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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the "discovery rule" applies to the one-year statute of limitations under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692, *et seq*.

PARTIES TO THE PROCEEDING

Petitioner is Kevin Rotkiske, the plaintiff below.

Respondents are Paul Klemm, Esq., Nudelman, Klemm & Golub, P.C., Nudelman, Nudelman & Ziering, P.C, Klemm & Associates, and John Does 1-10, the defendants below.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit was issued on May 15, 2018, is reported at 890 F.3d 422, and is reproduced in the Petition Appendix at Pet. App. 1.[1]

The March 15, 2016 Opinion of the United States District Court for the Eastern District of Pennsylvania is unreported, but is available at 2016 WL 1021140, and is reproduced at Pet. App. 15.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Third Circuit issued its opinion and entered judgment on May 15, 2018. Pet. App. 1-14. The Petition for Writ of Certiorari was filed on September 11, 2018, and granted on February 25, 2019.

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[1] References to the Petition Appendix are in the form "Pet. App."

STATUTORY PROVISIONS

This case concerns interpretation of the Fair Debt Collection Practices Act (the "FDCPA"), Pub. L. No. 95-109, 91 Stat. 874 (1977), including section 813(d), which provides:

> An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs.

15 U.S.C. § 1692k(d).[2]

[2] The "Jurisdiction" heading of 15 U.S.C. § 1692k(d) was not included in the statute passed by Congress. § 813, 91 Stat. at 881. The heading was added by the Office of the Law Revision Counsel, and has never been enacted into positive law. Where a change "was made by a codifier without the approval of Congress, it should be given no weight." *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

STATEMENT OF THE CASE

A. The Fair Debt Collection Practices Act

Confronted with "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," and finding that then-existing laws and procedures were "inadequate to protect consumers," Congress enacted the FDCPA in 1977 "to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(a), (b), (e).[3]

The FDCPA's broad proscriptions include a ban on the use of "any false, deceptive, or misleading representation" by debt collectors, including sixteen specific forms of such conduct. § 1692e. The statute similarly prohibits "unfair or unconscionable means to collect or attempt to collect any debt." § 1692f.

While government agencies—initially the Federal Trade Commission (FTC), and now primarily the Consumer Financial Protection Bureau (CFPB)—are assigned reporting responsibilities and enforcement authority by the

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[3] *See also Sheriff v. Gillie*, 136 S. Ct. 1594, 1598 (2016) (noting enactment to prevent competitive disadvantage of appropriately-acting debt collectors); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577 (2010) ("Congress enacted the FDCPA . . . to ensure that debt collectors who abstain from [abusive] practices are not competitively disadvantaged"). The statute also "seeks to help consumers . . . by preventing consumer bankruptcies." *Midland Funding, LLC v. Johnson*, 137 S. Ct. 1407, 1414 (2017).

FDCPA, "the chief means of obtaining compliance with the act [is] . . . the civil liability section . . . by enabling the consumer to sue whenever there has been a violation of the act." 123 CONG. REC. H8996 (daily ed. Sept. 8, 1977) (statement of Rep. Annunzio, primary sponsor). As the Court has observed, Congress included in the FDCPA a "calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman*, 559 U.S. at 603; *see also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1720 (2017) (statute "authorizes private lawsuits and weighty fines designed to deter wayward collection practices"); Margaret Mikyung Lee, Congressional Research Serv., *Fair Debt Collection Practices Act (FDCPA)* 10 (2013) (The FDCPA reflects "congressional intent to deter unlawful debt collection practices via private enforcement actions."). These statutory incentives include the recovery of "any actual damage" suffered from the violation, 15 U.S.C. § 1692k(a)(1), and the discretionary award of statutory damages, subject to certain limits. § 1692k(a)(2)(A). Congress also provided for the award of attorney's fees and costs to prevailing plaintiffs. § 1692k(a)(3).

The third-party debt collection industry governed by the FDCPA is enormous. According to an Ernst & Young report commissioned by the industry's largest trade association, in 2016 U.S. debt collection agencies earned $10.9 billion in commissions and fees, and employed almost 130,000 individuals. Ernst & Young, *The Impact of Third-*

Party Debt Collection on the US National and States Economies in 2016 i (2017).[4]

Notwithstanding the FDCPA, the third-party debt collection industry generates large numbers of complaints to the federal government each year. Between 2009 and 2013, the FTC received more than 600,000 complaints about debt collection activities.[5]

Congress recognized that attributes of the third-party debt collection industry render it ripe for consumer mistreatment. For instance, "[u]nlike creditors, who generally are restrained by the desire to protect their good will when collecting past due accounts," third-party debt collectors may "have no future contact with the consumer and often are unconcerned with the consumer's opinion of them." S. Rep. No. 95-382, at 2 (1977); *see also* Jeff Sovern & Kate E. Walton, *Are Validation Notices Valid?: An Empirical Evaluation of Consumer Understanding of Debt Collection Validation Notices*, 70 S.M.U. L. Rev. 63, 66 (2017) ("Congress's view that it need regulate only external collectors may perhaps be explained by the perceived reluctance of original creditors to lose customer good will by abusing customers. In contrast, debt buyers and collectors who do not need

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[4] *See also Midland Funding,* 137 S. Ct. at 1416 (Sotomayor, J., dissenting) ("Debt collection is a lucrative and growing industry."); 2019 CFPB ANN. FDCPA REP. 8 ("Debt collection is an $11.5 billion industry that employs nearly 118,500 people across approximately 7,700 collection agencies in the United States.").

