Record No. 18-2326

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL ENERGY REGULATORY COMMISSION, Petitioner-Appellee, v. POWHATAN ENERGY FUND, LLC, et al., Respondent-Appellants.	)	On Appeal from the United States District Court for the Eastern District of Virginia at Richmond

OPENING BRIEF OF APPELLANTS

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January 14, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. _____ Caption: FERC v. Powhatan Energy Fund, LLC et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Houlian Chen, HEEP Fund, Inc., and CU Fund, Inc.
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ John N. Estes III Date: October 4, 2018

Counsel for: Petitioners

CERTIFICATE OF SERVICE

****

I certify that on October 4, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

See attached

s/ John N. Estes III (signature) October 4, 2018 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-353 Caption: FERC v. Powhatan Energy Fund, LLC et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Powhatan Energy Fund, LLC
(name of party/amicus)

who is Petitioner, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☑ YES ☐ NO
If yes, identify all parent corporations, including all generations of parent corporations:
See Attachment A

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Jonathan T. Lucier Date: October 5, 2018

Counsel for: Powhatan Energy Fund, LLC

CERTIFICATE OF SERVICE

****

I certify that on October 5, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

See Attachment B

/s/ Jonathan T. Lucier
(signature)

October 5, 2018
(date)

ATTACHMENT A
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Powhatan Energy Fund LLC ("Powhatan") is a private investment fund organized as a Delaware limited liability company.

The members of Powhatan are:

1. LSE Capital Management, LLC ("LSE"), a Delaware limited liability company;
2. Eric Newman, an individual;
3. Gregory M. Sekelsky, an individual;
4. the Lawrence Scott Eiben Revocable Trust U/A DTD 9/7/2004, the trustees and beneficiaries of which are Mr. Eiben and individuals in his immediate family;
5. the Kevin James Gates Living Trust, the trustees and beneficiaries of which are Mr. Gates and an individual in his immediate family; and
6. the Richard John Gates Living Trust, the trustees and beneficiaries of which are Mr. Gates and an individual in his immediate family.

The sole member of LSE is Lawrence S. Eiben, an individual.

ATTACHMENT B
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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JURISDICTIONAL STATEMENT

This appeal arises from an action, pending before the United States District Court for the Eastern District of Virginia, in which the Federal Energy Regulatory Commission ("FERC") is seeking to impose both civil penalties and disgorgement remedies on appellants. Those proposed remedies are based on FERC's claim that appellants violated the Federal Power Act ("FPA"). The district court has jurisdiction under FPA § 31(d)(3)(B), 16 U.S.C. § 823b(d)(3)(B), and 28 U.S.C. § 1331.

This Court has jurisdiction under 28 U.S.C. § 1292(b). On September 24, 2018, the district court denied appellants' Motion to Dismiss in Part First Amended Complaint; that decision is the subject of this appeal. *Fed. Energy Regulatory Comm'n v. Powhatan Energy Fund, LLC*, No. 3:15-cv-00452, 2018 WL 4568611, Slip Op. (E.D. Va. Sept. 24, 2018) ("*FERC II*"), JA 372. The district court determined that its *FERC II* decision "involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from [the Order] would materially advance the ultimate termination of the litigation." Order, JA 418. Appellants timely filed a petition for permission to appeal. 4th Cir. No. 18-353 (ECF No. 2-1), JA 419. This Court granted permission by order dated November 5, 2018.

STATEMENT OF THE ISSUE

This case concerns the proper interpretation of 28 U.S.C. § 2462, the five-year statute of limitations that generally applies to claims for civil penalties sought by the federal government. Five years ago, the Supreme Court unanimously explained that, since the early days of the Republic, our legal system has required the government to bring civil penalty actions within five years of the disputed conduct. *Gabelli v. Securities and Exchange Commission*, 568 U.S. 442, 448-49 (2013). Reaching back to 1805, *Gabelli* quoted Chief Justice Marshall: "[I]t 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time,'" *id*. at 452 (quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)), leaving people and companies "forever liable to a pecuniary forfeiture," *Adams*, 2 Cranch at 342.

The issue here is: Whether a claim for civil penalties under FPA § 31(d)(3) "accrues," for purposes of § 2462, at (1) the time of the alleged violation, or (2) as the district court concluded, after the agency charged with enforcement (FERC) issues an order assessing penalties—a task that is entirely within the agency's control, that the agency can perform any time it chooses, and that has no temporal relation to the underlying conduct, allowing civil penalties under the FPA to "'be brought at any distance of time,'" *Gabelli*, 568 U.S. at 452 (quoting *Adams v.*

Woods, 2 Cranch at 342), leaving people and companies "forever liable to a pecuniary forfeiture," *Adams*, 2 Cranch at 342.

STATEMENT OF CASE

I. STATUTORY AND REGULATORY BACKGROUND

This case involves both (1) the statute of limitations in 28 U.S.C. § 2462 and (2) the process for imposing civil penalties under FPA § 31(d), 16 U.S.C. § 823b(d). Section 2462 has been addressed frequently by the Supreme Court and the United States Courts of Appeals. But FPA § 31(d) has never been addressed by a higher court in the context of applying § 2462.

A. Section 31 of the Federal Power Act

Section 31 of the FPA, 16 U.S. Code § 823b, governs the process by which FERC is authorized to seek civil penalties for alleged violations of that statute. FPA § 31(d) "creates two procedural pathways by which a penalty may be imposed," *Fed. Energy Regulatory Comm'n v. Powhatan Energy Fund, LLC*, 286 F. Supp. 3d 751, slip op. at 10 (E.D. Va. 2017) ("*FERC I*"), JA 27. The FPA gives the party facing potential civil penalties the right to elect which procedural path will apply. The pathway that applies here—termed the "Alternate Option" by the district court—provides for federal district court adjudication. 16 U.S.C. § 823b(d)(3)(A); *FERC I* at 12-13, JA 29-30. The other pathway—which the district court called the "Default Option," and which does not apply here—

provides for administrative adjudication. 16 U.S.C. § 823b(d)(2); *FERC I* at 10-11, JA 27-28.

Both procedural pathways start at the same point: FERC first must provide the potential subject of the proposed penalty "notice of the proposed penalty." 16 U.S.C. § 823b(d)(1). The notice "shall . . . inform such person of his opportunity to elect in writing . . . to have the [district court] procedures of paragraph (3)"—the so-called Alternate Option—"(in lieu of [the administrative procedures] of paragraph (2)) apply with respect to such assessment." *Id.* A party has thirty days to make that election. *Id.*

If—as here—a party elects the "Alternate Option," adjudication occurs in federal district court. "[T]he Commission shall promptly assess" the penalty "after the date of the receipt of the [election] notice." *Id*. § 823b(d)(3)(A). The subject of the penalty order that follows has no right to seek rehearing or appeal the order. *See, e.g., Houlian Chen*, 151 FERC ¶ 61,179 at P 193 & n.419 (2015) ("Penalty Assessment Order"), JA 177. Instead, if the penalty is not paid within sixty days, "the Commission shall institute an action" in the appropriate federal district court "for an order affirming the assessment." 16 U.S.C. § 823b(d)(3)(B). In that action, the court has "authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in [p]art, such assessment." *Id.*

If—as did *not* occur here—a party instead elects the "Default Option," then adjudication occurs before an administrative law judge at the agency. *Id.* § 823b(d)(1). Under those administrative procedures, FERC may not assess a penalty until it first makes a "determination of violation . . . on the record after an opportunity for an agency hearing pursuant to section 554 of title 5 before an administrative law judge." *Id.* § 823b(d)(2)(A). FERC's order then is subject to judicial review in a United States Court of Appeals under 16 U.S.C. § 825*l*, just like the mine run of orders FERC issues in the course of conducting its regular activities. *See, e.g.*, *City of Rockingham v. Fed. Energy Regulatory Comm'n*, 702 F. App'x 106 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1041 (2018).

