No. 11-1274

In the Supreme Court of the United States

MARC J. GABELLI AND BRUCE ALPERT, PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the five-year limitations period in 28 U.S.C. 2462 did not begin to run until the Securities and Exchange Commission discovered, or reasonably could have discovered, petitioners' alleged fraudulent scheme.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 653 F.3d 49. The opinion of the district court (Pet. App. 26a-51a) is not reported but is available at 2010 WL 1253603.

JURISDICTION

The judgment of the court of appeals was entered on August 1, 2011. A petition for rehearing was denied on November 22, 2011 (Pet. App. 52a-53a). On February 10, 2012, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 22, 2012. On March 7, 2012, Justice Ginsburg further extended the time to April 20, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Investment Advisers Act of 1940 (Act), 15 U.S.C. 80b-1 *et seq.*, "was the last in a series of Acts designed to eliminate certain abuses in the securities industry." *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963); see *id.* at 186-187 (noting that the Act is part of a comprehensive statutory scheme enacted by Congress to assure that "the highest ethical standards prevail in every facet of the securities industry") (internal quotation marks omitted). The Act "reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship." *Id.* at 191 (internal quotation marks omitted). In Congress's view, an investment adviser has "an affirmative duty of utmost good faith, and full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading his clients." *Id.* at 194 (internal quotation marks omitted). The Act is therefore designed "to eliminate, or at least expose, all conflicts of interest which might incline an investment adviser—consciously or unconsciously—to render advice which was not disinterested." *Id.* at 191-192.

To that end, the Act makes it unlawful for any adviser to "employ any device, scheme, or artifice to defraud any client or prospective client." 15 U.S.C. 80b-6(1). The Act also prohibits an adviser from "engag[ing] in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client." 15 U.S.C. 80b-6(2). The "fundamental purpose" of those provisions is to ensure that investment advisers give "full disclosure" to their clients regarding the management of their investments. *Capital Gains Research Bureau, Inc.*, 375 U.S. at 186. The Securities and Exchange Commission (SEC or Commis-

sion) may bring a civil enforcement action against investment advisers, or persons associated with them, who violate any of the provisions of the Act or who aid and abet such violations. 15 U.S.C. 80b-9(d).

2. a. This case concerns a type of "market timing" of mutual funds known as "time-zone arbitrage."[1] As a general rule, mutual funds are priced once a day, usually at 4 p.m. Eastern Time when the New York Stock Exchange closes. That price, called the fund's net asset value (NAV), reflects the closing prices of the securities held by the fund. If one of those securities is traded on an overseas market, however, the closing price incorporated into the fund's NAV can be based on stale information. For instance, if a United States mutual fund holds stock in a Japanese company that is traded on the Tokyo Stock Exchange (TSE)—which closes at 2 a.m. Eastern Time—the fund's NAV for each day incorporates the stock's Japanese closing price from 14 hours earlier. Positive market movements during the New York trading day, which will later cause the TSE price to rise when the TSE opens at 8 p.m. Eastern Time, will not be reflected in the fund's late-afternoon NAV. See 1:08-cv-3868, Doc. No. 1, at 6-9 (S.D.N.Y. Apr. 24, 2008) (Complaint).

"Market timers" attempt to exploit that type of pricing inefficiency by buying or selling a mutual fund's shares based on events that they do not expect to be reflected in the fund's NAV. Market timers then reverse their positions for a profit the next day. See *Ja-*

[1] This case arises on petitioners' motion to dismiss the Commission's complaint. See Pet. App. 51a. The factual statements in this brief are drawn from that complaint and are taken as true at this stage of the proceedings. See, *e.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1889 n.2 (2011).

nus Capital Group, Inc. v. *First Derivative Traders*, 131 S. Ct. 2296, 2300 n.1 (2011) ("[A] market-timing investor could buy shares of a mutual fund at the artificially low NAV and sell the next day when the NAV corrects itself upward."). That practice harms long-term mutual fund shareholders by capturing an arbitrage profit that comes dollar-for-dollar out of other shareholders' pockets. See *id.* at 2300 (observing that market timing "harms other investors in the mutual fund"). Market timing thus dilutes the value of mutual fund shares held by other investors. See Complaint 7-8.