[5] 2010-14 CFPB ANN. FDCPA REPS. The CFPB has estimated that "28 percent of consumers with a credit file have a trade line listed for a debt a third party is collecting." 2019 CFPB ANN. FDCPA REP. 8.

a good reputation among consumers can be less concerned about alienating customers and so might be tempted to behave badly."). The operation of the industry in the decades since the FDCPA was enacted has not lessened the acute need for its effective operation to deter and redress misconduct by debt collectors. *See* Note, *Improving Relief From Abusive Debt Collection Practices*, 127 Harv. L. Rev. 1447, 1449 (2014) (observing that "[t]he consumer debt collection industry is premised on a high-volume business model," and that high volume strategies "rely heavily on the assumption that consumers often fail to show up to contest the case" with "defective notice" among the reasons for failure to respond); Viktar Fedaseyeu & Robert Hunt, *The Economics of Debt Collection: Enforcement of Consumer Credit Contracts* 1, 35 (Fed. Reserve Bank of Phila., Working Paper No. 18-04, 2018) ("[w]hen the creditor hires third-party firms that collect in their own name . . . such firms are less constrained by the creditor in terms of the practices that they use"; "third-party debt collection generates, on average, about 10 times more complaints from consumers than a first-party debt collector"; third-party debt collectors "use harsher debt collection practices than original creditors").

B. Facts and Procedural History[6]

Between 2003 and 2005, Petitioner incurred credit card debt of approximately $1,200. Petitioner's bank referred that debt to Respondent Klemm & Associates ("Klemm") for collection.

In March 2008, Klemm filed suit against Petitioner seeking to collect on the debt. Klemm attempted personal service at an address it believed belonged to Petitioner, but Petitioner had moved. Instead, an individual unknown to and unassociated with Petitioner ostensibly accepted service. However, Klemm was unable to locate Petitioner's new address, and the complaint was withdrawn. Pet. App. 16.

In January 2009, Klemm again filed suit and again attempted service at the same address from which Petitioner had long ago moved.[7] During this attempt a different individual—also unknown to Petitioner—ostensibly accepted service. Pet. App. 16. Klemm then filed with the court an Affidavit of Service, which falsely verified that the "Adult in

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[6] This case comes to the Court after dismissal at the pleading stage. Petitioner's allegations were appropriately accepted as true by the courts below when dismissing Petitioner's case. Pet. App. 4 n.2, 18. The Third Circuit therefore correctly observed that "[t]he relevant facts of this case are undisputed." Pet. App. 3.

[7] As the Third Circuit noted, Respondent Paul Klemm was initially the managing partner of Respondent Klemm & Associates, then moved to a different firm. That firm—initially known as Nudelman, Nudelman & Ziering, and later known as Nudelman, Klemm & Golub—is also named as a respondent. Pet. App. 3 n.1. Like the Third Circuit, "for the sake of simplicity we refer only to Klemm." *Id.*

charge of Defendant(s) residence" had been served. Certification of Paul Klemm ("Klemm Certif.") Ex. B, *Rotkiske v. Klemm*, No. 15-3638 (Oct. 19, 2015 E.D. Pa.), ECF No. 16-6.

Lacking notice of the second proceeding, Petitioner did not appear, and on March 5, 2009, the Philadelphia Municipal Court entered a default judgment against Petitioner in the amount of $1,182.39. Docket Report, *Capital One Bank, N.A. v. Rotkiske*, SC-09-01-06-3327 (Phila. Cty. Mun. Ct.) ("Mun. Ct. Dkt.").

Petitioner lacked any knowledge of service of the complaint, of the lawsuit against him, or the default judgment, until September 2014, when he was denied a home mortgage as a result of the default judgment. Pet. App. 3, 16-17.

On June 29, 2015, less than one year after discovering the lawsuit filed against him and the default judgment, Petitioner filed suit in the United States District Court for the Eastern District of Pennsylvania. Pet. App. 3. He amended his complaint on October 19, 2015. "The Amended Complaint alleges that the Defendants deliberately made sure that [Petitioner] would not be properly served and thus wrongly obtained the default judgment against him in violation of the FDCPA." Pet. App. 17; *id.* at 27 (district court: Petitioner alleged Defendants served the lawsuit "at the same address as the first collection suit, even though the

Defendants knew this was no longer [his] residence.").[8]

Klemm moved to dismiss Petitioner's amended complaint on the basis that it was untimely.[9] On March 15, 2016, the District Court issued an opinion finding that "the discovery rule does not apply" to the FDCPA, and therefore that Petitioner's claim was untimely because "not filed within the one-year statute of limitations found in the FDCPA."[10] Pet. App. 26.[11]

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[8] The false Affidavit of Service filed by Respondents, which verified that the "Adult in charge of Defendant(s) residence" had been served, made it possible for a default judgment to be obtained without Petitioner's knowledge.

[9] Defendants also sought dismissal on the basis of the *Rooker-Feldman* doctrine. Pet. App. 18. That ground for dismissal was rejected by the district court, *id*. at 21, and was not appealed. Defendants did not seek dismissal on the ground that a violation of the FDCPA had not occurred. Defendants also moved, in the alternative, under Federal Rule of Civil Procedure 56(a), but the district court ruled instead on the basis of Federal Rule of Civil Procedure 12.

[10] The District Court contemporaneously issued an order granting Klemm's motion to dismiss with prejudice. *See* Pet. App. 29.

[11] The district court rejected Petitioner's invocation of "equitable tolling" on the ground that, "even though technically available," it was "no more than a second attempt to apply the discovery rule to his FDCPA claim." Pet. App. 29. The relationship of the discovery rule to "equitable tolling" (or other doctrines that may abate running of a limitations period, such as "equitable estoppel) is hardly self-evident. While "it is, in effect, a rule of interpretation," *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 681 (2014), equitable tolling does not appear to have a settled definition or parameters. In *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005), the Court observed: "Generally, a litigant seeking equitable tolling bears the

Petitioner timely appealed to the Third Circuit, and the appeal was briefed and then initially argued before a three-judge panel on January 18, 2017. Pet. App. 1. On September 7, 2017, before the panel released an opinion, the Court of Appeals *sua sponte* ordered rehearing *en banc*. *Id.* On May 15, 2018, the *en banc* Third Circuit affirmed the District Court's dismissal of Petitioner's FDCPA claim, holding that the statute's "one-year limitations period begins to run when a would-be defendant violates the FDCPA, not when a potential plaintiff discovers or should have discovered the violation." Pet. App. 6.

