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 OF AMICI CURIAE SAMUEL L. BRAY, DAVID MARCUS, AND STEPHEN C. YEAZELL IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICI CURIAE[1]

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Amici have no interest in who wins this case. The purpose of this brief is to provide the Court with the history of the doctrine that is now called the "discovery rule," because this history sheds considerable light on how courts should best interpret statutes of limitations that neither expressly include nor expressly preclude a discovery rule.

SUMMARY OF ARGUMENT

I. The doctrine now called the "discovery rule" originated in cases of fraud, where the victim never even realized he had been injured until long after the fraud was perpetrated. In such cases, American courts have always held that the limitations period does not begin until the victim discovers, or should reasonably have discovered, that he has been injured. The purpose of the rule has always been to

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this amicus brief.

prevent wrongdoers from profiting from their own wrongs. The rule has been read into every statute of limitations, regardless of how the statute is worded.

In the 20th century, when medical knowledge first allowed newly-discovered physical injuries to be traced to events that occurred many years earlier, courts extended the discovery rule to such latent injuries. In recent decades, courts have also used the discovery rule in other contexts in which an injury may not be reasonably discoverable until several years after its cause.

This case does not require the Court to identify the rule's outer limits, because the case falls within the rule's traditional domain of fraud. As we understand petitioner's complaint, it alleges that respondent deceitfully procured a default judgment against him by knowingly serving the wrong person, and that he did not find out until several years later. If this claim is true, under the traditional rule the limitations period would not begin until petitioner knew or should have known that he had been injured.

II. In light of this history, statutes that neither expressly include nor expressly preclude a discovery rule are best read to include a discovery rule in cases of fraud at the very least. Because the Court of Appeals below was apparently not informed of the discovery rule's history, the court drew three erroneous inferences from the text of the Fair Debt Collection Practices Act.

First, the Court of Appeals erred in inferring Congress's intent to reject a discovery rule from the fact that some statutes include express discovery rules but the FDCPA does not. 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 rule in the specific areas governed by those statutes, not to abrogate the traditional rule in cases of fraud brought under other statutes.

Second, the Court of Appeals erred in inferring Congress's intent to reject a discovery rule from the fact that the FDCPA's limitations period begins with the occurrence of an event rather than when a claim "accrues" or "arises." The traditional rule applies to all statutes of limitations, without regard to differences in their text, because the rationale for the rule does not depend on the precise wording of the statute.

Third, the Court of Appeals erred in assuming that a discovery rule must apply to all claims under the FDCPA or none of them. 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. Petitioner's Question Presented makes this erroneous assumption as well. The answer to the Question Presented, as worded, is not "yes" or "no" but "sometimes."

III. The Court of Appeals also erred in holding that petitioner should have invoked the doctrine of equitable tolling rather than the discovery rule. Equitable tolling does not apply in this situation. The discovery rule delays the commencement of the limitations period where the plaintiff does not know he has been injured because the injury is undiscoverable. Equitable tolling, by contrast, pauses an al-

ready-commenced limitations period where the plaintiff knows he has been injured and is diligently pursuing his rights but for some good reason does not file his suit on time. Where the victim of an injury does not know he has been injured, he has not been pursuing his rights diligently, or indeed at all, because he has not yet discovered that his rights have been violated. For this reason, he cannot satisfy one of the elements of equitable tolling.

ARGUMENT

I. In causes of action premised on fraud, courts have always delayed the start of the limitations period until the victim discovers or reasonably should discover that he has been injured.

How should a court apply a statute of limitations where the victim does not discover his injury, and could not reasonably discover it, until long after the injury was inflicted? In the 19th century, this question arose repeatedly in a single context—cases of fraud, where the fraudster was so successful that the victim never even realized he had been defrauded until years later. American courts quickly developed an answer. Even where the text of a statute of limitations included no exceptions, courts held that the start of the limitations period would be delayed until the victim discovered, or should reasonably have discovered, his injury.