b. Gabelli Funds LLC (Gabelli Funds) is an investment adviser, within the meaning of the Act, to a mutual fund called Gabelli Global Growth Fund (GGGF). See Pet. 6; Complaint 5. During the relevant period, petitioner Bruce Alpert was the Chief Operating Officer of Gabelli Funds and was responsible for, *inter alia*, monitoring trading in GGGF to eliminate market timing. *Id.* at 5, 11. Petitioner Marc Gabelli was the portfolio manager for GGGF and also managed other affiliated funds. *Id.* at 4-5.

In April 2008, the Commission brought a civil enforcement action against petitioners. The SEC alleged that petitioners had violated the Act by permitting one of GGGF's investors—Headstart Advisers, Ltd. (Headstart)—to market time the mutual fund, in return for Headstart's investment in one of the other funds managed by Gabelli. Complaint 1-2, 8-12. The Commission alleged that petitioners had failed to disclose Headstart's market timing (or their quid pro quo agreement with the market timer) to GGGF's board of directors and other investors. The Commission further alleged that petitioners had falsely represented that they were tak-

ing all necessary steps to eliminate market timing. *Id.* at 2-3, 13, 15.[2]

3. The district court granted in part and denied in part petitioners' motion to dismiss the complaint. Pet. App. 26a-51a. As relevant here, the court held that most of the Commission's claims for civil penalties were time-barred. *Id.* at 34a-39a. The court relied on 28 U.S.C. 2462, which provides in pertinent part that "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." The court held that the SEC's claims against petitioners had accrued when petitioners committed their various fraudulent acts, not when the Commission discovered or reasonably could have discovered petitioners' fraud. Pet. App. 37a. Because most of petitioners' fraudulent acts had occurred more than five years before the Commission filed its complaint in April 2008, the court concluded that the SEC was foreclosed from seeking civil penalties for the bulk of its claims. *Id.* at 37a-38a.

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[2] In a 2005 report to Congress, Commission staff described "egregious industry scandals" that were uncovered after the New York Attorney General announced an investigation into market timing in mutual funds in September 2003. See *Exemptive Rule Amendments of 2004: The Independent Chair Condition* 31 (Apr. 2005), http://www.sec.gov/news/studies/indchair.pdf. The report explained that fund managers in some of the largest mutual fund complexes had allowed certain investors to market time funds "in return for assets invested in other funds managed by the adviser." *Ibid.* The report concluded that, "[b]y placing their own interests in generating fees for themselves and their affiliated entities above those of the fund shareholders, and by failing to disclose these arrangements and resulting conflicts of interest to fund boards and shareholders, fund managers breached their fiduciary duties to shareholders." *Id.* at 33.

4. The court of appeals reversed. Pet. App. 1a-23a. As relevant here, the court noted that the Commission had brought its claims under "the antifraud provisions" of the Advisers Act and had alleged that petitioners "aided and abetted Gabelli Funds' fraudulent scheme." *Id.* at 19a. The court held that, because the Commission's claims sound in fraud, they are subject to the "discovery rule." *Id.* at 18a. That rule prevents an applicable limitations period from running in a fraud case until the fraud claim "is discovered, or could have been discovered with reasonable diligence, by the plaintiff." *Ibid.*; see *Merck & Co., Inc.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010).