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burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Cf. Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990) (extensively discussing "equitable tolling" without defining it); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014) ("[E]quitable tolling [is] a doctrine that 'pauses the running of, or "tolls," a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'") (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)). The primary definition of equitable tolling in Black's Law Dictionary sounds strikingly like the discovery rule: "The doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discovery the injury until after the limitations period had expired, in which case *the statute is suspended or tolled until the plaintiff discovers the injury*." *See Equitable Tolling,* Black's Law Dictionary 656 (10th ed. 2014) (emphasis added).

SUMMARY OF ARGUMENT

Congress enacted the FDCPA more than four decades ago to "eliminate" widespread misconduct by third-party debt collectors—misconduct that was hurting consumers, and disadvantaging scrupulous debt collectors who suffered competitively when refraining from such tactics.

In addition to generally prohibiting false, deceptive, misleading, unfair and unconscionable conduct by third-party debt collectors, the FDCPA specifically proscribes a wide range of violations which can or are likely to occur without immediate awareness by the victim. *See infra* Section II.D.2. The existence of victims "blamelessly ignorant" of FDCPA violations giving rise to liability under the statute is not an anomaly. The FTC and CFPB report thousands of complaints about debt collector actions which, by their nature, might not come to the attention of the prospective plaintiff until months or years after they transpire. For example, of the approximately 600,000 complaints the FTC received about debt collection activities between 2009 and 2013, nearly half concerned actions by debt collectors that might occur without the consumer's knowledge at the time of the violation itself.[12] And it stands to

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[12] *See* 2010-14 CFPB ANN. FDCPA REPS (129,622 complaints about debt collectors who failed to provide written notice of a debt owed; 92,871 complaints about debt collectors who failed to identify themselves as debt collectors; 57,834 complaints about debt collectors who revealed the existence or amount of a debt to a third party).

reason that many more such violations occur but are not reported to the FTC or CFPB.[13]

Petitioner is a quintessential "blamelessly ignorant" plaintiff—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. Here, the default judgment obtained by Respondents was made possible by the filing of a fraudulent Affidavit of Service. *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").[14]

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[13] In 2016, several debt collectors paid $60 million to settle allegations they had operated a "default judgment mill." According to the complaint, the defendants would systematically generate summonses and complaints directed to debtors, intentionally fail to serve them, and submit false proofs of service to the courts in order to collect default judgments. *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 76 (2d Cir. 2015); *Sykes v. Harris*, No. 09 CIV. 8486 (DC), 2016 WL 3030156 (S.D.N.Y. May 24, 2016). The defendants obtained nearly 50,000 default judgments, creating more than $1 billion in liabilities for unsuspecting debtors. 780 F.3d at 70; 2016 WL 3030156 at *1.

[14] Petitioner's amended complaint specifically challenged "the nature of the service of the collection lawsuit" which "purposefully ensured that plaintiff could never properly be served . . . ." Amended Complaint at ¶ 14, Rotkiske v. Klemm, No. 15-3638 (Oct. 19, 2015 E.D. Pa.), ECF No. 15. The willful failure to properly serve a complaint but nevertheless file proof of service is common enough to have its own name in the debt collection industry—"sewer service." *See* Terry Carter, *Payback: Lawyers on Both Sides of Collection are Feeling Debt's Sting*, 96 A.B.A. J. 40, 45 (2010).

This case concerns the application of section 813(d)'s one-year limitations period to claims brought by the victim of an FDCPA violation who was blamelessly ignorant of the violation until more than one year after it occurred. The specific question presented to the Court is whether the "discovery rule"—an equitable doctrine, which either delays the commencement of, or suspends the running of, the applicable statute of limitations—applies to the FDCPA. It does.

The text of section 813(d) makes clear it is not a statute of repose, which would preclude the application of equitable doctrines to abate the running of the limitations period. Respondents seem to have conceded as much, arguing that the petition for certiorari should have been denied because of the availability of equitable tolling for an FDCPA claim. *See* Brief in Opposition to the Petition 8-11.

What the text of section 813(d) does not make clear, however, is whether an FDCPA claim is time-barred even if brought within one year of when the violation was or could have been discovered. The answer to that question lies elsewhere—in the common law reflected in, and developed by, this Court's decisions, and in the remainder of the FDCPA itself, whose purpose and structure strongly suggest the discovery rule applies.

Congress legislates against a background of common law principles. In the decades preceding enactment of the FDCPA, this Court issued several decisions that would have reasonably led Congress to conclude that a private civil suit like Petitioner's—delayed only by his blameless ignorance of the facts giving rise to his claim and by

defendants' own fraudulent or concealing actions, but brought within one year of learning those facts—would not be dismissed by a court as untimely. Congress drafted the FDCPA aware of those decisions, and nothing in the statute suggests it did not intend for them to apply to cases brought challenging violations of the statute. To the contrary, consideration of the purposes and structure of the FDCPA strongly suggest that the best reading of the statute is that it permits Petitioner's lawsuit to proceed notwithstanding that it was not filed within one year of the violation about which he was blamelessly ignorant.

ARGUMENT

I. The "Discovery Rule"

The discovery rule is "essentially one of equity," which "allows the cause of action to accrue when the litigant first knows or with due diligence should know the facts that will form the basis for an action." 2 Calvin W. Corman, *Limitation of Actions* § 11.1.1, at 134-35 (1991); *see also Discovery Rule*, Black's Law Dictionary 565 (10th ed. 2014) ("The rule that a limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim. The discovery rule usu[ally] applies to injuries that are inherently hard to detect . . . ."); 54 C.J.S. *Limitations of Actions* § 136 (Mar. 2019 update) (Under the discovery rule, "a cause of action does not accrue until a claimant knows or should reasonably know of the existence of his or her claim.").

