operation of the statute of limitations.

Moreover, the SEC has been hamstrung by lobbying pressure from Congress and the private sector, which further diminishes the agency's capacity to undertake thorough enforcement investigations. Arthur Levitt has revealed that when he was Chairman of the SEC, bank-friendly members of Congress regularly threatened him with budget cuts unless he scaled back the Commission's activities. *See* Arthur Levitt & Paula Dwyer, *Take On The Street* 131–32 (2002). Private sector lobbying also impedes discovery of fraud by the Commission. Finance professors Frank Yu and Xiaoyun Yu conducted an empirical comparison of financial lobbying expenditure and fraud enforcement rates from 1998 to 2004. Their data revealed that regulators are 38% less likely to discover fraud committed by firms that lobby actively. Corporate Lobby-

ing and Fraud Detection 19 (Aug. 2007), *available at* http://www.stern.nyu.edu/cons/groups/content/documents/course_description/uat_025796.pdf. Furthermore, a financial firm that engages in lobbying is able to evade detection of fraud that it has committed by an average of 117 days. *Id.* at 13. Section 2462's simplistic five-year timeframe, codified two centuries ago, does not account for these complexities, whereas the discovery rule does.

This Court has received several amicus briefs from lobbyists for the financial services industry, including the Securities Industry and Financial Markets Association and the American Bankers Association. As per Yu and Yu's study, the financial lobby has already succeeded in effectively reducing the limitations period for financial fraud by 117 days. The lobby now seeks to utilize this Court as a mechanism to further reduce the limitations period, by the number of days in the discovery period. We exhort the Court to resist these machinations.

III. THE COURT SHOULD CONSIDER FACTORS BEYOND THE ACTIVITIES OF THE DEFENDANT IN ASSESSING THE APPLICABILITY OF THE DISCOVERY RULE

The Court should not restrict applicability of the discovery rule to those instances wherein the fraud defendant has taken some active role in the concealment of the fraud.

The Respondent has advocated for delayed "accrual" of claims under § 2462 in cases where the underlying fraud remains undiscovered despite reasonable dili-

gence. Opp. Cert. 7-8. In contrast, the Petitioners seek to restrict delayed "accrual" to those cases where the defendant took some active role in concealing the harm. Cert. Petn. 11; *see also* Pet. Br. 31. As noted by the Second Circuit in this case, the Petitioners have mistakenly conflated the discovery rule with the doctrine of fraudulent concealment. *SEC v. Gabelli*, 653 F.3d 49, 59 (2d Cir. 2011).

The Petitioners further argue that courts should not look beyond the activities of the defendant in determining whether the discovery rule applies. For instance, above we have asked the Court to consider the various practical difficulties that the SEC faces in detecting fraud, and have suggested that these difficulties warrant delayed accrual for purposes of the § 2462 statute of limitations. Petitioners would argue that these factors, which are unrelated to Gabelli and Alpert's direct actions, should play no role in deciding the statute of limitations timeframe. Petitioners rely on *3M* in support of their assertion that such outside factors are irrelevant. Pet. Cert. Rep. 5 (citing *3M*, 17 F.3d at 1461 ("nothing in the language of Sec. 2462 even arguably makes the running of the limitations period turn on the degree of difficulty an agency experiences in detecting violations.")); *see also* Pet. Br. 46. However, this line of reasoning loses sight of important Supreme Court precedent and the basic purpose of statutes of limitations in the first place.

The Supreme Court has previously stated that, in determining when a cause of action "accrues" for purposes of statutes of limitations, courts should balance i) the general purpose of the underlying statute in question, against ii) the "practical" reasons for

foreclosing claims as time-barred under the statute of limitations.

> We do not think it is possible to assign to the word "accrued" any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other; but the uncertainty is removed when the word is interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.

Reading Co. v. Koons, 271 U. S. 58, 61-62 (1926). Thus, *Reading* establishes a useful two-part test to determine when statute of limitations accrual should begin.[4] The Court should apply these two factors to the question presented in the instant case, which asks when to affix the accrual date under § 2462.

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[4] While *Reading* did not consider the applicability of the discovery rule to § 2462, that case is nevertheless useful precedent as it delineates the balancing test to apply when determining the inception of "accrual" for purposes of statutes of limitations. The primary issue raised in this case is essentially the same: the timeframe for "accrual" of a particular statute of limitations, § 2462.