The court of appeals rejected petitioners' argument that the discovery rule should not be applied because the Commission had failed to plead any affirmative acts by petitioners to conceal their fraud. Pet. App. 19a-20a. That argument, the court stated, conflates the discovery rule with the doctrine of fraudulent concealment, which prevents a limitations period from running when a defendant has taken steps to conceal his allegedly wrongful conduct. *Ibid.* Petitioners also contended that, "even if the discovery rule applies" to this case, the civil-penalty claims were time-barred because the SEC could have discovered the relevant facts earlier if it had exercised reasonable diligence. *Id.* at 21a. The court rejected that argument as "premature" at the motion-to-dismiss stage of the case, explaining that expiration of the limitations period is an affirmative defense and that the burden is therefore on petitioners to plead and prove the Commission's lack of reasonable diligence. *Ibid.* The court of appeals concluded that, because "the complaint expressly alleges that the [Commission] first discovered the facts of [petitioners'] fraudulent scheme in

late 2003," less than five years before the complaint was filed in April 2008, the Commission's "civil penalties claims [are] not clearly time-barred." *Ibid.*

ARGUMENT

The court of appeals correctly held that, because the Commission's penalty claims in this case are based on petitioners' fraud, the limitations period in 28 U.S.C. 2462 did not begin to run until the Commission discovered, or reasonably could have discovered, petitioners' unlawful scheme. That decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Section 2462 of Title 28 provides that an action for the enforcement of any civil penalty "shall not be entertained unless commenced within five years from the date when the claim first accrued." Petitioners contend (Pet. 11) that the Commission's claims against them for civil penalties "first accrued" when petitioners engaged in the fraudulent scheme at issue, regardless of the time at which the Commission discovered (or reasonably could have discovered) that scheme. This case, however, does not provide the Court a suitable opportunity to determine when, as a general matter, a claim "first accrue[s]" for purposes of Section 2462. Whatever the proper test for determining the accrual date for other sorts of claims, the Commission's claims here are for fraud. This Court has repeatedly recognized that, unless Congress specifies a different rule, the limitations period in a suit for fraud does not begin to run until the plaintiff discovers, or in the exercise of reasonable diligence could have discovered, the facts underlying his claim.

That rule derives from the equitable maxim that a party should not be permitted to benefit from its own misconduct. See, *e.g.*, *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-233 (1959) ("[W]e need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.") (footnote omitted). This Court has long held as a matter of equity that a defendant cannot use his own misconduct as a defense, including by unfairly relying on a statute of limitations. See, *e.g.*, *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).

"[I]n the statute of limitations context, the word 'discovery' is often used as a term of art in connection with the 'discovery rule,' a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010). That doctrine "arose in fraud cases as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action.'" *Ibid.* (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). That exception reflects the Court's longstanding "recogni[tion] 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." *Ibid.* When (as in Section 2462) a particular statute makes the "accru[al]" of a claim the event that triggers the limitations period, the *Merck* Court's description of the dis-

covery rule indicates that a fraud claim does not "accrue" until the plaintiff has (actually or constructively) discovered the relevant facts.[3]

The discovery rule also applies more broadly to delay the commencement of the applicable limitations period in cases involving fraud or concealment, even when the relevant statute specifies some event other than the accrual of the claim as the point at which the limitations period commences. "[T]his Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Holmberg*, 327 U.S. at 397 (quoting *Bailey*, 88 U.S. (21 Wall.) at 348). The Court in *Holmberg* explained that "[t]his equitable doctrine is read into every federal statute of limitation." *Ibid.*; see *Exploration Co.*, 247 U.S. at 449 ("When Congress passed the [limitations period] in question the rule of *Bailey* v. *Glover* was the established doctrine of this court. [The statute] was presumably enacted with the ruling of that case in mind.").

Thus, even if Section 2462 required that suit be commenced within five years after the defendant's wrongful

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[3] As petitioners correctly explain (Pet. 24-25), this case differs from *Merck* in that the statute at issue in *Merck* (28 U.S.C. 1658(b)) contained an express discovery rule. In construing Section 1658(b), however, the Court relied heavily on the background principles that generally govern the application of limitations provisions to fraud claims. See 130 S. Ct. at 1793-1796. The Court's discussion of those background rules is directly relevant here.