"The [discovery] rule avoids dismissing a suit on grounds of limitation when a plaintiff is blamelessly

ignorant of his or her cause of action . . . ." *Id.* (footnote omitted); *see also* Kyle Graham, *The Continuing Violation Doctrine*, 43 Gonzaga L. Rev. 271, 278 (2008) ("The discovery rule" concerns "the plaintiff who remains excusably ignorant of a claim," and when applicable "the statute of limitations on a claim begins to run only when the plaintiff knew or should have known of the essential facts underlying the cause of action."[15]

* * *

The question before the Court is whether, under the best reading of the FDCPA, Congress intended to permit or foreclose a lawsuit like Petitioner's: one filed within one year of his learning about Respondents' violation of the statute, which could not have been filed within one year of the violation due to Petitioner's "blameless ignorance."[16]

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[15] "The often confusing distinction between accrual and tolling of statutes of limitations is at play in those cases discussing the discovery rule; the rule has been characterized as performing both functions." 4 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1056 (4th ed. Apr. 2019 update). It does not appear the distinction matters for purposes of this case, but Petitioner submits the better view is that the discovery rule precludes a limitations clock from starting to run at all, rather than "tolling" or pausing an already-running clock. *Cf. Merck & Co., Inc. v. Reynolds*, 559 U.S. 633, 644 (2010) ("[T]he 'discovery rule' [is] a doctrine that delays accrual of a cause of action until the plaintiff has 'discovered' it"). For that reason, this brief has removed the word "toll" from the Question Presented as it appeared in the Petition for Writ of Certiorari.

[16] Respect 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. *Cf. California Pub. Emps.' Ret. Sys. v. ANZ Secs.,*

II. Under the Best Reading of the FDCPA, Petitioner's Lawsuit Was Not Time-Barred and Should Not Have Been Dismissed on That Basis

Applying traditional tools of statutory interpretation, the best reading of the FDCPA is that Congress intended to permit a lawsuit like Petitioner's, and that the courts below erred in concluding otherwise.

A. The FDCPA's Text Does Not Settle Whether the Discovery Rule Applies to Private Civil Lawsuits Under The Statute

When interpreting a federal statute, this Court has made clear that its responsibility is to discern Congress's intent, and then honor that intent by employing the best reading of the statute consistent with it. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543 (2019).

The Court typically begins its inquiry with the text of the statute at issue.

Here, the text of section 813(d) makes one thing abundantly clear: it is not a statute of repose, which would preclude the application of equitable doctrines to abate the running of the limitations period. "[S]tatutory time bars can be divided into two categories: statutes of limitations and statutes of

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Inc., 137 S. Ct. 2042, 2050 (2017) ("[W]hether a tolling rule applies to a given statutory time bar is one 'of statutory intent.'"). Petitioner is not advocating that the Court adopt a generally applicable discovery rule.

repose. *ANZ Secs.*, 137 S. Ct. at 2049. Statutes of limitations "typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008); *see also United States v. Brockamp*, 519 U.S. 347, 350 (1997) ("Ordinarily limitations statutes use fairly simple language, which one can plausibly read as containing an implied 'equitable tolling' exception."). "In contrast, statutes of repose are enacted to give more explicit and certain protection to defendants. These statutes 'effect a legislative judgment that a defendant should be free from liability after the legislatively determined period of time.'" *ANZ Sec.*, 137 S. Ct. at 2049 (quoting *CTS Corp.*, 573 U.S. at 9).

In weighing whether Congress intended to create a statute of repose, the Court has looked for a "two-sentence structure," 137 S. Ct. at 2049, pairing a shorter statute of limitations with a "corollary" unqualified termination of liability. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 697 (2014); *see, e.g.*, 21 U.S.C. § 335b(b)(3)(B) ("No action may be initiated under this section . . . more than 6 years after the date when facts material to the act are known or reasonably should have been known by the Secretary but in no event more than 10 years after the date the act took place."); 28 U.S.C. § 1658 (suit "may be brought not later than the earlier of (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation."); *see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) ("The 3-year limit is a period of repose inconsistent with tolling.").

The FDCPA's time limit for filing suit was not drafted as a statute of repose, to which equitable or common law exceptions may not apply. *See CTS Corp.*, 573 U.S. at 9; *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1809 (2018) ("Statutes of repose . . . are not ubiquitous. Most statutory schemes provide for a single limitation period without any outer limit . . . .") (internal citation omitted).

Respondents appear to concede that the text of section 813(d) permits the application of equitable principles to a lawsuit brought under the FDCPA more than one year after the violation occurred, having argued that the petition for certiorari should have been denied because of the availability of equitable tolling for an FDCPA claim. *See* Brief in Opposition to the Petition 8-11.[17]

The Third Circuit likewise reads the text of section 813(d) as permitting the application of equitable principles to the FDCPA, finding that district courts have "discretion . . . to avoid patent unfairness" when applying the Act's limitations period. Pet. App. 10; *id.* at 13 ("we have already

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[17] Respondents have taken the position throughout this case that the text of the FDCPA does not foreclose the application of equitable tolling doctrines. Reply Brief in Support of Defendants' Motion to Dismiss the Complaint at 4, *Rotkiske v. Klemm*, No. 15-3638 (E.D. Pa. Nov. 17, 2015), ECF No. 18 ("Defendants are not claiming that equitable tolling cannot be used on an FDCPA claim . , , ,"); Appellees' Supplemental Brief, *Rotkiske v. Klemm*, No. 16-1668 (3d Cir. Dec. 21, 2017) (consumers "have a handful of tolling doctrines at their disposal for use in FDCPA cases—tolling doctrines such as fraudulent concealment.").

recognized the availability of equitable tolling for civil suits alleging an FDCPA violation").[18]

Because the text of section 813(d) does not manifest congressional intent to foreclose judicial application of the discovery rule, discerning legislative intent about that issue requires other interpretative tools.[19]

B. Congress Is Presumed to Legislate Against the Background of Common Law Principles and Aware of This Court's Decisions

"Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991); *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966 (2017) (discussing "presumption that Congress legislates against the background of general common-law principles"); *Smith v. United States*, 568 U.S. 106, 112 (2013) (faced with the legislature's silence about the applicable burden of

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[18] The Court of Appeals did not explain how it reconciles permitting equitable tolling with its conclusion that the text of section 813(d) categorically forecloses application of the discovery rule to claims brought by blamelessly ignorant plaintiffs.

[19] The Court of Appeals recognized that, in general, it should "begin[] with the statutory text and then proceed[] to consider its structure and context." Pet. App. 12. In this case, however, it stopped after considering a few words in section 813(d)—refusing to consider "historical or equitable" reasons to adopt a discovery rule. *Id.* at 13.

proof, concluding "we presume that Congress intended to preserve the common-law rule").

