No. 18-328

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN ROTKISKE,
Petitioner,
v.
PAUL KLEMM, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

MATTHEW B. WEISBERG
WEISBERG LAW
7 South Morton Avenue
Morton, PA 19070

SCOTT E. GANT
Counsel of Record
SAMUEL S. UNGAR
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

Attorneys for Petitioner

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INTRODUCTION

Congress is presumed to legislate against the background of common law principles and aware of this Court's decisions. There is no dispute here that these important presumptions apply to statutes of limitations, or that in some circumstances equitable principles developed in the common law can suspend or extend a statutory limitations period, so long as Congress has not foreclosed their application.[1]

There is also no dispute that the statute of limitations in the FDCPA does not foreclose the application of *some* equitable principles to permit filing of a claim more than one year after an FDCPA violation occurred. Respondents and the United States acknowledge, for example, that Congress did not preclude the application of "equitable tolling" to an FDCPA claim.[2]

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[1] Brief for Respondents ("Resp. Br.") 8 ("Unless Congress has foreclosed the availability of equitable tolling, a plaintiff may try to prove that he is entitled to it."); Brief for the United States as Amicus Curiae ("U.S. Br.") 9 ("Equitable principles sometimes may warrant excusing a plaintiff's failure to comply with a limitations period, or precluding a defendant from asserting untimeliness as a defense."); *see also California Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2050-51 (2017) (tolling rules often apply to statutes of limitations based on the presumption that Congress legislates against background common-law principles).

[2] Resp. Br. 35-36; Brief in Opposition to the Petition 8-11; U.S. Br. 23 ("equitable tolling applies to the FDCPA"), 25 (agreeing with parties that equitable tolling is available for some FDCPA claims).

The parties' disagreements revolve around three issues: (1) whether there is a common law discovery rule; (2) whether Congress foreclosed application of the common law discovery rule to the FDCPA, and (3) whether Petitioner's claim, as alleged (and accepted as true at this stage in the case), fits within the contours of the common law discovery rule.

Respondents and their amici are wrong about these three issues. There is a common law discovery rule; Congress did not foreclose the rule's application to FDCPA claims; and Petitioner's case fits well within the rule's established contours.

ARGUMENT

I. There Is a Common Law Discovery Rule

Respondents appear to dispute the existence of a common law discovery rule. In their view, "Congress uses 'discovery' language when it intends to incorporate a discovery rule." Resp. Br. 21. According to Respondents, if Congress does not itself mention a discovery rule, none may apply; the common law doctrine appears to play no role. *See id.* at 17-18.

Attempting to substantiate this view, Respondents claim "most" of the cases cited in Petitioner's brief "are best understood as applying the doctrine of equitable tolling." *Id.* at 37. Of course, even this claim concedes that some of Petitioner's cases concern the discovery rule—not equitable tolling. In any event, Respondents' effort to recast discovery rule cases as equitable tolling cases is unavailing.

Perhaps most problematic for Respondents is *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), which made clear that the equitable doctrine it describes "is read into ***every*** federal statute of limitation"—even those with "an explicit statute of limitation for bringing suit." *Id.* at 397 (emphasis added). *See* U.S. Br. 30 (acknowledging).

Respondents inaccurately claim the holding in *Holmberg* concerned "equitable tolling" (Resp. Br. 37), but the Court never used that phrase. Moreover, Respondents claim the "fundamental difference" between the discovery rule and equitable tolling is that the latter "presumes claim accrual" and "steps in to toll, or stop, the running of the statute of limitations." Resp. Br. 9 (citation omitted); *see also id.* at 8. This is plainly not the rule addressed in *Holmberg*, under which "the bar of the statute *does not begin to run* until the fraud is discovered." 327 U.S. at 397 (emphasis added). Respondents also claim equitable tolling is available only when "some extraordinary circumstance" stood in plaintiff's way and prevented timely filing. Resp. Br. 8-9 (quoting *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016)), 15, 42. But the rule at issue in *Holmberg* imposes no such limitation. And Respondents' illustration of an "extraordinary circumstance"—"active misleading on the part of the Defendants" (*id.* at 43)—is directly at odds with the rule in *Holmberg*, which applies "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."