After either a final judgment in a district court action or a "final assessment order" under the administrative process, FERC can file "an action to recover" any civil penalty that remains unpaid. 16 U.S.C. § 823b(d)(5). In that recovery action, "the validity and appropriateness of such final assessment order or judgment shall not be subject to review." *Id.*

B. The Limitations Period Imposed by 28 U.S.C. § 2462

Under 28 U.S.C. § 2462, the government is subject to a five-year limitations period when seeking civil penalties. It provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same

> period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462. Section 2462 has a lengthy pedigree, as discussed below.

II. PROCEEDINGS BELOW

A. FERC's Investigation

In 2010, petitioner Dr. Chen was engaged in trading a particular financial electricity product on behalf of himself and two funds he owned, HEEP Fund and CU Fund, as well as on behalf of a separate third-party fund, Powhatan Energy Fund, LLC. The three funds also are appellants.

In August 2010, FERC began an investigation of trading in that electricity product. *FERC II* at 3-4, JA 374-75. After an investigation that lasted several years, the FERC enforcement staff asserted that appellants' trading activity between June 1, 2010 and August 3, 2010 violated the FPA. *Id.* at 3, JA 374. The enforcement staff recommended that the Commission order appellants to show cause why they should not be required to pay civil penalties for the alleged violations. *Id.* at 5 & n.7, JA 376.

B. FERC's Orders

In December 2014, more than four years after the disputed conduct occurred, FERC issued an "Order to Show Cause and Notice of Proposed Penalty," *Houlian Chen,* 149 FERC ¶ 61,261 (2014), JA 184. FERC's show cause order directed appellants to respond to the enforcement staff's allegations, and also notified them

of their statutory right, pursuant to FPA § 31(d), to choose between (1) an administrative hearing before an administrative law judge or (2) an "immediate" penalty assessment followed by a federal district court action. *See FERC II* at 2 (citing *FERC I*), JA 373. Appellants elected a court action. They also submitted answers that refuted the enforcement staff's allegations. *Id*. at 7-8, JA 378-79.

Almost six months later, on May 29, 2015, FERC issued the Penalty Assessment Order. *Id*. at 8, JA 379; *Houlian Chen*, 151 FERC ¶ 61,179 (2015), JA 91. Appellants did not pay the proposed penalties voluntarily during the next sixty days, preferring to exercise their right to require FERC to make its case in federal district court, as provided by FPA § 31(d)(3). *See FERC II* at 9-10, JA 380-81. The FPA's statutory waiting period expired sixty days later, on Tuesday, July 28, 2015.

C. FERC Filing the Court Action

On Friday, July 31, 2015, three days *after* the statutory waiting period expired, FERC filed an action against appellants in the United States District Court for the Eastern District of Virginia. *FERC II* at 10, JA 381. After questions arose regarding the nature of the district court proceeding under FPA § 31(d), the court ordered the parties to brief the issue. *FERC I* at 7, JA 24.

1. During briefing, FERC took the position that the court was "limited to the so-called (but statutorily undefined and unaddressed) 'administrative record.'"

Id. at 27, JA 44. The court rejected that argument, ruling that FERC's position had "little basis in the statute or common sense," and had "the potential for creating due process violations." *Id.*; *see also id.* at 30 & n.29 ("[T]he statutory interpretation FERC advocates in this litigation does not withstand even a deferential review."), JA 47. The court held that appellants "are entitled to a trial *de novo* in the district court in which the Federal Rules of Civil Procedure and the Federal Rules of Evidence will apply." *Id.* at 30, JA 47.

The court's decision on this issue was "consistent with other district courts to decide" the issue. *FERC I* at 8 & n.16 (citing *Fed. Energy Regulatory Comm'n v. Barclays Bank PLC*, 247 F. Supp. 3d 1118, 1119 (E.D. Cal. 2017) (collecting and citing cases)), JA 25.[1] The court explained in *FERC II* that "FERC's action in

[1] *See Fed. Energy Regulatory Comm'n v. Maxim Power Corp.*, 196 F. Supp. 3d 181, 185, 197 (D. Mass. 2016) (When a party elects review *de novo* in federal district court, the case "is to be treated as an ordinary civil action requiring a trial *de novo*."); *Fed. Energy Regulatory Comm'n v. City Power Mktg., LLC*, 199 F. Supp. 3d 218, 232 (D.D.C. 2016) (rejecting FERC's arguments for a summary review proceeding and holding that "the Court will treat this case like a normal civil action governed by the Federal Rules"); *Fed. Energy Regulatory Comm'n v. Silkman*, 233 F. Supp. 3d 201, 204, 228 (D. Me. 2017) ("resist[ing] the temptation to make a grand pronouncement about the scope of de novo review under § 823b(d)(3) and instead conclud[ing], based on the specific circumstances . . . , [that the court] will treat this matter as an ordinary civil action subject to the Federal Rules of Civil Procedure"); *Fed. Energy Regulatory Comm'n v. ETRACOM LLC*, No. 2:16-cv-01945-SB, 2017 U.S. Dist. LEXIS 33430, at *1 (E.D. Cal. Mar. 8, 2017)) ("the Federal Rules of Civil Procedure [] apply to this action"); *Barclays Bank PLC*, 247 F. Supp. 3d at 1120 (concluding, "in agreement with every other federal court that has expressly addressed this issue, that *(cont'd)*

[the district court] . . . gives [appellants] *their first opportunity for an adversarial adjudication of their allegedly manipulative activities*." *FERC II* at 29, JA 400 (emphasis added).

2. Appellants then filed a motion to dismiss the case in part, asserting that all but four days of the disputed conduct are beyond the five-year limitations period in § 2462. Mot. to Dismiss at 1-2, JA 281-82. As appellants observed, FERC's "claim first accrued" at the time of the alleged violations, which FERC claims took place from June 1, 2010 to August 3, 2010. *Id.* at 1, JA 281. But FERC did not file the district court action for penalties until July 31, 2015. As a result, nothing except the final four days of disputed conduct fell within the five-year statute of limitations period. *Id.* at 9-23, JA 289-303.

FERC opposed the motion. In its view, the claim before the district court was timely because FERC's "order to show cause proceeding was commenced within five years of the violations and, therefore, satisfies § 2462." FERC Opposition at 1, JA 317. FERC also argued that, because it "conducted the required administrative proceeding, a *new* five-year statute of limitations applies to an action in federal district court." *Id.* at 1, JA 317 (emphasis added). According to FERC, that second limitations period did not begin to run until "60 days after

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Defendants are entitled to conduct discovery under the Federal Rules of Civil Procedure") ("De Novo Review Cases").

the Commission's penalty order was issued" because "the FPA allowed Defendants 60 days to pay the assessed penalty before [FERC] could file" suit in the district court. *Id.* at 1-2, JA 317-18.

D. The District Court's Decision

The district court denied the motion to dismiss. The district court agreed with appellants that the civil action underlying this appeal must be "commenced within five years." *FERC II* at 21, JA 392 ("FERC plainly commenced 'an action, suit[,] or proceeding' within the meaning of § 2462 by filing its Complaint in this Court."). But the court disagreed with appellants about what *starts* the five-year clock—specifically, when FERC's "claim first accrued."