Thus, "[w]hen [Congress] adopts a statute, related judge-made law (common law) is presumed to remain in force and work in conjunction with the new statute absent a clear indication otherwise." Larry M. Eig, Congressional Research Serv., *Statutory Interpretation: General Principles and Recent Trends* 20 (2014); *see also Meyer v. Holley*, 537 U.S. 280, 286 (2003) (Congress's silence permits inference that it intended to apply ordinary background tort principles).

This important presumption often works in tandem with another: "[W]e presume that Congress expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997); *see also Merck*, 559 U.S. at 648 ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent."); *Exploration Co. v. United States*, 247 U.S. 435, 449 (1918) ("When Congress passed the act in question the rule of Bailey v. Glover was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind.").

As with all federal statutes, Congress is presumed to have drafted and enacted the FDCPA having in mind the common law and this Court's decisions. *Cf. ANZ Secs.*, 137 S. Ct. at 2050 ("Tolling rules . . . often apply to statutes of limitations based on the presumption that Congress 'legislate[s] against a background of common-law adjudicatory principles.") (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)).

C. Congress Reasonably Would Have Believed Courts Would Apply the Discovery Rule to the FDCPA In Light of This Court's Decisions Over the Preceding Decades

Congress began hearings on the legislation that became the FDCPA in April 1976, and ultimately passed the statute in September 1977.[20] In the preceding decades this Court issued several decisions that would have reasonably led Congress to conclude that a civil suit like Petitioner's—delayed only by his blameless ignorance of the facts giving rise to his claim and by defendants' own fraudulent or concealing actions, but brought within one year of learning those facts—would not be dismissed by a court as untimely.

* * *

In *Bailey v. Glover*, 88 U.S. 342 (1874), a case under the Bankruptcy Act, while acknowledging the importance of a limitations period and the objective of "speedy disposition of the bankrupt's assets," *id.* at 346, the Court also recognized the "very often applied" 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

[20] *The Debt Collection Practices Act: Hearings Before the Subcommittee on Consumer Affairs of the House Banking, Currency and Housing Committee on H.R. 11969*, 94th Cong. (1976). President Carter signed the FDCPA on September 20, 1977. 13 Weekly Comp. Pres. Doc. 1382-83 (Sept. 20, 1977).

party injured by it." *Id.* at 347. In rejecting a limitations argument, the Court further observed:

> In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by the affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud. We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

Id. at 347-48.[21]

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[21] "Since *Bailey v. Glover* the Supreme Court has adopted the position that in cases involving elements of fraud neither a statute of limitations nor the equitable doctrine of laches can begin to run until the fraud is or should have been discovered." Corman, *supra*, § 11.5.4, at 192-93; *see also* 2 Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* § 275, at 704 (1893) ("[I]t is an established rule of equity that where relief is asked on the ground of actual fraud, especially if the fraud has been concealed, that time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered."); *id.* at 707 ("It is an inflexible rule in those courts, when applying the

In *Exploration Co.*, 247 U.S. at 445, the Court addressed a limitations defense to a lawsuit alleging land patents were procured by fraud. Notwithstanding that the statute at issue provided lawsuits "shall only be brought within six years after the date of the issuance of such patents," the Court rejected the limitations argument, explaining: "We think the true rule is established in federal jurisprudence by the decision of this court in Bailey v. Glover." *Exploration*, 247 U.S. at 446. After noting that in the statute at issue *"there was no provision that the cause of action* should not be deemed to have accrued until the discovery of the fraud," referring to *Bailey*, the Court recounted: "But it was held that for the purpose of such statutes the cause of action did not accrue until the discovery of the fraud; that such was the undisputed doctrine of courts of equity, and that the weight of authority, English and American, applied the same rule to actions at law." *Id.* at 447. The Court then added: "When Congress passed the act in question the rule of Bailey v. Glover was the established doctrine of this court. It was presumably enacted with the ruling of that case in mind." *Id.* at 449. Therefore, in light of the "now 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

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general limitation prescribed in cases like this, to regard the cause of action as having accrued at the time the fraud was or should have been discovered . . . .").

of the limitations period was foreclosed. *Id.* ("We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government.").

In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), the Court considered a limitations challenge to a lawsuit under the Federal Farm Loan Act. Invoking *Bailey* and *Exploration*, the Court rejected the contention the lawsuit was too late: "this Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.'" *Id.* at 397 (quoting *Bailey*, 88 U.S. at 348). The Court elaborated, explaining unequivocally: "This equitable doctrine is read into ***every*** federal statute of limitation"—even those with "an explicit statute of limitation for bringing suit." *Id.* (emphasis added).[22]

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[22] The doctrine set out in *Bailey*, *Exploration* and *Holmberg* is applied without imposing rigid limitations on the concept of "fraud" for purposes of evaluating 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* Wood, *supra*, § 276 at 708 ("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

Three years later, the Court decided *Urie v. Thompson*, 337 U.S. 163 (1949), which concerned a limitations challenge to a lawsuit under the Federal Employers' Liability Act. Without expressly citing *Bailey*, *Exploration* or *Holmberg*, the Court ruled consistent with the doctrine reinforced by those decisions, rejecting the notion that Congress intended to impose a time bar on a plaintiff whose suit was delayed only by "blameless ignorance." *Id.* at 170. Barring such a suit, the Court concluded, could not be "reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time *after notice of the invasion of legal rights*." *Id.* (emphasis added).[23]

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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 . . . ."); Mary S. Humes, *RICO and a Uniform Rule of Accrual*, 99 Yale L. J. 1399, 1407 & n.54 (1990) (citing *Holmberg* to illustrate "expansion of the [discovery] rule to non-fraud Federal actions"); *id.* at 1418 ("Now the discovery rule governs most Federally created causes of action, regardless of whether these actions involve fraud."); Corman, *supra*, § 8.1, at 2-3 ("Doubtless, the expanded application of the discovery rule has been a leading development in contemporary adjudication of limitations actions."); 54 C.J.S. *Limitations of Actions* § 136 (Mar. 2019 update) ("Federal courts generally apply a discovery accrual rule when a statute is silent on the issue."). In *TRW Inc. v. Andrews*, 534 U.S. 19, 27 (2001), this Court described *Holmberg*'s rule as applicable to "fraud *or concealment*." (emphasis added). Later, in *Merck*, the Court observed that "both state and federal courts have applied forms of the 'discovery rule' to claims other than fraud." 559 U.S. at 645.