327 U.S. at 397 (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)).[3]

That *Holmberg* concerns the discovery rule is reinforced by *Gabelli v. SEC*, 568 U.S. 442, 449 (2013), where a unanimous Court extensively quoted from *Holmberg* in describing that rule by name.[4] While the *Gabelli* Court determined that the discovery rule did not apply to the government penalty actions before it, the Court never questioned the existence or longstanding roots of the rule. *Id.*; *see also Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644-45 (2010) ("[T]he 'discovery rule' [is] a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it"; identifying *Holmberg* in explaining the origins of the rule).

While the following year the Court did cite to *Holmberg* when discussing "equitable tolling," that

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[3] The United States similarly suggests "some" discovery rule cases cited in Petitioner's opening brief "applied equitable tolling," including *Holmberg*. U.S. Br. 24. This suggestion is misplaced. The United States' previous account of these cases was more faithful to the Court's decisions. *See* Brief for Respondent at 34, *Gabelli v. SEC*, 568 U.S. 442 (2013) (No. 11-1274) ("*Gabelli* Resp. Br.") ("[T]his Court has repeatedly applied the fraud discovery rule to limitations statutes that did not contain express language regarding the plaintiff's discovery of his cause of action.") (citing *Holmberg*, *Exploration Co. v. United States*, 247 U.S. 435 (1918), *Bailey*, and other cases).

[4] Some of Respondents' amici acknowledge *Holmberg*'s instruction that "the 'equitable doctrine' regarding discovery of fraud 'is read into every federal statute of limitation,'" but try to dismiss it as "dicta." Brief of Mortgage Bankers Association & U.S. Chamber of Commerce as Amici Curiae ("MBA Br.") 13. This Court has never overturned *Holmberg*, or suggested that Congress, or any lower court or litigant, should disregard its language.

reference, like others, appears best viewed as a mistaken use of the term. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10-11 (2014).[5] As Respondents acknowledge: "this Court has not always spoken perfectly clearly in this area. The discovery rule and equitable tolling are 'frequently confused.'" Resp. Br. 39 (citation omitted); *see also* Brief of Prof. Bray, et al., as Amici Curiae ("Scholars Br.") 22-23 ("It must be acknowledged that the Court has on occasion used the terms 'tolling' and 'equitable tolling' too loosely, to refer to the discovery rule."); U.S. Br. 23, 30.[6]

Respondents similarly attempt to recast *Exploration Co. v. United States*, 247 U.S. 435 (1918). Resp. Br. 38. But the decision itself refutes that effort. Explaining the "almost universal" rule that "statutes of limitations to set aside fraudulent transactions *shall not begin to run until the discovery of the fraud*," the Court rejected the contention that the lawsuit filed after the expiration of the limitations period was foreclosed. 247 U.S. at 449 (emphasis

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[5] *Holmberg* played no apparent role in the *Lozano* opinion after this lone citation.

[6] This is not the only context in which the Court has used terms in a manner that led to uncertainty or confusion among lower courts and litigants. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (discussing previous overuse of the word "jurisdiction," and observing: "This Court, no less than other courts, has sometimes been profligate in its use of the term."). The Scholars' amicus brief aptly observes: "This case would be a good occasion to clarify the distinction between the two doctrines." Scholars Br. 23; *cf.* U.S. Br. 30 (positing that the discovery rule may be "a specialized application of, or close analogue to, equitable tolling"); *see also* Brief for Petitioner ("Pet. Br.") 9 n.11.

added). So too with *Bailey v. Glover*. Resp. Br. 38. Using Respondents' distinction between equitable tolling and the discovery rule, *Bailey*—addressing the principle that "in mitigation of the strict letter of general statutes of limitation . . . when the object of the suit is to obtain relief against a fraud, the bar of the statute *does not commence to run* until the fraud is discovered or becomes known to the party injured by it" (88 U.S. (21 Wall.) at 347) (emphasis added)—was not about equitable tolling.[7]

These cases, and others,[8] clearly established the doctrine eventually known as the "discovery rule."[9] Aware of these decisions, it is difficult to imagine that Congress would have expected, when enacting the FDCPA in 1977, anything other than judicial application of the discovery rule to a claim under the

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[7] The misguided effort to recast discovery rule cases as equitable tolling cases—including by exploiting inconsistent uses of those phrases (*see supra* at 5)—brings to mind the pitfalls of a "jurisprudence of labels," at the expense of engaging the substance and purposes of the doctrines. *Pleasant Grove City v. Summum*, 555 U.S. 460, 484 (2009) (Breyer, J., concurring); *see also International Soc'y for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) ("[P]ublic forum doctrine ought not to be a jurisprudence of categories rather than ideas . . . .").