A. Factor One: The Vital Purpose of the Underlying Statute – Protection of the Public Against Fraud – Favors Delayed Accrual Pursuant to the Discovery Rule

Antifraud laws such as the Advisers Act provision implicated in this case, 15 U.S.C. § 80b-6, serve a vital function in promoting fair and equitable conduct in the marketplace. The Petitioners' interpretation of "accrual" under § 2462 would reduce the timeframe within which enforcement agencies like the SEC could bring antifraud claims against malefactors. This outcome would greatly hamper that agency's ability to combat fraud in the marketplace, which in turn would frustrate the basic investor protection purpose of § 80b-6. *See United States v. Windward*, 821 F. Supp. 690, 694 (N.D. Ga. 1993) (endorsing the discovery rule so that the underlying environmental protection objectives implicated in that case were not thwarted); *see also Atlantic States Legal Found. v. Al Tech Specialty Steel Corp.*, 635 F. Supp. 284, 288 (N.D.N.Y. 1986); *United States v. Material Serv. Corp.*, No. 95-C-3550, 1996 U.S. Dist. LEXIS 14471, at *11 (N.D. Ill. Sept. 30, 1996).

If the Court endorses the Petitioners' position on accrual under § 2462, a deleterious signal would be sent to the public: that a malefactor can expect to commit fraud free of punishment as long as the agency in charge with enforcement is too overwhelmed, or the fraudulent scheme is too convoluted to lead to discovery. The Petitioners have repeatedly cited a district court case from 1813, *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813) for the proposition that a broadened timeframe for the § 2462 statute of limita-

tions would "be utterly repugnant to the genius of our laws." Pet. Br. 36-37; Supp. Cert. Br. 2; Cert. Petn. 29. Curiously, Petitioners' solicitude for the "genius of our laws" seems to exclude our antifraud laws.

The government has a compelling interest in protecting the markets and the public at large from fraud. The area of financial fraud is of particular concern given the catastrophic impact that excesses on Wall Street have had on the global economy in the last few years.

The recent financial crisis is testament to the dire need for aggressive enforcement of antifraud laws. While recessions are cyclical in nature, fraud played a significant role in propelling the onset and exacerbating the severity of the recent financial crisis. The government has recognized the causative role that financial fraud played in the 2008 financial crisis,[5] which has devastated the economic position of multinational conglomerates and poor individuals alike. In particular, mortgage fraud flourished in an environment of collapsing lending standards and lax regulation. A study by the Financial Crisis Inquiry Commission estimated that the total economic loss attributable to mortgage fraud alone between 2005 and 2007 was $112 billion. The Financial Crisis Inquiry Report: Final

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[5] For instance, the Financial Fraud Enforcement Task Force, a government body comprised of 20 federal agencies, 94 US Attorneys Offices and state and local partners, states on its website that it was created in November 2009 "to hold accountable those who helped bring about the last financial crisis as well as those who would attempt to take advantage of the efforts at economic recovery." About the Task Force, http://www.stopfraud.gov/about.html (last visited December 2, 2012).

Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States xxii (2011). The Great Recession, borne largely of acquisitive speculation, mismanagement, negligence and fraud at financial institutions, extinguished nearly 40% of family wealth from 2007 to 2010. Jesse Bricker, *et al.*, *Changes in U.S. Family Finances from 2007 to 2010: Evidence from the Survey of Consumer Finances* 17, Federal Reserve Bulletin (June 2012). The inflation-adjusted median household net worth actually regressed back to 1992 levels. *Id.* Stronger government enforcement of various financial and consumer protection laws could have greatly alleviated these public losses.

Even if § 2462 were restricted in scope to time-limiting financial fraud enforcement actions, there would be a compelling interest in an expanded statute of limitations through the imposition of the discovery rule. The fact that § 2462 actually controls the timeliness of a wide swathe of government enforcement actions only serves to underscore the compelling interest that various federal agencies have in protecting the public from fraudsters of various types.

B. Factor Two: The Practical Ends to be Served by the § 2462 Statute of Limitations are Addressed Even if the Discovery Rule Applies

The government clearly has a compelling interest in avoiding the frustration of its antifraud statutes. The remaining inquiry under *Reading* is whether the ends to be served by the § 2462 statute of limitations are relatively more or less compelling, given the circumstances.