[23] By 1950, commentators recognized "judicial reluctance to attribute to Congress an intent to require the courts to depart

In *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231, 231 (1959), the Court rejected the argument that a claim under the Federal Employers' Liability Act not filed "within three years from the day the cause of action accrued" was too late. After the lower courts had dismissed the lawsuit of a plaintiff who delayed filing because the defendants represented that the plaintiff had seven years to sue (instead of three), this Court revered, explaining "we need look no further than the maxim that no man may take advantage of his own wrong." *Id.* at 232. "Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." *Id.* at 232-33 (footnote omitted). Finding nothing in the language or history of the Federal Employers Liability Act "to indicate that this principle of law, older than the country itself, was not to apply in suits arising under that statute," the Court held that the petitioner's lawsuit was timely. *Id.* at 234-35 (footnotes omitted).

If Congress had enacted the FDCPA after hearing no more from the Court after *Bailey*, *Exploration*, *Holmberg*, *Urie* and *Glus*, it would have been reasonable for Congress to expect that courts would apply the discovery rule to claims of a blamelessly ignorant plaintiff alleging violation of

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from the traditional equity practice of refusing to bar a plaintiff who has had no opportunity to discover the wrong." *Developments in the Law—Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1267 (1950) (footnote omitted).

the Act absent an express indication by the legislature that they should not.

But not long before Congress began drafting the FDCPA, the Court decided one of its most significant statute of limitations decisions: *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). In *American Pipe*, the Court held that the commencement of a putative class action "tolls the running of the statute for all purported members of the class," despite the four-year time limit specified in the statute at issue. *Id.* at 553. In explaining its decision, the Court pointedly observed that, when a plaintiff has been unable to sue because of the defendant's actions, "this Court has not hesitated to find the statutory period tolled or suspended." *Id.* at 559. The Court simultaneously also explained: "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *Id.*

* * *

These cases form the backdrop against which the FDCPA was enacted.[24] Taken together, it is difficult to imagine that Congress would have expected anything other than judicial application of the discovery rule to the FDCPA claim of Petitioner or any other blamelessly ignorant plaintiff.[25]

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[24] In *Merck*, the Court identified both *Bailey* and *Holmberg* in explaining the origins of the discovery rule. 559 U.S. at 644-45; *see also Gabelli v. SEC*, 568 U.S. 442, 449 (2013) (citing *Bailey* and *Holmberg*, and noting the rule's "centuries-old roots").

[25] In *Rotella v. Wood*, 528 U.S. 549 (2000), the Court observed that "the traditional federal accrual rule of injury discovery" is "generally appl[ied] . . . when a statute is silent on the issue." *Id.* at 555. The following year, in *TRW*, the Court noted its observation from *Rotella*, but remarked: "we have not adopted that position as our own." 534 U.S. at 27. In the decision below, the Third Circuit acknowledged it was departing from that court's "earlier practice of presuming that federal statutes of limitations include an implied discovery rule." Pet. App. 12; *see also id.* at 22 (district court: "Absent a contrary directive from Congress, the discovery rule applies to federal statutes of limitations."). The Court of Appeals attributed its shift to *TRW*. *Id.* at 12. But when Congress enacted the FDCPA in 1977, it almost certainly operated under the same view as the Third Circuit did before *TRW*—that courts regularly employed a discovery rule to the claims of blamelessly ignorant plaintiffs. Even if it is arguable that ***after*** *TRW* it would have been less reasonable for Congress to expect courts to apply the discovery rule to a statute absent express direction in the legislation, that has no bearing here given the FDCPA was enacted long before *TRW*. As for *TRW* itself, it rejected the Ninth Circuit's holding that "a generally applied discovery rule" governs claims under the Fair Credit Report Act, finding the particular text and structure of the Act "evidence Congress' intent to preclude judicial implication of a discovery rule." 534 U.S. at 28 ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one."). But Petitioner here is not advocating for a generally applicable discovery rule like

D. The FDCPA's Purposes and Structure Suggest the Discovery Rule Applies to Private Civil Lawsuits Under The Statute

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989). The Court's "duty, after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010)).

Confronted with "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors," and finding that then-existing laws and procedures were "inadequate to protect consumers," Congress enacted the FDCPA in 1977 "to eliminate abusive debt collection practices by debt collectors, [and] to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." § 1692(a), (b), (e). "Downright deceit" was among the misconduct that "drew Congress's eye to the debt collection industry," leading to enactment of the FDCPA. *Henson*, 137 S. Ct. at 1720.

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the Ninth Circuit's version rejected in *TRW*, and the FDCPA differs materially from the Fair Credit Report Act.

1. Congress Designed the FDCPA to Incentivize Private Civil Lawsuits as the Primary Means For Achieving the Statute's Objectives

This Court has previously recognized the centrality of private suits to achieving the FDCPA's objectives, noting its "calibrated scheme of statutory incentives to encourage self-enforcement." *Jerman*, 559 U.S. at 603; *see also* 123 CONG. REC. H8996 (daily ed. Sept. 8, 1977) ("the chief means of obtaining compliance with the act [is] . . . the civil liability section, that is, by enabling the consumer to sue whenever there has been a violation of the act.") (statement of Rep. Annunzio, primary sponsor). These statutory incentives include the recovery of "any actual damage" suffered from the violation, 15 U.S.C. § 1692k(a)(1), and the discretionary award of statutory damages, subject to certain limits. § 1692k(a)(2)(A). Congress also provided for the award of attorney's fees and costs to prevailing plaintiffs. § 1692k(a)(3).

In contrast with the robust private enforcement scheme created by the FDCPA, the FTC and CFPB historically bring only a handful of enforcement actions each year. For example, during 2018 the CFPB initiated one enforcement action, and the FTC initiated two. 2019 CFPB ANN. FDCPA REP. 24, 29, 32. Each agency initiated an average of fewer than seven enforcement actions annually in recent years. *See* 2015-19 CFPB ANN. FDCPA REPS.