[8] Respondents fail to address additional cases and treatises evidencing the discovery rule cited in the Scholars' amicus brief. *See* Scholars Br. 6-8.

[9] After struggling to portray these cases as about equitable tolling, Respondents ultimately concede "Petitioner's cases generally involved language that was at least arguably susceptible to a discovery rule . . . ." Resp. Br. 39.

statute delayed only by *defendants' own* fraudulent or concealing actions.[10]

The United States has previously addressed the Court about the deep historical roots of a common law discovery rule, explaining it "dates to the beginning of the Republic." *Gabelli* Resp. Br., *supra* note 3, at 24. And here, the United States again acknowledges (albeit tepidly) a "per se" common law equitable "rule that the Court has long recognized in the specific context of fraud claims." U.S. Br. 17, 28 (under the rule "a limitations period is deemed not to apply to a suit for fraud while the plaintiff, despite reasonable diligence, remains unaware of the fraud"); *see also id.* at 23, 27-32.

* * *

Unable to credibly demonstrate that there is no common law discovery rule from cases predating enactment of the FDCPA, Respondents turn to *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), suggesting it is the case "most relevant" to the question presented here. Resp. Br. 28. Hardly. *TRW*'s conclusion that the particular text and structure of the Fair Credit Reporting Act "evince Congress' intent to preclude judicial implication of a discovery rule" in *that*

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[10] Having told Congress repeatedly that it would presume federal laws are enacted against the background of the common law, the presumption constitutes an important element of the "dialogue between Congress and the Court." *Boumediene v. Bush*, 553 U.S. 723, 738 (2008). Congress is entitled to rely on that presumption in enacting legislation. Watering down or disregarding the presumption, as effectively urged by Respondents, would show unwarranted disregard for a commitment made to a co-equal branch of government.

statute, including "by explicitly including a more limited" statutory discovery rule, 534 U.S. at 28, tells us nothing about the FDCPA, which contains no such provision. *See also* Scholars Br. 19-20 ("*TRW* did not alter the traditional rule. . . . The holding of *TRW* tells us little about how to interpret a statute that neither expressly includes nor expressly precludes a discovery rule."). Also irrelevant here is *TRW*'s discussion of the court of appeals's belief that "all federal statutes of limitations, *regardless of context*, incorporate a general discovery rule." 534 U.S. at 27 (emphasis added). Petitioner is making no such claim.

II. Congress Did Not Foreclose Application of the Common Law Discovery Rule to FDCPA Claims[11]

Respondents assert that even if there is a common law discovery rule, the FDCPA's "plain text" "overrides" it. Resp. Br. 14, 29.[12] It does not.[13]

Respondents' primary argument is that by using the phrase "violation occurs," Congress closed the door on application of the common law discovery rule by courts applying the FDCPA's statute of

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[11] Protests by Respondents and the United States about a supposed discovery rule "presumption" are a red herring. *See* Resp. Br. 1, 14, 27, 29; U.S. Br. 8, 15-17. As explained in Petitioner's opening brief, and here again, Congress *is* presumed to legislate against the background of common law principles and aware of this Court's decisions. Those background common law principles apply, unless Congress has foreclosed their application. That much should be uncontroversial. However, "[r]espect for the distinct roles assigned to Congress and the federal courts by the Constitution warrants a *statute-specific determination* of whether Congress intended for the discovery rule to apply" and "Petitioner is not advocating that the Court adopt a generally applicable discovery rule." Pet. Br. 15 n.16 (emphasis added). Petitioner's view here appears consistent with that previously advanced by the United States concerning the discovery rule. *See generally Gabelli* Resp. Br., *supra* note 3.

[12] Neither Respondents nor their amici explain how the FDCPA's text overrides or precludes a common law discovery rule but neither overrides nor precludes common law equitable tolling, which also has the effect of allowing a claim to be brought more than one year after the "violation occurred."

[13] Respondents falsely claim "Petitioner ignores the statutory text altogether." Resp. Br. 14. Petitioner's opening brief discussed the text, explaining it "does not settle whether the discovery rule applies to private civil lawsuits under the statute." Pet. Br. 16-19.

limitations.[14] Resp. Br. 1. According to Respondents, "Congress could not have spoken more clearly." *Id.* It could have. Congress could have said, for example, that "an action . . . may be brought . . . within one year from the date on which the violation occurs, *regardless of when the violation is discovered*." That would have been clearer. As would: ". . . within one year from the date on which the violation occurs, *with no exceptions*." Either would have resolved the question currently before the Court.