The district court focused on the requirement in FPA § 31 that FERC issue a penalty assessment order, then wait sixty days before filing suit. The court held that, "[b]ased on the plain meaning of the word 'accrue,' . . . FERC's suit for 'an order affirming the [Penalty Assessment Order] accrued when [appellants] failed to pay the [assessed penalty] within sixty days of its issuance." *FERC II* at 28, JA 399.[2] The court "acknowledge[d] that aspects of [appellants'] arguments seem

[2] The district court concluded that it "need not address" FERC's "alternative argument" that "the proceedings initiated by its Order to Show Cause amounted to the 'action suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture" because of its holding that FERC's cause of action did not accrue until the conclusion of the sixty-day period after FERC issued the penalty assessment order. *Id.* at 21 n.24, JA 392. FERC's alternative argument is addressed below.

more consistent with the overall statutory scheme of § 823b and the purpose of statutes of limitations," but concluded that "the plain meaning of the word 'accrue'" compelled the court's decision. *Id.* at 45, JA 416.

SUMMARY OF ARGUMENT

For over 200 years, the United States Code has imposed a statute of limitations on any proceedings the federal government might bring to seek civil penalties for alleged violations of law. For over 200 years, the Supreme Court has guarded that limitations period with vigilance, repeatedly ruling that "it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Gabelli*, 568 U.S. at 452 (quoting *Adams v. Woods*, 2 Cranch at 342). The district court's decision reaches exactly that "repugnant" result, transforming § 2462 into a statute of *no* limitations. That decision conflicts with the text of § 2462, an unbroken line of Supreme Court decisions, and decisions by other circuit courts. This Court should reverse.

As the Supreme Court in *Gabelli* unanimously reiterated, the "natural reading" of § 2462 is that the five-year limitations clock starts ticking—and the claim "first accrues"—when the defendant engaged in the allegedly offending conduct. 568 U.S. at 448. Once that conduct occurs, the government has five years to seek penalties based on it. The district court's decision divorces that clock from the underlying conduct, keying it instead to action by the agency—here,

FERC. Because FPA § 31 requires FERC to issue a "penalty assessment order" before filing a lawsuit seeking civil penalties, the district court ruled that the five-year limitations period begins only *after* FERC issues such an order.

That outcome is unfounded. The timing of the penalty order is entirely within FERC's control. And there is no reason why FERC could not issue such an order within the five-year limitations period mandated by § 2462. Under FPA § 31, FERC has no authority to adjudicate either liability or penalties in this case. FERC's penalty assessment order does not decide anything other than whether the agency will file suit, and what level of penalties the agency will seek in court. It is a decision to prosecute, not a decision resolving the merits. Starting the five-year clock based on this procedural action by the agency defies the very purpose of having a limitations period.

Such an outcome, unsurprisingly, contradicts the language of § 2462. The district court acknowledged that if the subject of an investigation elects the option for an administrative adjudication, then FERC's claim "*clearly* accrue[s] at the time of the purported violations." *FERC II* at 19, JA 390 (emphasis added). Where, as here, there is an election for a federal district court adjudication, the same claim for alleged violations of the FPA likewise "first accrue[s]"—consistent with *Gabelli*—when the disputed conduct occurred. It was that conduct by the appellants that gave rise to the controversy and that gave birth to FERC's assertion

that the appellants should be liable for civil penalties; the alacrity with which FERC thereafter decided to pursue those penalties was entirely up to FERC.

The outcome reached by the district court also contradicts—indeed eviscerates—the purpose of § 2462, which, as *Gabelli* instructs, is to ensure the timely adjudication of civil penalty liability. 568 U.S. at 449. Because the district court's interpretation would permit FERC to take as much time as it wants to issue a penalty assessment order, starting the five-year clock after the statutory waiting period following that action makes the five-year period meaningless—stretching it over an infinite horizon of the agency's choosing. The first and only adjudication of civil penalty liability in cases like this will be in federal district court. *FERC II*. at 29, JA 400. And under the district court's decision here, that adjudication might happen at any distance of time. That defeats the core purpose of § 2462.

It also contradicts the Supreme Court's steadfast efforts to ensure that civil penalty liability is adjudicated before memories fade and facts recede. And it contradicts decisions by other circuit courts, which have repeatedly started the five-year clock in § 2462 with the disputed conduct.

FERC may revert to an argument it made below—which the district court did not adopt—advocating a "two-clock" approach. As explained in the last section of this brief, that argument suffers several fatal flaws. Most importantly, given the way FPA § 31 works, it suffers from the same infinite statute-of-

limitations problem as the district court's decision. If FERC makes that alternative argument, the Court should reject it.

ARGUMENT

STANDARD OF REVIEW

The issue for appeal "presents a pure question of law . . . ." *FERC II* at 13, JA 384. And "[t]his court reviews pure questions of law *de novo* . . . ." *United States v. Han*, 74 F.3d 537, 540 (4th Cir. 1996). In addition, "because § 2462 is 'generally applicable to all federal agencies,' and Congress did not delegate any administrative authority to the Commission to interpret it, the Court owes no deference to FERC's reading of the statute." *FERC II* at 17 n.21, JA 388 (citing *Fed. Energy Regulatory Comm'n v. Barclays Bank PLC*, No. 2:13cv02093, 2017 WL 4340258, at *8 (E.D. Cal. Sept. 29, 2017) (quoting *DLS Precision Fab LLC v. United States Immigration & Customs Enf't*, 867 F.3d 1079, 1087 n.1 (9th Cir. 2017))). Finally, § 2462 is administered by courts, not agencies. As a result, agencies are not entitled to any deference with respect to its interpretation. *See, e.g.*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

I. FERC'S "CLAIM FIRST ACCRUED" AT THE TIME OF THE ALLEGED VIOLATIONS

A. Under the Plain Language of § 2462, as Interpreted by the Supreme Court, the "Claim First Accrued" When the Disputed Conduct Occurred

1. Statutes of limitations serve the critical interest of repose, protecting individuals from the prospect of open-ended punitive liability and the unfair prospect of having to defend themselves years after the fact, when memories have faded and evidence has been lost. *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). Consistent with that purpose, statutes of limitation ordinarily require plaintiffs seeking relief to file suit within a certain period following the conduct giving rise to liability. Thus, in *Gabelli*, the Supreme Court held that under § 2462, a claim for civil penalties "accrues—and the five-year clock begins to tick—when a defendant's allegedly fraudulent conduct occurs." *Gabelli*, 568 U.S. at 448-49.

Applying § 2462 to a variety of different statutes, courts have recognized that the limitations period for the government to bring suit first starts running when the defendant engages in the challenged conduct. *See, e.g.*, *Gabelli*, 568 U.S. at 448-49; *3M Co. (Minn. Mining & Mfr.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994); *United States v. Core Labs., Inc.*, 759 F.2d 480 (5th Cir. 1985).

As a result, this should be a straightforward case. FERC accuses appellants of having violated the FPA by engaging in certain trading activity. *FERC II* at 3-4, JA 374-75. All of the challenged conduct took place between June 1 and August 3, 2010. *FERC II* at 3, JA 374. As a result, the limitations period for seeking civil penalties for those alleged violations began on June 1, 2010, and in order to bring a timely claim covering all of the challenged conduct, FERC needed to file the federal district court action by June 1, 2015. 28 U.S.C. § 2462. This action, however, was filed on July 31, 2015, more than five years after all but the last four days of challenged conduct.