2. Congress Structured the FDCPA to Include Among Its Targets Numerous Specifically Prohibited Actions About Which the Victim Could or Likely Would Be Unaware at the Time of the Violation

In addition to generally prohibiting false, deceptive, misleading, unfair and unconscionable conduct by third-party debt collectors, the FDCPA specifically proscribes a wide range of actions about which the victim could or likely would be unaware at the time of the violation—as occurred here.[26]

For example, section 804 requires or proscribes specific actions by "[a]ny debt collector communicating with any person *other than the consumer* for the purpose of acquiring location information about the consumer." 15 U.S.C. § 1692b (emphasis added). Because a violation of section 804

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[26] There is a consensus among the federal courts of appeals that "[i]n evaluating whether a particular debt-collection practice violates the Act," they should examine the practice from the perspective of the "least sophisticated debtor." *Levins v. Healthcare Revenue Recovery Grp. LLC*, 902 F.3d 274, 280 (3d Cir. 2018). *See also Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 & n.4 (1st Cir. 2014); *Kolbasyuk v. Capital Mgmt. Servs., LP*, 918 F.3d 236, 239 (2d Cir. 2019); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 408 (4th Cir. 1999); *Gonzalez v. Kay,* 577 F.3d 600, 607 (5th Cir. 2009); *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 758 n.8 (6th Cir. 2018); *O'Boyle v. Real Time Resolutions, Inc.*, 910 F.3d 338, 344 (7th Cir. 2018) ("unsophisticated debtor" standard); *Scheffler v. Gurstel Chargo, P.A.*, 902 F.3d 757, 761-62 (8th Cir. 2018); *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1061 (9th Cir. 2011); *Fouts v. Express Recovery Servs., Inc.*, 602 F. App'x 417, 421 (10th Cir. 2015); *LeBlanc v. Unifund CCR Partners,* 601 F.3d 1185, 1194 (11th Cir. 2010).

necessarily involves communication with someone other than the consumer, there will necessarily be a delay—potentially lengthy—between the violation and its discovery by the prospective plaintiff.

Section 805 provides "a debt collector may not communicate with a consumer in connection with the collection of any debt" under certain circumstances, but several of those circumstances turn on information not necessarily available to the consumer. 15 U.S.C. § 1692c(a). For instance, debt collector communication is proscribed:

> (2) if the debt collector ***knows*** the consumer is represented by an attorney with respect to such debt and ***has knowledge of, or can readily ascertain, such attorney's name and address***, ***unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer***; or
>
> (3) at the consumer's place of employment ***if the debt collector knows or has reason to know*** that the consumer's employer prohibits the consumer from receiving such communication.

§ 1692c(a)(2)-(3). (emphasis added).

Another provision, section 805(b), governs debt collector communication with third-parties in connection with collection of a debt—generally prohibiting them absent consent from the consumer, subject to specified exceptions. But because violations of this section arise based on

communications with someone other than the consumer, the prospective plaintiff is unlikely to be aware of a violation at the time it occurs. Moreover, awareness of a violation of this section may require knowledge of subsidiary facts not immediately available to the consumer—such as whether the communication was made with "the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy." 15 U.S.C. § 1692c(b).

Section 806 generally provides: "A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt." 15 U.S.C. § 1692d. Among the specific conduct prohibited in that section are several violations about which the consumer may not be immediately aware, including:

> (3) The publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of section 603(f) or 604(3) of this Act.
>
> (4) The advertisement for sale of any debt to coerce payment of the debt.
>
> (5) Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.
>
> (6) Except as provided in section 804, the placement of telephone calls without meaningful disclosure of the caller's identity.

15 U.S.C. § 1692d(3)-(6); 91 Stat. at 877.

Section 807 provides "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt," and then identifies sixteen specific examples of such prohibited conduct.[27] 15 U.S.C. § 1692e. Any violation under this section is capable of avoiding detection by the consumer because it necessarily turns on the provision of "false, deceptive, or misleading" representations, and the consumer may be unaware or unable to ascertain the accuracy of the information imparted by the debt collector.

Section 808 provides "[a] debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f. At least two types of conduct specifically prohibited by this section may escape detection by the consumer for months or years:

> (5) Causing charges to be made to any person for communications ***by concealment of the true purpose of the communication***. Such charges include, but are not limited to, collect telephone calls and telegram fees.
>
> (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if . . .

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[27] With one exception, these sixteen categories are unchanged since enactment of the FDCPA in 1977. In 1996, Congress amended 15 U.S.C. § 1692e(11) to alter the requirements for language debt collectors must use on legal pleadings. Pub. L. 104-208, § 2305, 110 Stat. 3009, 3425 (1996).

(B) ***there is no present intention to take possession of the property.***

15 U.S.C. § 1692f(5)-(6) (emphasis added).

Section 812(a) provides: "It is unlawful to design, compile, and furnish any form knowing that such form would be used to create the false belief in a consumer that a person other than the creditor of such consumer is participating in the collection of or in an attempt to collect a debt such consumer allegedly owes such creditor, ***when in fact such person is not so participating***." 15 U.S.C. § 1692j(a) (emphasis added). A violation of this section could plausibly escape a consumer's detection because the consumer is unaware or unable to ascertain whether such a person is actually participating.

3. Dismissing Lawsuits Filed By "Blamelessly Ignorant" Plaintiffs After Discovery of an FDCPA Violation as Time-Barred Is Inconsistent With the Purposes and Structure of the Statute, and Would Yield "Odd" Results Eschewed by The Court When Considering Congressional Intent

As the foregoing makes clear, by its very terms the FDCPA expressly prohibits numerous actions and types of misconduct about which the consumer may be unaware for months or years after they occur. The existence of victims "blamelessly ignorant" of FDCPA violations giving rise to liability is a logical consequence of the statute's provisions—not an anomaly.[28] And the existence of such violations is corroborated by FTC and CFPB reports of tens of thousands of complaints which, by their nature, might not come to the attention of the prospective plaintiff for a considerable period after the violation. *See supra* p.11 & n.12.