Legislators sometimes draft imperfectly. *See, e.g.*, *Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1061 (2019) (statutory provision "does not represent an example of perfect draftsmanship"); *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (statute "contains more than a few examples of inartful drafting"). Congress surely could have been clearer about whether the common law discovery rule should be applied by courts to FDCPA claims falling within the ambit of the rule.[15] But the fact that

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[14] Respondents cite no decision by this Court holding that a statute's selection of "occurrence" to start the limitations period precludes application of the discovery rule or any other equitable doctrine implicating the timeliness of a cause of action. Petitioner is aware of none. The Court has declined to address the application of a discovery rule to suits under Title VII, which must be brought within 180 days "after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e–5(e)(1). *See Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 642 n.10 (2007).

[15] If Congress had been clearer, there likely would not have been a split among the courts of appeals, with two circuits holding the discovery rule applies. *See* Resp. Br. 11 ("The

Congress could have eliminated doubt by drafting differently does not foreclose either side's reading of the statute—as the United States told the Court in a case decided last Term.[16] Just as Congress knows how to include a statutory discovery rule in legislation, it likewise knows how to preclude the application of some or all equitable doctrines that suspend the running of, or toll, a limitations period. That is precisely what Congress does with a statute of repose. But the text of section 813(d) makes abundantly clear it is not a statute of repose (Pet. Br. 16)—and Respondents do not contend otherwise.[17]

Respondents insist that a statutory "occurrence rule" and common law "discovery rule" cannot coexist. Nonsense. How a statute describes the event triggering commencement of the statute of limitations (*e.g.*, accrual, cause of action arises, liability arises, occurrence, etc.) is an issue separate

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Third Circuit's decision created a circuit split on whether the FDCPA incorporates the discovery rule.").

[16] Brief for Respondents at 15, *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853 (2019) (No. 17-1594) ("[T]he fact that Congress could have expressed its intent more clearly does not mean that petitioner's interpretation . . . is correct.").

[17] The United States seems, in this case, to share Respondents' view that use of the phrase "violation occurs" precludes application of a common law discovery rule. U.S. Br. 12-13, 15. It previously advanced a different—and more sound—view to this Court. *Gabelli* Resp. Br., *supra* note 3, at 17 ("The Court's reasoning in cases like *Bailey*, *Exploration Co.*, and *Holmberg* does not depend on whether a limitations period commences upon a claim's 'accrual' *or upon some other event*.") (emphasis added).

from whether Congress has foreclosed the application of common law principles which are otherwise the background against which Congress legislates. *See* Scholars Br. 19 (noting that *Exploration Co.*, 247 U.S. at 445, involved an "occurrence rule," with the limitations period running from the date of patent issuance);[18] *cf. Credit Suisse Secs. (USA) LLC* v. *Simmonds*, 566 U.S. 221, 228 (2012) (holding that "limitations period would not expire until two years after a reasonably diligent plaintiff would have learned the facts underlying" her cause of action even though statute specified that the limitations period ran from date "profit was realized" by the defendant).[19]

To be sure, Congress sometimes provides by statute that a limitations period does not begin to run until discovery of a violation. But the existence of *statutory* discovery rules in some laws does not negate the existence of a *common law* rule or its application to other laws. "In the statutes in which Congress has included express discovery rules, the evident intent of Congress has been to limit, clarify, or enhance the traditional [discovery] rule in the specific

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[18] The United States seemingly reads *Exploration Co.* similarly, noting the Court applied "the *Bailey* rule" even though "the applicable limitations period . . . ran from the 'date of issuance of' the land patent that the plaintiff sought to annul." U.S. Br. 31 (quoting 247 U.S. at 445).

[19] For the same reason, also irrelevant is the notion that a limitations period commences when a plaintiff has a "complete and present cause of action." *See* Resp. Br. 7, 14, 29, 30; U.S. Br. 14. What triggers commencement of a limitations period generally does not determine whether the discovery rule may suspend its commencement in certain circumstances.

areas governed by those statutes, not to abrogate the traditional rule in cases of fraud brought under other statutes." Scholars Br. 2-3; *see also id*. at 17.