A. It was Justice Story who first thoroughly explored the issue, in a case involving a defendant who had defrauded the plaintiff in the sale of a ship. *Sherwood v. Sutton*, 21 F. Cas. 1303, 1303

(C.C.D.N.H. 1828). The statute of limitations included no exception for actions founded on fraud. *Id.* The defendant had managed to conceal his deceit from the plaintiff until several years after the sale, when the limitations period would already have run had it commenced on the date of the sale. *Id.* at 1305. "How far," Justice Story asked, "has such a concealment been held to constitute an avoidance of the bar of the statute of limitations?" *Id.*

He began by surveying English equity cases, which he found to have established a clear rule: "as fraud is a secret thing, and may remain undiscovered for a length of time, during such time the statute of limitations shall not operate." *Id.* (citation and internal quotation marks omitted). Justice Story turned to the English law courts and determined that they applied the identical rule. *Id.* at 1305-06. He then catalogued the American cases, which followed the English rule. *Id.* at 1306. In cases of fraud, he concluded, the limitations period does not commence until the victim discovers or should have discovered the fraud. *Id.* at 1307.

"What, then, is the reason, upon which this exception has been established?", Justice Story asked. *Id.* "It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs, which it was designed to cure." *Id.* If the limitations period began with the fraudulent sale rather than with the victim's discovery of his injury, fraudsters would be rewarded for successfully keeping their victims in the dark for as long as possible. "The statute of limitations was mainly intended to suppress fraud," Justice Story observed, "by preventing fraudulent and unjust claims from starting up at

great distances of time …. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation." *Id.* Indeed, he concluded, "if any exception out of the words of the statute is to be created by implication, I can scarcely conceive of one, which stands upon better reason than that now insisted on; for it is in furtherance, and not in evasion of the legislative intention." *Id.*

The Court consistently applied this doctrine in subsequent years. For example, in *Veazie v. Williams*, 49 U.S. 134 (1850), an auctioneer deceived a bidder by making fictitious bids that caused the bidder to overpay. The auction took place in 1836, but the bidder did not discover the scheme until 1840, after the limitations period would have expired had it commenced with the sale. *Id.* at 158. The Court held that the suit was not barred by the statute of limitations, because the bidder did not "suspect any imposition till informed of it within a few years; and then he seasonably applied for relief, and should not be barred from obtaining it by any lapse of time while the fraud or mistake as to the bids not being real remained undiscovered." *Id.*

Similarly, in *Rosenthal v. Walker*, 111 U.S. 185, 186 (1884), the defendant effected a fraudulent transfer of much of his inventory before declaring bankruptcy. The bankruptcy trustee did not find out until four years later. *Id.* at 187. The Court held that the trustee could recover from the defendant, despite the two-year statute of limitations, because the defendant's fraud had been hidden from the trustee. *Id.* at 189-90.

See also Meader v. Norton, 78 U.S. 442, 458 (1870) ("Laches and the statute of limitations are set up in argument, but such defences cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered."); *Bailey v. Glover*, 88 U.S. 342, 349-50 (1874) ("[W]e hold that when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing."); *Brown v. Cty. of Buena Vista*, 95 U.S. 157, 160 (1877) (statute of limitations would not apply if fraud could be proven, "because the fraud, if it existed, was not known sufficiently early. The statute could run only from the time of the discovery."); *Traer v. Clews*, 115 U.S. 528, 537-38 (1885) (quoting extensively from *Bailey* and *Rosenthal*); *Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130, 136 (1887) ("[W]here relief is asked on the ground of actual fraud, especially if such fraud has been concealed, 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."); *Amy v. City of Watertown*, 130 U.S. 320, 324 (1889) ("[W]here one person has been injured by the fraud of another, and the facts constituting such fraud do not come to the knowledge of the person injured until some time afterwards, the statute will not commence to run until the discovery of those facts, or

until by reasonable diligence they might have been discovered.").