2. The district court's decision in this case departed from the well-established principle that limitations periods begin at the time of the conduct in dispute. *See, e.g.*, *Unexcelled Chem. Corp. v. United States*, 345 U.S. 59 (1953) (construing limitations period in the Walsh-Healy Act); *United States v. Lindsay*, 346 U.S. 568 (1954) (construing limitations period in the Commodity Credit Corporation Charter Act). It also departs from the text of the limitations provision at issue here, and its underlying purpose. In the district court's view, the claim here first accrued when the enforcing agency—FERC—completed *its* role in the *penalty assessment process*, rather than when the disputed conduct occurred. But that cannot be reconciled with the Supreme Court's decision in *Gabelli*. The district court properly looked to that case for guidance on the general meaning of

the term "claim first accrued," but contradicted the Court's actual decision about how to interpret it in the context of § 2462, given the purpose of that provision.

The district court focused on the following language from *Gabelli*:

> In common parlance a right accrues when it comes into existence. *Gabelli*, 568 U.S. at 448 (quoting *United States v. Lindsay*, 346 U.S. 568, 569 (1954) (alteration omitted)). . . . It therefore follows that "the 'standard rule' is that a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Gabelli*, 568 U.S. at 448 (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). Such a definition of "accrue" has "appear[ed] in dictionaries from the 19th century up until today." *Id.* (citing 1A Burrill, *A Law Dictionary and Glossary* 17 (1850), which stated that "an action *accrues* when the plaintiff has a right to commence it.").

FERC II at 28-29, JA 399-400 (quoting *Gabelli*, 568 U.S. at 448). As the district court saw it, FERC would not have a "complete and present cause of action" until FERC issued a penalty assessment order and sixty days passed. *FERC II* at 28, 45, JA 399, 416.

The district court's fundamental error was to focus on the conduct of the agency, not the conduct of appellants. The underlying facts existed when the disputed conduct occurred. And the provision of the FPA that FERC claims was violated was in existence at that point in time too. So that is the point in time when appellants became liable for any violations. Whatever other, subsequent points of "accrual" might exist, that would be when FERC's "claim first accrued" under § 2462. As the D.C. Circuit explained in *3M*, "Because liability for the penalty attaches at the moment of the violation, one would expect this to be the time when

the claim for the penalty 'first accrued.'" *3M*, 17 F.3d at 1461. FERC then could have proceeded to court in short order. No prerequisite outside of FERC's sole control needed to be satisfied before FERC could file a civil action, and the minimal statutory procedural prerequisites that existed could have been met easily and promptly.[3]

Under the plain language of § 2462, the "claim" here is that provisions of law were violated and penalties should be imposed. In a portion of *Gabelli* the district court's decision did not cite or quote, the Supreme Court observed that "the most natural reading" of § 2462 is that a claim "accrues—and the five-year clock starts to tick," when the disputed conduct occurs. *Gabelli* 568 U.S. at 448.

In *Gabelli*, moreover, the Supreme Court ruled that the claim there accrued even though it had not yet been discovered by the government. *Id*. at 454 ("Given the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of § 2462, we decline to do so."). Knowing a claim exists is perhaps the most fundamental prerequisite there possibly can be to filing a lawsuit. But the Court in *Gabelli* nonetheless found that the claim accrued when the disputed conduct occurred.

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[3] *See, e.g.*, 18 C.F.R. § 385.1509 ("After receipt of the [FPA § 31] notification of election to apply the provisions of this section pursuant to Rule 1507 [for district court adjudication], the Commission will promptly assess the penalty it deems appropriate, in accordance with Rule 1505.").

While *Gabelli* did not involve a penalty proposed under FPA § 31, its ruling on the meaning and purpose of § 2462 is not limited to a particular factual context but sweeps broadly, encompassing other government enforcement schemes subject to § 2462. The district court, however, never acknowledged its departure from *Gabelli*. Instead, invoking a fifty-year-old Supreme Court case, the district court stated that it was "mindful of 'the hazards inherent in attempting to define *for all purposes* when a 'cause of action' first 'accrues.'" *FERC II* at 17, JA 388 (citing *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967). But *Crown Coat* involved a limitations period very different from § 2462—one that governed the time within which a government contractor can sue the government about contractual disputes. It is one thing to allow some flexibility when deciding when a limitations period bars a suit against the government for contractual damages. It is another thing entirely to disregard *Gabelli's* unconditional ruling that government claims for civil penalties must face a fixed expiration date, five years from when the disputed conduct occurred. *Crown Coat*'s treatment of limitations periods applicable to suits against the government therefore provides no support for the view of § 2462 taken by the district court.[4]

[4] The district court also cited *3M* for the proposition that a claim normally accrues when "the factual and legal prerequisites for filing suit" are "in place." *Id.* at 28, 33, 45, JA 399, 404, 416 (citing *3M*, 17 F.3d at 1460 (citing *Lindsay*, 346 U.S. at 569). Like *Gabelli*, *3M* actually undercuts the district court's decision, *(cont'd)*

3. Nothing about the details of the procedures in FPA § 31 supports any departure from the "natural reading" of the word "accrue" set forth in *Gabelli*: that the claim accrued when the disputed conduct occurred. The district court seemed to be of the view that the limitations period does not begin to run until *FERC* has issued a penalty assessment order and sixty days pass without payment. But that order is simply a public pronouncement of FERC's decision to file a lawsuit, absent capitulation by (or settlement with) the subject of the proposed civil penalty. The timing of that order is entirely within FERC's control. It should go without saying that when the timing of prerequisites to filing suit are within the control of a plaintiff, they cannot be used to avoid the applicable statute of limitations.[5]

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rejecting the position that a claim did not accrue until it had been discovered by the government. As the court in *3M* explained: "[b]ecause liability for the penalty attaches at the moment of the violation, one would expect this to be the time when the claim for the penalty 'first accrued.'" 17 F.3d at 1460-61 (footnote omitted). The *3M* court ruled accordingly: "[W]e hold that an action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty." *Id*. at 1462. Both the *3M* court and the court below cited *Lindsay*, 346 U.S. at 569, for the proposition that "[a] claim normally accrues when the factual and legal prerequisites for filing suit are in place." *FERC II* at 28, JA 399 (quoting *3M*, 17 F.3d at 1460). But *Lindsay* likewise undercuts the decision below because (construing a different statute of limitations) the Supreme Court held in that case that the claim at issue accrued upon the occurrence of the underlying disputed conduct. 346 U.S. at 569.