Because the text of section 813(d) does not manifest congressional intent to foreclose judicial application of the common law discovery rule, discerning legislative intent requires consideration of the purposes and structure of the FDCPA.[20] And those strongly support application of the common law discovery rule to FDCPA claims falling within its contours.[21] Applying the discovery rule to an otherwise untimely FDCPA claim of a victim who is unaware for a time of the violation giving rise to his potential cause of action because of deceptive, misleading or fraudulent conduct by the prospective defendant exemplifies a situation "in which excusing an untimely filing serves the statute's goals." Resp. Br. 26.[22]

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[20] *See* U.S. Br. 11 ("[A] court may conclude that, although a particular time bar's text is ambiguous, the statutory context indicates that Congress intended a discovery rule to apply.").

[21] *See generally* Pet. Br. 29-39; *id*. at 37 (foreclosing application of the discovery rule "would have the perverse effect of *encouraging* debt collectors to conceal their FDCPA violations, because even a short delay in discovery, coupled with section 813(d)'s one-year limit, could be enough to shield the debt collector from responsibility for his or her actions," contrary to the history that led to enactment of the statute).

[22] *See* U.S. Br. 21 ("Petitioner is correct that, for some violations of the FDCPA, a plaintiff might not learn even of the defendant's conduct within the limitations period."); Resp. Br. 35 (acknowledging same).

III. Petitioner's Claim Fits Within the Established Contours of the Common Law Discovery Rule

The discovery rule, as set out in *Bailey*, *Exploration Co.* and *Holmberg*, among other cases, is applied without imposing rigid limitations on the concept of "fraud" for purposes of evaluating the defendant's action which impeded discovery of the misconduct. For example, in *Holmberg*, the "fraudulent conduct" that "prevented the plaintiff from being diligent" was concealing stock ownership under the name of another person. *Holmberg*, 327 U.S. at 393, 396. *See also* 2 Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 276, at 708 (1893) ("The provision that if a person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action, applies to causes of action for fraud, as well as to other causes of action . . . ."); *Merck*, 559 U.S. at 645 (noting "both state and federal courts have applied forms of the 'discovery rule' to claims other than fraud."). In *TRW*, the Court described *Holmberg*'s rule as applicable to "fraud *or concealment*." 534 U.S. at 27 (emphasis added).[23]

But even taking a narrow view of the common law discovery rule, "th[is] case falls within the [discovery] rule's traditional domain of fraud."

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[23] The United States has previously recognized that the discovery rule applies in cases of "concealment" in addition to fraud. *Gabelli* Resp. Br., *supra* note 3, at 29.

Scholars Br. 2; *id.* at 13 ("[T]his case . . . presents no occasion for the Court to delineate the discovery rule's outer limits, because the case falls comfortably within the discovery rule's traditional domain of causes of action premised on fraud.").

A. Petitioner's Allegations Should Be Accepted as True at This Stage

Because this case comes to the Court after dismissal at the pleading stage, Petitioner's allegations are accepted as true. Pet. Br. 7 n.6; *see also Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1927 (2019) ("Because this case comes to us on a motion to dismiss, we accept the allegations in the complaint as true.").

B. Petitioner's Dismissed Claim Sounds in Fraud

The default judgment obtained by Respondents at issue in Petitioner's complaint was made possible by the filing of a fraudulent Affidavit of Service.[24] *See Fraud*, Black's Law Dictionary 775 (10th ed. 2014) (defining "fraud" as "[a] knowing misrepresentation or knowing concealment of a material fact" or "[a] reckless representation made without justified belief in its truth to induce another person to act").

Petitioner's amended complaint specifically challenged "the nature of the service of the collection

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[24] Certification of Paul Klemm Ex. B, *Rotkiske v. Klemm*, No. 15-3638 (E.D. Pa. Oct. 30, 2015), ECF No. 16-6 (Affidavit of Service, falsely verifying that the "Adult in charge of Defendant(s) residence" had been served).

lawsuit" which "purposefully ensured that plaintiff could never properly be served." Amended Complaint at ¶ 14, *Rotkiske v. Klemm*, No. 15-3638 (E.D. Pa. Oct. 19, 2015), ECF No. 15. The complaint also alleged that Respondents' actions were self-concealing, and invoked *Bailey*. *Id*. The willful failure to properly serve a complaint but nevertheless file proof of service is referred to in the debt collection industry as "sewer service." *See* Pet. Br. 12 n.14. Petitioner claimed before the district court that Respondents "violated the FDCPA in obtaining the judgment." Resp. Br. 6; *see also* Pet. App. 17.[25]