act, the discovery rule would delay the running of the limitations period in a fraud case until the relevant information was discovered or could have been discovered by a reasonably diligent plaintiff. See *Exploration Co.*, 247 U.S. at 445, 449 (applying discovery rule where pertinent limitations period ran from "the date of the issuance of [certain] patents"). The Court has sometimes referred to this rule as one of tolling. See *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001) (*TRW*) (explaining that "equity tolls the statute of limitations in cases of fraud or concealment"); *id.* at 37 (Scalia, J., concurring in the judgment); cf. *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (identifying, as one circumstance where "equitable tolling" of limitations periods has been approved, the situation "where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass"). The timeliness of the Commission's complaint in this case does not depend, however, on whether the discovery rule is used to determine when the Commission's claims "accrued" or instead is treated as a ground for tolling the applicable limitations period.

The Seventh Circuit made precisely that point in a similar fraud case brought by the Commission for civil penalties. See *SEC* v. *Koenig*, 557 F.3d 736 (2009). The court explained that it did not need to decide "when a 'claim accrues' for purpose of [Section] 2462 generally, because the nineteenth century recognized a special rule for fraud, a concealed wrong." *Id.* at 739. That doctrine, the court noted, "is apt to be called equitable tolling." *Ibid.* The court observed, however, that it is "unimportant in practice" "[w]hether a court says that a claim for fraud accrues only on its discovery (more precisely, when it *could have been* discovered by a person exercis-

ing reasonable diligence) or instead says that the claim accrues with the wrong, but that the statute of limitations is tolled until the fraud's discovery." *Ibid.* "Either way," the court explained, "a victim of fraud has the full time from the date that the wrong came to light, or would have done had diligence been employed." *Ibid.* In *Koenig*, as in this case, the Commission brought its enforcement action within five years after it was able to discover the fraud at issue. The Seventh Circuit therefore concluded that the Commission's enforcement action was timely. *Id.* at 739-740.

Like the Seventh Circuit in *Koenig*, the court of appeals correctly applied the discovery rule in this case. The Commission's claims against petitioners under the Advisers Act are based on fraud. The Commission has alleged that petitioners permitted a single investor in a mutual fund that they managed (GGGF) to market time the fund in exchange for a quid pro quo investment in another Gabelli-managed fund. Petitioners did not disclose the market timing and their resulting conflict of interest, and they falsely informed the GGGF's board and other investors that they were taking all necessary steps to eliminate market timing. See pp. 4-5, *supra*. The court of appeals therefore held that, because "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, the discovery rule defines when the claim accrues." Pet. App. 19a.

The court below thus treated the discovery rule as a means of identifying a fraud claim's accrual date, rather than as a ground for tolling Section 2462's five-year limitations period. As the Seventh Circuit recognized in *Koenig*, however, that terminological choice is "unim-

portant in practice." 557 F.3d at 739; cf. *Sherwood* v. *Sutton*, 21 F. Cas. 1303, 1305 (C.C.N.H. 1828) (Story, J.) (noting the existence of "some diversity of judgment" as to whether the discovery rule was "an implied exception out of the words of the statute, or whether the right of action, in a legal sense, does not accrue until the discovery of the fraud"). Either way, the Commission was required to bring its suit within five years after it discovered, or with reasonable diligence could have discovered, petitioners' fraudulent scheme. Applying that rule to the facts of this case, the court of appeals correctly held that the Commission's complaint was not subject to dismissal on limitations grounds. Pet. App. 21a-22a.

2. Petitioners advance several arguments why the limitations period in 28 U.S.C. 2462 should have commenced to run before the Commission discovered, or reasonably could have discovered, petitioners' fraudulent scheme. None withstands scrutiny.

a. Petitioners argue (Pet. 19-21) that applying a discovery rule is inconsistent with the text of Section 2462, which imposes a five-year time limit without establishing any express exception for cases involving fraud or concealment. Whether described as a doctrine of accrual or tolling, however, the discovery rule has long been understood as a background principle that presumptively governs the application of federal limitations statutes unless Congress specifies otherwise. Its applicability does not depend on express language incorporating the discovery rule into Section 2462.