American treatises consistently restated this doctrine. *See, e.g.*, Joseph K. Angell, *A Treatise on the Limitation of Actions at Law, and Suits in Equity* 193 (1829) (noting that it has "been expressly decided, in this country, by courts of law, that where there is fraud, the statute [of limitations] does not operate, until the party is conscious of it"); *Whether Fraud is a Sufficient Answer, in an Action at Law, to a Plea of the Statute of Limitations*, 1 U.S.L. Intelligencer & Rev. 139, 140 (1829) ("[W]here the delay in bringing the suit is owing to the fraud of the defendant, the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain a knowledge that he had a cause of action."); 2 Joseph Story, *Commentaries on Equity Jurisprudence* 739 (2d ed. 1839) ("In cases of fraud, or mistake, it [i.e., the limitations period] will begin to run from the time of the discovery, of such fraud or mistake, and not before."); H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 332 (1883) ("[W]here the action is predicated upon the fraud of a party …. the statute would not begin to run until the fraud was, or reasonably could have been, discovered."); William Trickett, *The Law of Limitations of Actions in Pennsylvania* 248 (1888) ("In cases in which fraud is the fact out of which a cause of action arises, the commencement of the statutory term will be postponed until the discovery of this fact."); Henry F. Buswell, *The Statute of Limitations and Adverse Possession* 548 (1889) ("[W]here the delay in bringing suit is owing to the fraud of the defendant, the cause of action ought not to be con-

sidered as having accrued until the plaintiff could obtain a knowledge that he had a cause of action.").

The oft-stated rationale for this rule was the one expressed by Justice Story—to prevent wrongdoers from benefiting from their own wrongs. The rule "is founded in a sound and philosophical view of the principles of the statutes of limitation," the Court reflected in *Bailey*, 88 U.S. at 349. "To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure." *Id.* As one of the commentators explained, "the defendant is not to be permitted to avail himself of his own fraud by successfully setting up the statute [of] limitation[s] to defeat the plaintiff's claim." Buswell, *Statute of Limitations*, 548.

Although this rule originated in equity and was often described as an equitable doctrine, the Court made clear that it applied equally in actions at law. *Bailey*, 88 U.S. at 349 ("[T]he weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity."); *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918) (same).

The Court also made clear that the rule applied where the defendant fraudulently concealed the plaintiff's injury *and* where the defendant committed a fraud "of such character as to conceal itself," *Bailey*, 88 U.S. at 349-50, even where the defendant made no attempt to conceal the fraud after having committed it. That is, "the bar of the statute does not

begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Id.* at 348.

It bears emphasizing that this doctrine was "read into every federal statute of limitation," *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), regardless of how the statute was worded. In *Exploration Co.*, for example, the limitations period began with the occurrence of an event—"the date of the issuance of such patents." 247 U.S. at 445. In *Rosenthal*, by contrast, the limitations period began "when the cause of action accrued." 111 U.S. at 189. Such textual variations made no difference. Undiscoverable fraud delayed the start of the limitations period whether that period began with an event or with the accrual of a cause of action. This was a general background principle that applied to all statutes of limitations, so that fraudsters could not use their own frauds to defeat lawsuits filed by their victims.

B. Before the 20th century, this doctrine applied only to fraud, because fraud was the only situation in which a victim might not know of his injury until many years after he had been injured. In the 20th century, however, advances in medical knowledge allowed newly-discovered physical injuries to be ascribed to events that occurred years earlier. Courts, including this Court, began to hold that for such latent injuries, as with fraud, the limitations period does not begin until the injury is reasonably discoverable.

Urie v. Thompson, 337 U.S. 163 (1949), for example, involved a railroad employee diagnosed with sil-

icosis in 1940 as a result of thirty years' inhalation of silica dust on the job. His employer argued that his suit, filed in 1941, was too late under the three-year statute of limitations, because he must have unwittingly contracted silicosis before 1938. *Id.* at 169. The Court rejected the employer's argument on the ground that even if the employee had contracted silicosis before 1938, he could not reasonably have known it until 1940, when he became too ill to work. *Id.* at 170. *See also United States v. Kubrick*, 444 U.S. 111, 122 (1979) (observing that in cases of latent injury, that the victim "has been injured in fact may be unknown or unknowable until the injury manifests itself"); *Rotella v. Wood*, 528 U.S. 549, 555 (2000) (noting that federal courts "generally apply a discovery accrual rule when a statute is silent on the issue," especially in cases "of medical malpractice, where the cry for a discovery rule is loudest").