The debt collection industry's "leading trade association," one of Respondents' amici, acknowledges the conduct alleged here is "fraudulent." Brief of ACA International as Amicus

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[25] Application of the discovery rule does not turn on whether the underlying statute is directed partially or at all to fraudulent conduct, as Respondents inaccurately assert. Resp. Br. 32. *Cf. Holmberg*, 327 U.S. at 393 (Federal Farm Loan Act); *Exploration Co.*, 247 U.S. at 445 (statute governing suits by United States "to vacate and annul [land] patents"); *Bailey*, 88 U.S. (21 Wall.) at 346 (Bankruptcy Act). It turns on whether the plaintiff was prevented from timely filing a claim due to fraudulent (or similar) conduct—which may or may not be part of the underlying cause of action. Even so, the FDCPA's proscriptions are broad, and numerous provisions can be violated by fraudulent acts. *See*, *e.g.*, 15 U.S.C. §§ 1692e ("A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt."), 1692f ("A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt."). Respondents recognize that "[a] particular violation of the FDCPA . . . could conceivably involve a misrepresentation or other fraudulent act." Resp. Br. 32.

Curiae ("ACA Br.") at 1, 12 (discussing "sewer service" and "similar fraudulent service of process practices"). The United States, recognizing Petitioner's allegation "that respondents filed a false affidavit of service attesting that he had been properly served," observed that such conduct is a "close analogue to, what courts have termed, 'fraudulent concealment.'" U.S. Br. 26 (quoting *Klehr v. A. O. Smith Corp.*, 521 U.S. 179, 194 (1997)).[26]

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[26] Respondents contend that the discovery rule must be applied to all FDCPA claims or none at all. Resp. Br. 1, 7, 8, 37; *see also* MBA Br. 13. That makes no sense. As the Scholars' amicus brief explains: "The traditional rule applies to *actions* sounding in fraud, not to *statutes* aimed at preventing fraud. The relevant question is not whether the FDCPA as a whole is primarily concerned with fraud, but rather whether the plaintiff's claim is premised on fraud." Scholars Br. 3, 21; *see also id*. at 20 ("[T]he Court of Appeals erroneously assumed that a discovery rule must apply to all claims under a statute or to none of them."). This "all or none" argument is at odds with how equitable principles generally apply. Indeed, the equitable tolling doctrine supported by Respondents and the United States applies in *precisely* the way Respondents reject here: to some claims, but not others, brought under a particular statute (or common law doctrine). *See* Resp. Br. 8 ("Equitable tolling allows a plaintiff to make an individual, case-specific showing that equity should excuse his late filing."); *id*. at 15 (same).

C. Petitioner's Claim Should Be Addressed by the District Court After Remand

Respondents complain about the sufficiency of Petitioner's complaint for reasons not argued or adjudicated below, including that the complaint "does not describe—much less attach—the affidavit Petitioner seems to believe shows fraud." Resp. Br. 43.[27]

The only basis for dismissal of the complaint was the statute of limitations (Pet. App. 29), and the Third Circuit correctly observed "[t]he relevant facts . . . are undisputed" (*id.* at 3). In any event, if the case is remanded, should the district court deem it appropriate, the complaint could be amended to provide further details about the fraudulent affidavit of service. *Cf.* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend pleadings] when justice so requires."). If there is any doubt about whether Petitioner can sufficiently allege fraud covered by the discovery rule (*see* U.S. Br. 31-32), such issues are properly addressed in the first instance by the district court, which can oversee the amendment of pleadings and other case management issues. *See Department of Transp. v. Association of Am. Railroads*, 135 S. Ct. 1225, 1234 (2015) ("[O]urs is a court of final review and not first view.") (citation omitted).

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[27] *See* Pet. Br. 9 n.9.

CONCLUSION

The Judgment of the Third Circuit should be reversed, and the case remanded for further proceedings.

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Respectfully submitted,

SCOTT E. GANT
Counsel of Record
SAMUEL S. UNGAR
BOIES SCHILLER FLEXNER LLP
1401 New York Avenue, NW
Washington, DC 20005
(202) 237-2727

Attorneys for Petitioner