[5] This principle is well-established. *See, e.g.*, *United States v. Meyer*, 808 F.2d 912, 920 (1st Cir. 1987) ("[I]f statutes of limitations did not begin running until a party resolved to bring suit or otherwise take affirmative action to vindicate its rights, no statute of limitations would ever lapse; the promise of repose would
(cont'd)

That result follows from plain meaning, common sense, and the long-recognized core purpose of a statute of limitations to protect defendants from eternal potential liability. The head of a federal agency might need to grant an approval before the agency files suit. A city council might need to pass a resolution before filing a lawsuit. But does that mean the claim has not accrued until these approvals occur, so that the lawsuit can be delayed for decades but still not be time-barred? That is akin to saying that because a grand jury indictment is required for a federal criminal felony case, the statute of limitations begins to run, not with the commission of the alleged crime, but when the indictment comes

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be as empty as a beggar's purse."); *see also McMahon v. United States*, 342 U.S. 25, 27 (1951) (rejecting construction of statute at issue there that would "giv[e] claimants an option as to when they will choose to start the period of limitation"); *Reading Co. v. Koons*, 271 U.S. 58, 65 (1926) ("Every practical consideration which would lead to the imposition of any period of limitation, would require that the period should begin to run from the definitely ascertained time of death rather than the uncertain time of the appointment of an administrator. Here the appointment was not made until six years after the death. No reason appears, if the opinion of the court below is followed, why the time might not have been extended."); *DLS Precision Fab LLC*, 867 F.3d at 1086-87 (rejecting construction that would allow agency "to postpone the filing of an action for decades, even centuries, on the theory that the filing would still be timely because the statute of limitations did not begin to run until the action reached a final decision and the penalty had been imposed"); *Core*, 759 F.2d at 482-83 (where "[t]he progress of [pre-filing] administrative proceedings is largely within the control of the Government . . . [a] limitations period that began to run only after the government concluded its administrative proceedings would . . . amount in practice to little or none").

down, with the timing of the indictment fully in the control of the government and, lacking any deadline, capable of occurring at any distance of time.

4. The district court's decision also misreads FPA § 31. The district court correctly concluded that, if the subject of an investigation elects the administrative adjudication path, then FERC's claim "*clearly* accrue[s] at the time of the purported violations." *Id*. at 19, JA 390 (emphasis added). If the subject elects the so-called alternate path of a district court action, by contrast, the cause of action accrues at a different point—after *FERC* takes action to notify the subject of its decision to assess a penalty. Nothing in FPA § 31 or § 2462 suggests that a "claim first accrues" at such vastly disparate points in time depending on the procedural path the subject elects. Nor does either provision remotely suggest the incongruous result that some subjects are protected by a five-year limitations period that runs from the alleged conduct, but others face the prospect of liability that stretches in perpetuity under a limitations period that does not begin to run until after FERC completes an administrative task that it controls and that has no temporal connection to the disputed conduct. A five-year limitation period means nothing if it begins running only after some unknown and unbounded point in the future, potentially decades away, that the accusing agency can entirely control.

Such an outcome would contravene the fundamental purpose of a statute of limitations. As the district court correctly recognized, the FPA's provision for

these two procedural paths reflects "a statutory intent that the *initial adversarial penalty adjudication* occur *either* before an [administrative law judge] or before a district court." *FERC II* at 32, JA 403 (emphasis added). "[T]he statute itself describes district court adjudication as an alternative track for reaching the same result as the administrative option: *a final adjudication on the merits*." *Id*. at 31, JA 402 (emphasis added). Both paths are simply alternative means of adjudicating the same questions: were there violations and, if so, should they be penalized? Both are based on the same underlying facts. And both are based on the same underlying law—the FPA provision allegedly violated. Under the plain meaning of § 2462, FERC's claim that appellants violated the FPA, and that penalties should be imposed, "first accrued" when the disputed conduct occurred, regardless of which path appellants chose to adjudicate that claim.[6]

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[6] The district court did not expressly purport to define the word "claim" for purposes of analyzing when FERC's "claim first accrued." But the court specified *what* it deemed to "first accrue" as follows:

> Based on the plain meaning of the word "accrue," the Court must conclude that *FERC's suit for "an order affirming the assessment of the civil penalty"—the action currently pending before this Court*—accrued when [appellants] failed to pay the Commission's penalty assessment order within sixty days of its issuance.

FERC II at 20, JA 391 (emphasis added). The court is correct that FPA § 31(d)(3)(B) expressly provides for FERC to "institute an action . . . for an order affirming the assessment of the civil penalty," 16 U.S.C. 823b(d)(3)(B), but that language merely describes the vehicle by which FERC pursues its claim for civil penalties, it does not describe the *claim* itself. FERC's claim is that appellants *(cont'd)*

B. The District Court's Decision Contradicts the Purpose of § 2462

For more than two centuries, and as recently as 2017, the Supreme Court has emphatically reminded agencies and the courts alike that § 2462 is designed to ensure the timely adjudication of civil penalty claims. *See, e.g.*, *Kokesh v. Securities and Exch. Comm'n*, 137 S. Ct. 1635, 1641-42 (2017). The district court's decision sharply contravenes that principle. And it violates the fundamental canon of statutory construction against interpreting a statute so as to cause it to destroy itself.[7] It also violates the canon of construction against rendering a statute a nullity.[8]

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violated the FPA and should be subject to civil penalties; it is appellants' disputed conduct, not FERC's vehicle for pursuing the allegations of violations, that gave rise to FERC's claim.

This issue is directly related to the question presented in the De Novo Review Cases. FERC repeatedly argued in those cases that its extra-statutory show cause order process is an adversarial adjudication on the merits, and that the FPA's provision for "de novo review" is intended to limit the district court to an appellate-style review of the resulting penalty assessment order and what FERC called the "administrative record." FERC's argument for a limited district court review was repeatedly rejected, including by the court below in *FERC I*, in part because the FPA specifies that the court is required to "review de novo *the law and the facts* involved," 16 U.S.C. § 823b(d)(3)(B). *FERC I* at 17-18 (rejecting FERC's argument that review of "the law and the facts involved" meant review of the Penalty Assessment Order and the so-called administrative record), JA 34-35 (emphasis added).

[7] *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011) (quoting *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998)); *United States v. Braverman*, 373 U.S. 405, 408 (1963) (a statute should not be interpreted "so narrowly as to defeat its obvious intent"); *United States v. Williams*,
(cont'd)

As the Supreme Court explained in *Gabelli*: "all limitations provisions" advance the same "basic policies": "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Gabelli*, 568 U.S. at 448 (quoting *Rotella*, 528 U.S.at 555). "Statutes of limitations are intended to 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* (quoting *Order of R.R. Telegraphers*, 321 U.S. 348-49). The repose offered by statutes of limitation is "vital to the welfare of society," providing "security and stability to human affairs." *Id.* at 449 (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)).

The requirement of prompt adjudication of civil penalty claims has deep roots that reach back to the early years of the Republic. As *Gabelli* recounts,

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485 F.2d 1383, 1384 (4th Cir. 1973) ("statutes are not to be construed in a manner which would defeat their clear purpose."); *cf. Stone v. Instrumentation Lab. Co.*, 591 F.3d 239, 243 (4th 2009) (courts will not "adopt a 'literal' construction of a statute if such interpretation would thwart the statute's obvious purpose or lead to an 'absurd result'") (citation omitted).

[8] *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 824 (2018) (adopting reading of statutory provision that is "consistent 'with one of the most basic interpretive canons, that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant'" (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)); *Motor Coach Indus., Inc. v. Dole*, 725 F.2d 958, 967 (4th Cir. 1984) (rejecting interpretation that "would make the carefully-conceived statutory framework described above a nullity when applied to the [statute at issue]").

"Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions, stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could' be brought at any distance of time.'" *Gabelli*, 568 U.S. at 452 (quoting *Adams v. Woods*, 2 Cranch at 342). As Chief Justice Marshall went on to explain: "[i]n a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed, that an individual would remain forever liable to a pecuniary forfeiture." *Adams*, 2 Cranch at 342. And as Justice Story similarly put it a few years later (sitting as a circuit justice): "it would be utterly repugnant to the genius of our laws, to allow such prosecutions a perpetuity of existence." *United States v. Mayo*, 26 F. Cas. 1230, 1231 (C.C.D. Mass. 1813).