The term "discovery rule" is itself a product of this expansion from cases of fraud to cases of latent physical injury. When the doctrine applied only to fraud, it did not have a name. The state courts began calling it the "discovery rule" in cases of latent physical injury. *See, e.g.*, *Lopez v. Swyer*, 300 A.2d 563, 566 (N.J. 1973). This Court first used the term "discovery rule" to refer to the doctrine in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 640 (1985), while discussing "the trend in many States toward a 'discovery rule' for determining when a cause of action for latent injury or disease accrues."

In the past few decades, state courts and lower federal courts have used the discovery rule in other contexts in which an injury may not be reasonably discoverable until several years after its cause. The

Court has often commented on this development, usually without expressing approval or disapproval. *See, e.g.*, *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 n.4 (2014) (noting that most courts of appeals use a discovery rule in copyright cases); *Merck & Co. v. Reynolds*, 559 U.S. 633, 645 (2010) ("state and federal courts have applied forms of the 'discovery rule' to claims other than fraud"); *Rotella*, 528 U.S. at 555 ("Federal courts, to be sure, generally apply a discovery accrual rule when a statute is silent on the issue."); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 191 (1997) (observing that the courts of appeals use a discovery rule in civil RICO cases).

Two members of this Court have expressed disapproval of the discovery rule's expansion in recent decades. *TRW Inc. v. Andrews*, 534 U.S. 19, 35-39 (2001) (Scalia, J., joined by Thomas, J., concurring in the judgment). But while Justice Scalia denounced this *expansion* of the doctrine as "bad wine of recent vintage," he was careful to distinguish the doctrine's traditional use in "suits based on fraud," with which he expressed agreement. *Id.* at 37. No member of the Court has ever doubted the traditional rule delaying the start of the limitations period in cases of fraud where the victim's injury is not reasonably discoverable. As the Court has explained, without recorded disagreement, "[t]his Court long ago recognized that something different was needed in the case of fraud, where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Merck & Co.*, 559 U.S. at 644.

The principle underlying the use of a discovery rule for fraud and latent physical injuries may apply equally to any injury that is "self-concealing," *Explo-*

ration Co., 247 U.S. at 435—i.e., any injury that, by its nature, cannot reasonably be discovered by the victim at the time it is inflicted. "Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed." *Gabelli v. SEC*, 568 U.S. 442, 450 (2013). In such cases, to commence the limitations period at the moment of the injury would be to reward wrongdoers for their success in keeping injuries hidden from their victims, and to impose on the rest of us an unrealistic burden of constantly investigating to find out whether we have been injured in some way we had not previously realized. *See id.* at 450-51 ("Most of us do not live in a state of constant investigation; absent any reason to think we have been injured, we do not typically spend our days looking for evidence that we were lied to or defrauded."). When a court applies the discovery rule in this context, it is not innovating or acting contrary to the will of Congress; it is merely enforcing one of the doctrines of the common law background against which all legislation is enacted. *See California Pub. Emps.' Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2051 (2017).

As we understand this case, however, it 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. Petitioner alleges that respondent deceitfully procured a default judgment against him by knowingly serving the wrong person, and that he only found out several years later when he applied for a mortgage and dis-

covered he had bad credit. If these allegations are true, under the traditional doctrine the limitations period would not begin until petitioner knew or should have known he had been injured.

II. Because Congress legislates against this background, statutes that neither expressly include nor expressly preclude a discovery rule are best read to include a discovery rule in cases of alleged fraud.

In light of this history, statutes that neither expressly include nor expressly preclude a discovery rule are best read to include a discovery rule in cases of fraud, at the very least. The Court of Appeals below held otherwise, but the court appears not to have been informed of the traditional rule's long history. As a result, the Court of Appeals drew three erroneous inferences from the text of the Fair Debt Collection Practices Act.