Thus, while the date of the defendant's wrongdoing will often be the accrual date for purposes of that statute, the Court in *Merck* described the discovery rule in fraud cases as "a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it." 130

S. Ct. at 1793. The Court likewise has repeatedly held that statutes of limitations are generally "subject to rules of forfeiture and waiver" and "typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008); see *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (explaining that federal statutes of limitations are "normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling") (quoting *Irwin*, 498 U.S. at 95-96). That Section 2462 does not explicitly incorporate the discovery rule does not render inapplicable the background principles that govern the interpretation of federal limitations periods in cases of fraud or concealment. See pp. 8-9 & n.3, *supra*.[4]

The court of appeals therefore correctly reasoned "that for claims that sound in fraud a discovery rule is read into the relevant statute of limitation." Pet. App. 20a. This Court and other courts have long said the same thing. See, *e.g.*, *Holmberg*, 327 U.S. at 397 ("This equitable doctrine is read into every federal statute of limitation."); *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990) ("[T]he 'discovery rule' of federal common law * * * is read into statutes of limitations in federal-question cases * * * in the absence of a con-

[4] Section 2462's five-year deadline for filing suit likewise contains no express exception for cases in which the defendant fails to assert its limitations defense in a timely manner. The absence of such an express exception, however, does not cast doubt on the inference that Section 2462's deadline (like statutes of limitations generally) "is subject to rules of forfeiture and waiver." *John R. Sand*, 552 U.S. at 133. Similarly with respect to the discovery rule, the crucial question is not whether Section 2462 explicitly authorizes that equitable doctrine, but whether Congress has clearly displaced the usual rule that the doctrine applies in cases of fraud or concealment.

trary directive from Congress."), cert. denied, 501 U.S. 1261 (1991); *Dabney* v. *Levy*, 191 F.2d 201, 205 (2d Cir.) (Hand, J.) ("[I]n cases of fraud, * * * when Congress does not choose expressly to say the contrary, the period of limitation set by it only begins to run after the injured party has discovered, or has failed in reasonable diligence to discover[,] the wrong.") (internal quotation marks omitted), cert. denied, 342 U.S. 887 (1951). Indeed, this Court applied the discovery rule in *Holmberg*, *Exploration Co.*, and *Bailey*, although none of the limitations statutes at issue in those cases contained express language regarding the plaintiff's discovery of his cause of action. See *Holmberg*, 327 U.S. at 397; *Exploration Co.*, 247 U.S. at 449; *Bailey*, 88 U.S. (21 Wall.) at 347.

Nor does it matter, as petitioners argue (Pet. 32-33), that the Commission is the plaintiff in this fraud case and is seeking civil penalties. This Court has made clear that the discovery rule applies in cases involving fraud or concealment (without deciding whether the rule also applies in other contexts). See *TRW*, 534 U.S. at 27. The Court has further explained that there is "no good reason why the rule, now almost universal, that statutes of limitations upon suits to set aside fraudulent transactions shall not begin to run until the discovery of the fraud, should not apply in favor of the Government as well as a private individual." *Exploration Co.*, 247 U.S. at 449; see *Koenig*, 557 F.3d at 739 ("[T]he United States is entitled to the benefit of [the discovery] rule even when it sues to enforce laws that protect the citizenry from fraud, but is not itself a victim.") (citing *Exploration Co.*). The court of appeals therefore correctly held that the discovery rule applies to the time limit in Section 2462 in this case, just as it would apply to other

statutes of limitations in other cases involving fraud or concealment.