Congress does not pass statute of limitations laws such as § 2462 to serve as mere "Get Out of Jail Free Cards" for lucky defendants whose misdeeds remain unnoticed for certain periods of time. Rather, § 2462 and other limitations are in place in recognition of certain statutory "practical ends which are to be served" by such laws. *Reading*, 271 U.S. at 62. Under *Reading*, this Court should weigh those practical ends and consider the reasons why claims are time-barred in the first place. *Id.*

As noted by the Petitioners, statutes of limitations are designed to protect defendants from having to defend claims after "evidence has been lost, memories have faded, and witnesses have disappeared." Cert. Petn. 30; *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944). While this is an important objective, it should be of limited concern in today's technologically-advanced society. Section 2462's five year limitation has remained largely unchanged since the 1839 version of the statute. *See 3M*, 17 F.3d at 1462. However, a fraud defendant's capacity to avoid the loss of evidence, memories or witnesses is much stronger now than it was nearly two centuries ago, given the advent of electronic data storage and instantaneous video and telecommunications. A five-year look back period is, for practical purposes, much shorter now than it was in 1839. Technological innovations like hard drives make the maintenance of evidence a virtually cost-free endeavor. Therefore, the practical ends to be served by § 2462 will not be frustrated by the imposition of the discovery rule because evidence is now easier to maintain. That is, even if the discovery rule expands the allowable timeframe for the

pursuit of actions under § 2462, little harm should obtain from that expansion.

The Petitioners have also argued that the discovery rule would lead to an infinite tolling period, Cert. Petn. 28-29, which "would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). This simplistic argument fails to recognize that the judicially-imposed discovery rule involves a reasonableness component, which ends the tolling effect five years from when the government should have discovered the fraud. *See TRW Inc. v. Andrews*, 534 U.S. 19, 30 (2001); *Gabelli*, 653 F.3d at 59. Under the discovery rule, the timeframe for a defendant's potential liability can only be infinite, *a fortiori*, if that outcome is somehow reasonable (which is unlikely).[6]

Petitioners also argue that the discovery rule would undermine the principle of repose, Pet. Br. at 39, which "gives security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). These concerns are misplaced. The discovery rule, as propounded by the Second Circuit and the Respondent, is not inconsistent with the orderly reposal of claims. Indeed, the Respondent does not seek limitless liability. Under its theory, potential claims do find repose: five years from discovery or when discovery should reasonably have occurred. The Petitioners exaggerate matters (and strain credulity) in arguing that the imposition of the discovery rule would bring instability to human affairs.

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[6] Even if the discovery rule did lead to infinite exposure to liability for fraud, such an outcome would not be as unusual as Petitioners suggest. For instance, in a case involving a fraudulent tax return filed with intent to evade taxes, the Internal Revenue Service can pursue an assessment "at any time," in perpetuity. 26 U.S.C. § 6501(c).

See Pet. Br. at 39. The reposal of claims five years from their actual or constructive discovery is entirely consistent with the orderly extinguishment of stale claims. After all, even under the discovery rule, a reviewing court is required to time-bar claims by the government that are filed beyond the statutory time period if the delayed discovery were unreasonable. *Gabelli*, 653 F.3d at 59.

As noted above, the SEC (like other financial regulatory agencies) is overburdened. The practical consequence of this difficulty is that some fraudsters are left unpunished for no meritable reason other than the mere running of the applicable statute of limitations period before the agency can reasonably discover the fraud. The purpose of statute of limitations laws is not to give carte-blanche immunity for fraud penalties simply because the prosecuting agency is too overburdened to uncover fraud within the requisite timeframe (here, five years). Such windfalls are not one of "those practical ends which are to be served by any limitation of the time within which an action must be brought." *Reading*, 271 U.S. at 62. However, if the Court follows *3M* and the Petitioners' view by only permitting concealment of fraud by a defendant to serve as a basis for delayed "accrual" under § 2462, it will ensconce such unjustifiable windfalls into the law's firmament. In doing so, it will unjustly expand the purview of statute of limitations laws beyond their intended scope.

Stated differently, the question here is not whether factors external to the defendant, such as practical impediments to fraud-discovery by agencies, justify delayed accrual of the statute of limitations. Rather, the issue is, for what policy reasons should claims be time-barred in the first place? Statutes of limitations

like § 2462 are not written for the purpose of giving fraudsters an "out" in case the governmental enforcement authority is too burdened to discover fraud. An agency's reasonable difficulties in detecting fraud should not end up being the sole reason that a fraud action is time-barred. Statute of limitations laws like § 2462 were not written with that end in mind.

Reading basically calls for a balancing of the government's interest, which involves the effective enforcement of antifraud statutes, and the defendant's interest vis-à-vis time-limiting liability. As shown above and in the Respondent's brief, the government's interest is more compelling than that championed by the Petitioners.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to rule in favor of the Respondent and hold that the discovery rule should determine when the government's claim first accrues for purposes of applying the five-year limitations period under 28 U.S.C. § 2462.

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Respectfully submitted,

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