The Supreme Court has carefully policed the requirement that the five-year period in § 2462 be a *fixed* period, not some unbounded, unknown amount of time that lies within the government's control. As the Court emphasized in *Gabelli*, statutes of limitations "set[] *a fixed date* when exposure to the specified Government enforcement efforts end[]." *Gabelli*, 568 U.S. at 448 (emphasis added). The Court recently reinforced that bedrock rule in *Kokesh*, 137 S. Ct. at 1641-42, where the Court held that § 2462 applied to SEC enforcement actions for disgorgement.

The district court's decision contradicts this core purpose of providing repose. *Gabelli* confirmed that § 2462's "five-year clock begins to tick" when a defendant's allegedly fraudulent conduct occurs. Under the district court's decision, the point in time when the disputed conduct occurs is entirely irrelevant to when a claim for civil penalties becomes time-barred. Instead, the five-year clock starts ticking after FERC has issued a penalty assessment order—an issuance entirely within FERC's control—and sixty days has passed. But there is no limit on when such an assessment order must issue. As a result, under the district court's view, a civil penalty action could be timely if filed decades—or even centuries—after the disputed conduct. The statute of limitations would become a statute of no limitations, stretching infinitely into the future. The five-year clock in § 2462 would have no set starting point and the five-year limitation would have no meaning: FERC could start the clock at any point in time of its own devising, and until that happens, no passage of time would make a civil penalty action stale.

The district court's decision thus contradicts the purpose of § 2462; transforming the entire provision into a nullity. That cannot be the law.

II. THE DISTRICT COURT'S DECISION WOULD CONTRADICT THE APPROACH ADOPTED BY MULTIPLE CIRCUITS

The courts of appeals generally agree on one thing: Whatever the proper construction of § 2462 in this context, it does not set a limitations period of forever. To the contrary, they agree on one fundamental proposition—that a

government claim for civil penalties first accrues when the disputed conduct occurs. While there may be differences among the Circuits regarding what *stops* the clock, they are universal in agreeing that the government's civil penalty "claim *first* accrue[s]" with the defendant's disputed conduct. 28 U.S.C. § 2462 (emphasis added). Adopting the district court's position therefore would create a circuit conflict on that issue.

1. In *Core* for example, the Fifth Circuit addressed the proper application of the five-year clock under § 2462. The enforcement provision at issue there specified mandatory administrative adjudication of violations and penalties, followed by a collection action in federal district court. The Fifth Circuit held that no type of administrative proceeding can stop the five-year clock, *id.* at 759 F.2d 483-84, meaning the government must finish the administrative adjudication *and* file a court collection action within five years of the challenged conduct.

As the Fifth Circuit explained, because "[t]he progress of administrative proceedings is largely within the control of the Government," a "limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or none." *Id.* at 482-83. With language and reasoning that presaged *Gabelli*, the Fifth Circuit said that such an outcome would be a "derogation of the right to be free of stale claims, which

comes in time to prevail over the right to prosecute them." *Id*. at 483 (citing *Burnett v. N.Y. Cent. R.R. Co*., 380 U.S. 424, 428 (1965) (quoting *Order of R.R. Telegraphers*, 321 U.S. at 348-49)).[9]

The First Circuit expressly rejected the "core of *Core*," *Meyer*, 808 F.2d at 913, but reached a similar conclusion with respect to when a claim first accrues. In *Meyer*, the court of appeals understood that the limitations period begins to run once the defendant's conduct occurs[10] Departing from *Core*, the First Circuit held that mandatory administrative adjudication sufficed to stop that five-year clock, and that a subsequent enforcement action in federal district court was also timely if commenced within a second five-year clock after a "final assessment of an administrative penalty" that is a "statutory prerequisite to the bringing of an action judicially to enforce" the penalty. *Id*. at 920-22.[11] But the First Circuit also

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[9] More recently, the Fifth Circuit reaffirmed *Core*'s holding and rationale in *Securities and Exh. Comm'n v. Bartek*, 484 F. App'x 949 (5th Cir. 2012), a decision that expressly (and presciently) declined to follow a Second Circuit opinion that was later overturned in *Gabelli*.

[10] That specific issue was not contested in *Meyer*. 808 F.2d at 914 ("Both parties concede that, as applied to the [statute at issue], [§ 2462] *at least requires* that any administrative action aimed at imposing a civil penalty must be brought within five years of the alleged violation.") (emphasis added; footnote omitted).

[11] This has been referred to as *Meyer's* "two-clock" rule, where the agency must commence its statutorily mandated administrative adjudication within five years, and a second five-year clock applies to any eventual court action to collect penalties.

recognized that where the statutory scheme did *not* provide for mandatory agency adjudication of civil penalty liability, but rather assigned the agency a prosecutorial role, those types of functions would not serve to satisfy § 2462 and stop the five-year limitations clock. *Id.*

As the First Circuit explained:

> Administrative determinations of [the prosecutorial] ilk, however necessary they may be to the prosecution of enforcement actions, are not in any sense adjudicative. At bottom, they comprise nothing more or less than decisions to bring suit. In significant contrast to the adjudicative administrative proceedings required before [the statute at issue] penalties may be imposed and enforced, these determinations fall entirely within the suzerainty of the government. Were the statute of limitations to run against, say, an F.T.C. action, the Commission would have only its own indecision to blame. The [statute at issue] analogue to this kind of administrative prerequisite is not the imposition of a statutory penalty by an [administrative law judge ("ALJ")] after notice, discovery, and hearing; rather, it is the Department's initial issuance of a charging letter. No one disputes that the limitations period on wholly administrative action runs from the time of the underlying violation rather than from the government's decision to prosecute the charge. Indeed, if statutes of limitations did not begin running until a party resolved to bring suit or otherwise take affirmative action to vindicate its rights, no statute of limitations would ever lapse; the promise of repose would be as empty as a beggar's purse. To liken prosecutorial decisionmaking to mandatory administrative adjudication is to compare plums with pomegranates.

Id. at 920-21.[12] The upshot here is that, under *Meyer*'s reasoning, in cases where the government is statutorily designated to fulfill a prosecutorial role, the government needs to file a court action within five years of the challenged conduct.

The district court's decision cannot be reconciled with either the First or Fifth Circuit's approach. Setting aside what might "stop the clock," those courts agree that it is the defendant's conduct—*not* the *agency's*—that *starts* it. The district court here reached the opposite result, refusing even *to start* the five-year clock until the agency finishes its part in the civil penalty process. Neither *Core*

[12] The Sixth, Seventh, and Eighth Circuits have similarly held that where the statute authorizing the penalty provides for administration adjudication of penalty liability, resulting in a final order, the limitations period for a subsequent enforcement or collection action begins after the administrative proceeding has concluded. *See Securities and Exh. Comm'n v. Mohn*, 465 F.3d 647, 654 & n.3 (6th Cir. 2006) (after civil penalty was administratively imposed and affirmed in a final Securities and Exchange Commission ("SEC") order, and SEC sought to recover penalty in federal court, Sixth Circuit held that the SEC's case was a "collection action," and that "a claim accrues and the period of limitations begins to run on any collection proceeding to which § 2462 applies once the underlying administrative action establishing liability becomes final"); *Dep't of Labor v. Old Ben Coal Co*., 676 F.2d 259, 261 (7th Cir. 1982) (after an administrative hearing and a "final" order assessing civil penalties, the subsequent federal district court enforcement action was timely either because "the limitations period begins to run when the administrative order becomes final"); *United States v. Godbout-Bandal*, 232 F.3d 637, 640 (8th Cir. 2000) ("[W]here an Act which authorizes the assessment of a civil penalty also provides for an administrative procedure for assessing that penalty, the statute of limitations period set out in § 2462 will not begin to run until that administrative process has resulted in a final determination.").

nor *Meyer* support that result. Neither *Core* nor *Meyer* permit an infinite statute of limitations. The district court decision does.