b. Petitioners contend (Pet. 23-24, 30-31) that the discovery rule does not extend the limitations period in this case because they did not take affirmative steps to conceal their fraud. That contention, the court of appeals recognized, conflates two distinct (though related) justifications for extending an applicable limitations period. One justification is that the fraudulent nature of a defendant's offense prevents a plaintiff from knowing that she has been defrauded. Another is that the defendant has misrepresented or concealed facts that are essential to a plaintiff's cause of action, whether or not that cause of action sounds in fraud. See, *e.g.*, *Riddell* v. *Riddell Washington Corp.*, 866 F.2d 1480, 1491 (D.C. Cir. 1989) (distinguishing between "wrongs as to which concealment is established by the nature of the act, and wrongs as to which additional acts of concealment are required to trigger the tolling requirement") (internal quotation marks omitted); *Texas* v. *Allan Constr. Co.*, 851 F.2d 1526, 1529 (5th Cir. 1988) ("[The fraudulent concealment] doctrine, which is applicable to any cause of action, should not be confused with the doctrine applicable where the gist of the action itself is fraud, and the concealment is inherent in the fraud.") (internal quotation marks omitted; brackets in original; capitalization added). In either case, an applicable limitations period does not begin to run until the plaintiff is aware, or could have been aware through reasonable diligence, of the facts underlying her cause of action.

This Court has long recognized that *either* of those circumstances justifies deferring the commencement of a limitations period for so long as the plaintiff is reasonably unaware of the facts underlying his claim. In

Bailey, the Court observed that "where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud." 88 U.S. (21 Wall.) at 347-348. The Court further explained, however, that "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, *though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party*." *Id.* at 348 (emphasis added). Thus, although the Court recognized a distinction between "concealing a fraud" and "committing a fraud in a manner that it concealed itself," *id.* at 349, it made clear that the discovery rule applies in both circumstances. Because application of the discovery rule in this case depends on the fraudulent nature of petitioners' violation, it does not require that petitioners have taken additional affirmative steps to conceal their fraud.[5]

c. Petitioners argue (Pet. 28-30) that the decision below creates the potential for limitless tolling in cases

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[5] See Pet. App. 18a ("[S]ince fraud claims by their very nature involve self-concealing conduct, it has been long established that the discovery rule applies where, as here, a claim sounds in fraud."); see also *Allan Constr. Co.*, 851 F.2d at 1529 ("[I]n a fraud case, the plaintiff need only aver the underlying fraud in order to toll the statute of limitations until such time as the plaintiff had some notice of the wrong; fraud is, by its very nature, self-concealing."). John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 880-883 (1933) ("Where undiscovered 'fraud' was the basis of liability, it was universally agreed that no new concealment was necessary and the wrongdoer might remain wholly passive, provided no avenues were open to the plaintiff for discovery of the fraud.").

where the government alleges fraudulent violations of the securities laws. Petitioners' concerns, however, are neither novel nor peculiar to securities cases. Courts long ago recognized that, despite concerns about stale evidence and the passage of time, the discovery rule was necessary to ensure that a defendant could not benefit from his own fraud or concealment. See, *e.g.*, *Prevost* v. *Gratz*, 19 U.S. (6 Wheat.) 481, 498 (1821) (observing that although the "length of time necessarily obscures all human evidence," it is likewise true that "the length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a Court of equity to grant ample and decisive relief").

Under the traditional discovery rule, moreover, the limitations period in a fraud case begins to run when a reasonably diligent plaintiff *could have* discovered the relevant facts, even if the actual plaintiff did not discover them until later. And to bring an enforcement action like this one, the Commission must satisfy not only Section 2462's timing requirement, but also the pleading standards for fraud, which may become more difficult to meet as the defendant's conduct becomes more remote in time. See, *e.g.*, *SEC* v. *Cuban*, 620 F.3d 551, 552-553 & n.4 (5th Cir. 2010) (discussing those standards). If an enforcement action is allowed to go forward and the Commission prevails on the merits, the district court has discretion to set the amount of any civil penalty, and it can consider the passage of time as well as other relevant factors. See, *e.g.*, 15 U.S.C. 80b-9(e)(2)(A) (providing that the "amount of the penalty shall be determined by the court in light of the facts and circumstances"). Taken together, the relevant stat-

utory provisions create ample incentives for the Commission to pursue its claims diligently.