The notion that Petitioner and other blamelessly ignorant victims of FDCPA violations lost the right to sue even before learning of violations giving rise to their claims is precisely the kind of "odd" interpretive result the Court avoids "in the absence of any such indication in the statute." *Reiter v.*

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[28] The Third Circuit erroneously presumed that "the conduct proscribed by the FDCPA will usually be obvious to its victims," in attempting to distinguish this case from a prior decision in which it applied the discovery rule to another statute to avoid thwarting that statute's "fundamental objective." Pet. App. 9 n.3.

Cooper, 507 U.S. 258, 267 (1993); *see also Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) (quoting *Reiter*); *Corley v. United States*, 556 U.S. 303, 317 (2009) ("the absurdities of literalism . . . show that Congress could not have been writing in a literalistic frame of mind").[29]

Foreclosing lawsuits by blamelessly ignorant plaintiffs would also reward wayward debt collectors for concealing their misconduct from consumers as the limitations period starts and runs out. Indeed, it 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.[30] These results would be entirely at odds with "[t]he history that led to the enactment" of the statute, *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S.

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[29] It is hardly self-evident that the victim of an FDCPA violation who is unaware of the conduct giving rise to liability under the statute has Article III standing to sue before becoming aware of the violation. If there is no standing prior to discovery of the violation, the Third Circuit's interpretation of the FDCPA as foreclosing a claim before standing to assert it even exists may raise constitutional questions that would be avoided by application of the discovery rule.

[30] Congress no doubt understood that a lawsuit cannot be filed immediately upon discovery of an FDCPA violation. A consumer suspecting a violation would have to search for, and then consult with, an attorney, and then negotiate terms of engagement (including a fee arrangement), before being able to file a lawsuit. Debt collectors know this too—which means that concealing their misconduct may result in successful evasion of liability even if the violations are discovered by the consumer prior to the one year anniversary of their occurrence.

369, 380 (2004), and Congress's aim to "eliminate" abusive debt collection practices.

Such a rule also would have the counterintuitive effect of treating identical FDCPA violations differently, depending on the contingency of whether the victim learns of the violation before or after the one-year anniversary of its occurrence. But there is nothing in the FDCPA to suggest that Congress intended to enact a "sometimes-a-claim-sometimes-not" approach. *Green*, 136 S. Ct. at 1779.

Also at risk is the FDCPA's carefully "calibrated scheme" of self-enforcement. *Jerman*, 559 U.S. at 603. By legislative design, and in practice, "the chief means" of encouraging compliance with the FDCPA are the private lawsuits authorized by the statute, 123 CONG. REC. H8996, incentivized by the availability of actual and statutory damages, as well as attorney's fees and costs. Congress's scheme would be impaired by effectively rendering immune broad swaths of misconduct. And that would not only harm consumers, but it also would undermine Congress's express objective of leveling the competitive playing field between law-abiding and unscrupulous debt collectors.

Consideration of the FDCPA's purposes and structure strongly suggests that the best reading of the statute is that it permits Petitioner's lawsuit to proceed notwithstanding that it was filed more than one year after the violation about which he was blamelessly ignorant.[31] *Cf. Honda v. Clark*, 386 U.S.

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[31] On remand, once the case is beyond the pleading stage, Petitioner would have to establish before the district court that

484, 495, 500 (1967) (Based on "[a]n analysis of the statutory scheme as devised by Congress" and considering the "result most consistent with the legislative purpose of Act," the statute "itself requires tolling the limitation period."); *Jerman*, 559 U.S. at 618-19 (Kennedy, J., dissenting) ("When construing a federal statute, courts should be mindful of the effect of the interpretation on congressional purposes explicit in the statutory text.").

E. Applying the Discovery Rule to the FDCPA Is Fully Consistent With the General Purposes Underlying Statutes of Limitation

While statutes of limitation are "fundamental to a well-ordered judicial system," *Board of Regents of Univ. of State of New York v. Tomanio*, 446 U.S. 478, 487 (1980), their utility derives from the purposes they serve—primarily "preventing surprises" to defendants, and "barring a plaintiff who has slept on his rights." *Artis v. District of Columbia*, 138 S. Ct. 594, 608 (2018) (quoting *American Pipe*, 414 U.S. at 554). Thus, as the Court has recognized, "[m]ost

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he satisfies the factual predicate for application of the discovery rule: that he did not know, and could not through reasonable due diligence have known, the facts giving rise his FDCPA claim. *See* Corman, *supra* § 11.1.1, at 134-35; *Discovery Rule*, Black's Law Dictionary 565 (10th ed. 2014) ("limitations period does not begin to run until the plaintiff discovers (or reasonably should have discovered) the injury giving rise to the claim"; 54 C.J.S. *Limitations of Actions* § 136 (Mar. 2019 update) ("cause of action does not accrue until a claimant knows or should reasonably know of the existence of his or her claim.").

statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).

Where, like here, the only reason a lawsuit was not filed before expiration of the limitation period is "blameless ignorance" of the facts giving rise to the claim as a result of actions by the defendant, none of the primary purposes underlying statutes of limitation are served by foreclosing the suits as time-barred. *Cf*. Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 366 (1868) ("All statutes of limitation . . . must proceed on the idea that a party has had an opportunity to try his right in the courts.").

The consistency of abating the statute of limitations here with the general purposes underlying adopting limitations periods is another factor militating in favor of concluding that Congress intended to permit the abatement. *See*, *e.g.*, *American Pipe*, 414 U.S. at 555 ("the tolling rule we establish here is consistent . . . with the proper function of the limitations statute"); *Urie*, 337 U.S. at 170 ("Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights."); *see also Exploration*, 247 U.S. at 449 ("We cannot believe that Congress intended to give immunity to those who for the period named in the statute might be able to conceal their fraudulent action from the knowledge of the agents of the government."); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v.*

Ferbar Corp. of Cal., Inc., 522 U.S. 192, 200 (1997) (rejecting interpretation of statute under which "the limitations period commences at a time when the [plaintiff] could not yet file suit" as "inconsistent with basic limitations principles").

CONCLUSION

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

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Respectfully submitted,

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