The decision below defies *Core* and *Meyer* in another respect. *Core* and *Meyer* both recognize that, in many situations, the statute of limitations does not *stop*—it is not satisfied—until the agency files suit. *Meyer* recognizes an exception for statutes that require agency *adjudications*. As explained below, however, this case would not fall into that exception. This case involved FERC's execution of its prosecutorial (enforcement) role. There is no basis for stopping the limitations period (or refusing to start it) in view of the agency's prosecutorial delay. Because the district court found that the limitations period here did not start until years after appellants' alleged violations, that decision must be reversed.

III. FERC'S ALTERNATIVE ARGUMENT CONTRADICTS THE PLAIN STATUTORY MEANING, COMMON SENSE, AND THE CASE LAW

Before the district court, FERC argued that its action was timely because (1) the "show cause proceeding was commenced within five years of the violations and, therefore, satisfies § 2462;" and (2) a new, second five-year limitations clock applies to the filing of the court action. FERC Opposition at 1, JA 317. FERC claimed that *Meyer* supported this position. *Id.*

The court below did not adopt FERC's analysis. Instead, the court stated that because it concluded that FERC's cause of action accrued sixty days after appellants failed to pay the Penalty Assessment Order, the court did not need to

address FERC's "alternative argument" that the show cause order proceeding satisfied § 2462. *FERC II* at 21 n.24, JA 392. Because we anticipate that FERC may revive this argument, we lay bare a few key flaws that are fatal to FERC's argument.[13]

First, FERC's position creates the same infinite statute of limitations problem as *FERC II*. Between FERC's two limitations clocks, there is an elastic period, unbounded in time. FERC could file its federal district court penalty action at any distance of time, with no connection to the time of the alleged violations.

Under FERC's view, once it issues a show cause order, it is "off the clock." The second clock starts when FERC can file a court case, because it has issued a penalty assessment order and sixty days have passed. But between those two points in time, the only requirement is FPA§ 31's requirement that once FERC issues a notice of election (which historically has happened with a show cause

[13] FERC may try to bolster this alternative argument by referring to the district court's statement that the administrative hearing under the Default Option is commenced when FERC issues the show cause order. *FERC II* at 33 (Under the Default Option, the "traditional Administrative ALJ proceeding[] . . . begins when FERC issues the [show cause order]."), JA 404. That statement provides no help to FERC because it is mistaken. Pursuant to FERC's own regulations, the administrative adjudication contemplated by FPA § 31(d)(2) is commenced by a separate order: "If the respondent is not entitled to an election . . . or does not timely elect to have the [district court procedures] of Rule 1509 apply, the Commission will commence a proceeding in accordance with the provisions of subpart E of this chapter," 18 C.F.R. § 385.1508 (emphasis added), which expressly states that a hearing is to be initiated by a notice or order that includes certain specifically required information, 18 C.F.R. § 385.502.

order, but can happen at any time), it shall "promptly" issue a penalty assessment order. 16 U.S.C. § 823b(d)(3)(A). But unlike § 2462's hard and fast five-year limitation, the FPA imposes no sanction if FERC does not issue its order "promptly." FERC's interpretation therefore not only more than doubles the five-year statute of limitations under § 2462—because of the two five-year clocks—but makes the time-bar endless.

FERC disputed below that its position makes the statute of limitations endless, but its logic is absurd. According to FERC, the threat of a government enforcement action is not indefinite because the would-be subject of the penalty can file a mandamus action to force the agency to commence a district court action. FERC Opposition at 16, JA 332. But "an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Mandamus would not lie as a matter of law. *See In re City of Va. Beach*, 42 F.3d 881, 884 (4th Cir. 1994). And even if that were not the case, FERC's delay would have to last quite a few years to prompt judicial action. *Id.* at 885-86 (delay of over four years insufficient to be action unreasonably delayed). In any event, FERC's argument on this point makes no sense. The only way to be free from untimely FERC claims for civil penalties is to file a mandamus action asserting that FERC has unreasonably delayed filing an action for civil penalties? The person facing a potential penalty not only has no

"clear and indisputable [right"] to that discretionary act, *id.* at 884, but opposes it in the first place. FERC's mandamus argument is nonsense.

Second, *Meyer* only saw § 2462 as permitting a second limitations period where the agency was required to engage in a mandatory administrative adjudication of penalty liability. *Meyer* drew a sharp distinction between statutory schemes that assign the agency a prosecutorial role versus ones that provide for "mandatory administrative adjudication." 808 F.2d at 920-21. *Meyer* thus recognized that if an agency's claim only accrued after some sort of prosecutorial decisionmaking, the agency would have the ability to forestall the limitations period, which is wholly inconsistent with its purpose. *Id.*

FERC's role in the civil penalty process is prosecutorial, not adjudicative. Where, as here, there is an election for federal district court adjudication, the FPA requires FERC to assess the penalty without any adjudication and prove its case in a federal district court action under the Federal Rules of Civil Procedure and the Federal Rules of Evidence. *See generally FERC I*, JA 18.[14] As *Meyer* concluded, "administrative determinations of this ilk" do not dictate claim accrual under § 2462: "No one disputes that the limitations period on wholly administrative action runs from the time of the underlying violation rather than from the

[14] *See also Clifton Power Corp. v. Fed. Energy Regulatory Comm'n*, 88 F.3d 1258, 1263-64 (D.C. Cir. 1996) (Under FPA's "alternate route, the Commission promptly assesses a penalty without a hearing.").

government's decision to prosecute the charge." 808 F.2d at 920. *Meyer* thus contradicts, rather than supports FERC's position.

Moreover, FERC's show-cause-order process is an agency invention that has no statutory basis.[15] And the district court determined in *FERC I* that the process before FERC bore none of the hallmarks of an adjudication.[16] Indeed, the court

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[15] No show cause order or proceeding is mentioned anywhere in FPA § 31(d)(3). None is mentioned in the FERC regulations implementing § 31(d)(3). *See generally* 18 C.F.R. pt. 385, Subpart O ("Procedures for the Assessment of Civil Penalties Under Section 31 of the Federal Power Act"). And none is mentioned in the description of FPA § 31(d)(3) set forth in FERC's Assessment Procedures Policy. The Assessment Procedures Policy states simply, "Though not required by the statute, the Commission will allow the person to file with the Commission . . . any legal or factual arguments that could justify not issuing the assessment or a reduction or modification of the proposed penalty." *Process for Assessing Civil Penalties*, 117 FERC ¶ 61,317 at P II.5.1 (2006). The current approach was adopted by FERC in 2007: "To provide additional due process in all future civil penalty cases under the FPA, [and two other statutes FERC administers], at the time Office of Enforcement investigative staff completes its investigation, it will transmit to the Commission a report with recommended findings and conclusions of fact and law and the Commission will attach the report to a show cause order to respond to the recommended findings." *Energy Transfer Partners, L.P*, 121 FERC ¶ 61,282 at P 89 (2007). In short, "'the procedures that [FERC] allege[s] govern [its] penalty assessment . . . ar[i]se from FERC's own policies, and are not derived from the express language of the statute.'" *FERC I* at 25 (quoting *Silkman*, 233 F. Supp. 3d at 219)), JA 42.