3. Contrary to petitioners' contention (Pet. 13-19), the decision below does not conflict with any decision of another court of appeals. Like the Second Circuit in this case, the other two courts of appeals (the First and Seventh Circuits) to consider the question presented here have held that, in fraud cases brought by the Commission seeking civil penalties, Section 2462's five-year limitations period does not begin to run until the Commission knew or should have known the relevant facts. See *Koenig*, 557 F.3d at 739-740; *SEC* v. *Tambone*, 550 F.3d 106, 148-149 (1st Cir. 2008).[6] Petitioners suggest that in *Koenig* "the [Commission] made sufficient allegations of the defendant's concealing conduct to permit the [Commission] to go forward with its penalty claim." Pet. 18. But the defendant's fraud in *Koenig* was no more or less "conceal[ed]" than in this case. In *Koenig*, a corporate executive used various accounting methods to overstate the company's profits. See 557 F.3d at 737-739. The executive falsely told outside accountants that he would discontinue using those methods, see *id.* at 740, but that is not different from petitioners' false representation to directors and investors that they were attempting to eliminate market timing. In any event, nothing in the

[6] The First Circuit granted en banc review in *Tambone* and accordingly withdrew the panel opinion, but the en banc court limited its review to a different issue in the case. See *SEC* v. *Tambone*, 573 F.3d 54 (1st Cir. 2009). The en banc court's subsequent opinion was confined to that issue, and the court expressly reinstated the panel's conclusion that an enforcement action by the Commission is timely if brought within five years of when the Commission discovered, or reasonably could have discovered, a defendant's fraud. See *SEC* v. *Tambone*, 597 F.3d 436, 450 (1st Cir. 2010).

Seventh Circuit's decision rested on the fact that the defendant there misled outside accountants.

Petitioners argue (Pet. 13-18) that four other courts of appeals have held that a claim "accrue[s]" for purposes of Section 2462 at the time of the underlying violation. In three of those cases, however, the underlying violation had nothing to do with fraud. See *FEC* v. *Williams*, 104 F.3d 237, 241 (9th Cir. 1996) (defendant exceeded campaign contribution limits but did not fail to disclose the violations), cert. denied, 522 U.S. 1015 (1997); *3M Co.* v. *Browner*, 17 F.3d 1453, 1460-1463 (D.C. Cir. 1994) (defendant imported chemicals in violation of the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*); *United States* v. *Core Labs., Inc.*, 759 F.2d 480, 481 (5th Cir. 1985) (defendant violated the antiboycott provisions of the Export Administration Act of 1979, 50 U.S.C. App. 2401 *et seq.*). Those cases thus stand for the unremarkable proposition that a cause of action often accrues at the time of a defendant's unlawful conduct. See Pet. App. 20a n.4 (noting that petitioners' reliance on *3M Co.* is "misplaced" because that case "did not involve fraud claims"); *Koenig*, 557 F.3d at 739 (distinguishing *3M Co.* on the same ground). Cf. *Merck*, 130 S. Ct. at 1793 (explaining that the discovery rule "delays accrual of a cause of action until the plaintiff has 'discovered' it," and that "[t]he rule arose in fraud cases as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action'") (quoting *Bay Area Laundry*, 522 U.S. at 201).

In the fourth case on which petitioners rely, *United States* v. *Witherspoon*, 211 F.2d 858 (6th Cir. 1954), the government alleged that the defendant had fraudulently procured surplus property from the War Assets Admin-

istration. *Id.* at 860. The question in *Witherspoon*, however, was whether the government's action was for civil penalties and thus whether Section 2462 applied at all. The government brought its action under the Surplus Property Act of 1944, 40 U.S.C. 123, which provides that a defendant who fraudulently procures federal property is liable for $2000 per fraudulent act (in addition to double damages and costs). See *Witherspoon*, 211 F.2d at 860. The government argued that its suit was for damages rather than civil penalties within the meaning of Section 2462, but the court of appeals rejected that contention. *Ibid.* The court did not address the discovery rule, however, let alone hold that the rule does not extend Section 2462's five-year window in cases involving fraud or concealment. And in any event, *Witherspoon* was overruled by *Koller* v. *United States*, 359 U.S. 309 (1959), which held that a suit under the Surplus Property Act of 1944 is not one for civil penalties subject to Section 2462's limitations period. See *Solomon* v. *United States*, 276 F.2d 669, 672-673 (6th Cir.), cert. denied, 364 U.S. 890 (1960).