[16] There is no statutory requirement "that the Commission meet any evidentiary standard, such as preponderance, before assessing a penalty," and the subject of the investigation has no opportunity "to test the reliability or veracity of the Commission's evidence through the evidentiary standards of either the Federal Rules of Evidence or the APA's requirement that 'irrelevant, immaterial, or unduly repetitious evidence' be excluded in formal hearings." *FERC I.* at 25, 28 (quoting 5 U.S.C. § 556(d)), JA 42, 45. Nor is there any requirement that the Commission *(cont'd)*

correctly confirmed that the district court action is the appellants' "*first* opportunity for an adversarial adjudication" of the claims against them. *Id*. at 29, JA 400.[17]

CONCLUSION

The electric power industry makes up about five percent of the gross national product of the American economy. Jeannine Anderson, *US Electric Sector Provides 5% of GDP, Supports 7 Million Jobs, Study Finds*, Am. Pub. Power Ass'n (Aug. 2, 2017), https://www.publicpower.org/periodical/article/us-electric-sector-provides-5-gdp-supports-7-million-jobs-study-finds.

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"'act as a neutral decision-maker' when making its penalty assessment under the Alternate Option." *Id.* at 25 (quoting *Barclays*, 247 F. Supp. 3d at 1136), JA 42; *see also id.* at 22-23 (noting that FERC conducts investigations "as an *enforcer*, not as a neutral arbiter"), JA 39-40.

[17] One district court addressing the statute of limitations came to the same conclusion. *See Barclays Bank PLC*, No. 2:13cv02093, 2017 WL 4340258, at *15 (holding that the statute of limitations for a district court action brought pursuant to the Default Option runs from the time of the underlying violation). A different court reached the opposite conclusion. *See Fed. Energy Regulatory Comm'n v. Silkman*, 177 F. Supp. 3d 683, 700-01 (D. Mass. 2016) ("*Silkman I*") (holding that FERC's district court action was timely under § 2462). Recently, the transferee court now presiding over the *Silkman* case issued an order agreeing with *Silkman I* that FERC's claim was timely. *See Fed. Energy Regulatory Comm'n v. Silkman*, No. 1:16-cv-00205, Order on Motions for Summary Judgment (D. Me. Jan. 4, 2019) (ECF No. 155) ("*Silkman II*"). Both *Silkman I* and *Silkman II* were based on the conclusion that FERC had "conducted an adjudication" and that *Meyer* controlled. *See Silkman II*, Slip Op. at 93 (quoting *Silkman I*, 177 F. Supp. 3d at 700).

And electricity itself is the lifeblood of the American economy—the engine that powers practically everything else. *Id.* In the words of *Gabelli*, the destabilizing threat to repose that is posed by the decision below imperils interests that are "vital to the welfare" of a critical and large part of the nation's economy. *Gabelli*, 568 U.S. at 449.

And the logic of the decision below is not limited to the electric industry. By extension, any statutory scheme for imposing civil penalties that includes some prerequisite, however trivial, that must precede the filing of a court action would fall prey to the same outcome reached by the district court in this case.

The five-year statute of limitations in § 2462 cannot be a potentially infinite period of time controlled exclusively by the federal government. That is unlawful, and the damage it would pose is too great.

In sum, because the district court action below was filed more than five years after all but four days of the challenged conduct, FERC's claims for all but those last four days are time-barred. Accordingly, the order below should be reversed.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 34(a), appellants respectfully request that this Court grant them oral argument on the issue presented by this appeal.

Respectfully submitted,

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January 14, 2019

CERTIFICATE OF COMPLIANCE

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure, the undersigned counsel for appellants certifies that the accompanying brief is printed in 14 point proportionally spaced typeface, with serifs, and, including footnotes, contains no more than 13,000 words.

According to the word-processing system used to prepare the brief, Microsoft Word, it contains 10,244 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments).

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 2019, I caused this Brief to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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I further certify that on this 15th day of January, 2019, the required copies of the Brief shall be hand filed with the Clerk of the Court.

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STATUTORY ADDENDUM

Section 31(d) of the Federal Power Act, 16 U.S.C. § 823b(d) provides:

§ 823b. Enforcement

* * * *

(d) Assessment

(1) Before issuing an order assessing a civil penalty against any person under this section, the Commission shall provide to such person notice of the proposed penalty. Such notice shall, except in the case of a violation of a final order issued under subsection (a), inform such person of his opportunity to elect in writing within 30 days after the date of receipt of such notice to have the procedures of paragraph (3) (in lieu of those of paragraph (2)) apply with respect to such assessment.

(2)(A) In the case of the violation of a final order issued under subsection (a), or unless an election is made within 30 calendar days after receipt of notice under paragraph (1) to have paragraph (3) apply with respect to such penalty, the Commission shall assess the penalty, by order, after a determination of violation has been made on the record after an opportunity for an agency hearing pursuant to section 554 of Title 5 before an administrative law judge appointed under section 3105 of such Title 5. Such assessment order shall include the administrative law judge's findings and the basis for such assessment.

(B) Any person against whom a penalty is assessed under this paragraph may, within 60 calendar days after the date of the order of the Commission assessing such penalty, institute an action in the United States court of appeals for the appropriate judicial circuit for judicial review of such order in accordance with chapter 7 of Title 5. The court shall have jurisdiction to enter a judgment affirming, modifying, or setting aside in whole or in Part, the order of the Commission, or the court may remand the proceeding to the Commission for such further action as the court may direct.

(3)(A) In the case of any civil penalty with respect to which the procedures of this paragraph have been elected, the Commission shall promptly assess such penalty, by order, after the date of the receipt of the notice under paragraph (1) of the proposed penalty.

(B) If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (A), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in Part, such assessment.

(C) Any election to have this paragraph apply may not be revoked except with the consent of the Commission.

(4) The Commission may compromise, modify, or remit, with or without conditions, any civil penalty which may be imposed under this subsection, taking into consideration the nature and seriousness of the violation and the efforts of the licensee to remedy the violation in a timely manner at any time prior to a final decision by the court of appeals under paragraph (2) or by the district court under paragraph (3).

(5) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order under paragraph (2), or after the appropriate district court has entered final judgment in favor of the Commission under paragraph (3), the Commission shall institute an action to recover the amount of such penalty in any appropriate district court of the United States. In such action, the validity and appropriateness of such final assessment order or judgment shall not be subject to review.

(6)(A) Notwithstanding the provisions of Title 28 or of this chapter, the Commission may be represented by the general counsel of the Commission (or any attorney or attorneys within the Commission designated by the Chairman) who shall supervise, conduct, and argue any civil litigation to which paragraph (3) of this subsection applies (including any related collection action under paragraph (5)) in a court of the United States or in any other court, except the Supreme Court. However, the Commission or the general counsel shall consult with the Attorney General concerning such litigation, and the Attorney General shall provide, on request, such assistance in the conduct of such litigation as may be appropriate.

(B) The Commission shall be represented by the Attorney General, or the Solicitor General, as appropriate, in actions under this subsection, except to the extent provided in subparagraph (A) of this paragraph.

28 U.S.C. § 2462 provides:

§ 2462. Time for commencing proceedings

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.