4. Petitioners contend (Pet. 25-27) that the Court should grant their petition, vacate the judgment below, and remand the case for reconsideration in light of *Credit Suisse Securities (USA) LLC* v. *Simmonds*, 132 S. Ct. 1414 (2012). Nothing in *Simmonds*, however, casts doubt on the correctness of the decision below.

In *Simmonds*, this Court considered the limitations period for filing suit against a corporate insider to recover short-swing profits under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b). "Section 16(b) provides that suits must be brought within 'two years after the date such profit was realized.'" 132 S. Ct. at 1417 (quoting 15 U.S.C. 78p(b)). The Court

"divided 4 to 4" on the question whether that two-year period could be tolled at all. *Id.* at 1421. It held that, "assuming some form of tolling does apply, it is preferable to apply that form which Congress was certainly aware of," *ibid.*, rather than a more expansive tolling rule that was "completely divorced from long-settled equitable-tolling principles," *id.* at 1419.

In particular, the Court in *Simmonds* rejected the plaintiff's contention that Section 16(b)'s limitations period should be tolled until the corporate insider filed the disclosure statement required by Section 16(a) of the Securities Exchange Act. See 132 S. Ct. at 1419. The Court found it "well established * * * that when a limitations period is tolled because of fraudulent concealment of facts, the tolling ceases when those facts are, or should have been, discovered by the plaintiff." *Id.* at 1420. Accordingly, the Court concluded, "[a]llowing tolling to continue beyond the point at which a [Section] 16(b) plaintiff is aware, or should have been aware, of the facts underlying the claim would quite certainly be inequitable and inconsistent with the general purpose of statutes of limitations." *Ibid.* (emphasis omitted).

Petitioners' reliance on *Simmonds* is misplaced. Even with respect to Section 16(b), the Court in *Simmonds* did not hold that tolling was impermissible. Rather, the Court was evenly divided on that question, and held only that any tolling could not extend beyond the time when a reasonably diligent plaintiff would have discovered the relevant facts. The *Simmonds* Court's stated reason for rejecting the expansive tolling rule proffered by the plaintiff in that case is also inapposite here. In *Simmonds*, the plaintiff's proposed approach was novel because it divorced equitable-tolling principles from the reason why equity would delay the limita-

tions period in the first place: the plaintiff's reasonable lack of awareness of the facts underlying her claim. Here, by contrast, the court of appeals applied the discovery rule in its traditional form, holding that Section 2462's limitations period would begin to run when the SEC knew, or with reasonable diligence could have known, of petitioners' fraudulent scheme. See Pet. App. 18a-21a.

Finally, contrary to petitioners' contention (Pet. 27), the Court in *Simmonds* did not suggest "that the doctrine of fraudulent concealment [is] the only appropriate basis for avoiding a statutory limitations period where Congress ha[s] not specified otherwise." The Court in *Simmonds* discussed fraudulent concealment as a possible ground for tolling because that was the tolling principle potentially applicable to the case. The plaintiff's claim for recovery of short-swing profits did not sound in fraud; rather, the plaintiff argued that the defendants' failure to file the statement required by Section 16(a) of the Securities Exchange Act should be viewed as a form of fraudulent concealment. See 132 S. Ct. at 1419 (explaining that the expansive tolling rule advocated by the plaintiff was unsound "[e]ven accepting that equitable tolling for fraudulent concealment is triggered by the failure to file a [Section] 16(a) statement"). This Court had no occasion to address the application of the discovery rule to cases where the underlying violation is based upon fraud.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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