A. First, the Court of Appeals observed that in some statutes, Congress has expressly included a discovery rule, but that Congress did not include one in the FDCPA. Pet. App. 6. The Court of Appeals inferred that FDCPA claims are not governed by a discovery rule. *Id.* This might be a natural inference if one were reading the United States Code in isolation, without considering its common law background. With historical context, however, the error of this inference becomes apparent.

In the 20th century, Congress began including express discovery rules in some statutes, but it seems clear that in so doing, Congress did not intend to abrogate the traditional rule with respect to fraud-

based claims that are not governed by these statutes. Rather, these express statutory discovery rules were evidently intended to serve different purposes.

• Some of these express discovery rules were in statutes creating new fraud-based causes of action and were paired with longer periods of repose, to cut off claims arising from frauds discovered many years after they took place. For example, in the Securities Act of 1933, the limitations period for claims based on false or misleading prospectuses and registration statements was two years from when the deceit was or should have been discovered, but in no event more than ten years after the security was offered to the public. Pub. L. No. 73-22, § 13, 48 Stat. 74, 84 (1933) (codified as amended at 15 U.S.C. § 77m). The Securities Exchange Act of 1934 included a similar provision governing claims based on the manipulation of security prices, under which a one-year discovery rule was paired with a three-year period of repose. Pub. L. No. 73-291, § 9(e), 48 Stat. 881, 890-91 (1934) (codified at 15 U.S.C. § 78i(f)).

Statutes like these are subject-specific restrictions on the traditional rule governing fraud. The traditional rule placed no limit, in principle, on the amount of time that could elapse between the perpetration of a fraud and the commencement of the limitations period, where the fraud was not reasonably discoverable until long afterwards. By enacting these express discovery rules paired with longer periods of repose, Congress imposed such a limit.

• Some of these express discovery rules were in statutes that established multiple causes of action, some sounding in fraud and others not sounding in fraud. The evident purpose of these provisions was to

clarify that only the fraud-based claims are governed by a discovery rule. In the Fair Credit Reporting Act of 1970, for example, Congress provided a two-year limitations period, "except that where a defendant has materially and willfully misrepresented any information required under this title to be disclosed to an individual …, the action may be brought at any time within two years after discovery by the individual of the misrepresentation." Pub. L. No. 91-508, tit. VI, § 618, 84 Stat. 1114, 1134 (1970) (codified as amended at 15 U.S.C. § 1681p); *see TRW Inc. v. Andrews*, 534 U.S. 19 (2001) (interpreting this provision). In ERISA, Congress similarly established a six-year limitation period for suits claiming the breach of a fiduciary duty, "except that in cases of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach." Pub. L. No. 93-406, § 413, 88 Stat. 829, 889 (1974) (codified as amended at 29 U.S.C. § 1113). In the Privacy Act of 1974, Congress likewise established a two-year limitation period, "except that where an agency has materially and willfully mispresented any information …, the action may be brought at any time within two years after discovery by the individual of the misrepresentation." Pub. L. No. 93-579, § 3(g)(5), 88 Stat. 1896, 1902 (1974) (codified as amended at 5 U.S.C. § 552a(g)(5)).

• In other statutes, Congress has enacted express discovery rules to extend the traditional rule to claims that are not based on fraud. In the Quiet Title Act of 1972, for example, Congress allowed suits against the United States to adjudicate disputed titles to real property, so long as such suits were

brought within twelve years of "the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." Pub. L. No. 92-562, § 3(a)(f), 86 Stat. 1176, 1177 (1972) (codified as amended at 28 U.S.C. § 2409a(g)). Similarly, in CERCLA, Congress created a cause of action for losses stemming from the release of hazardous substances, for which claims must be filed within three years of "the date of the discovery of the loss." Pub. L. No. 96-510, § 112(d), 94 Stat. 2767, 2795 (1980) (codified as amended at 42 U.S.C. § 9612(d)(2)(A)).

In enacting these express discovery rules, Congress manifested no intention to abrogate the traditional background rule for cases of fraud. The statutory discovery rules were intended to serve different purposes. In some instances, Congress limited the traditional rule for certain newly-created fraud-based causes of action, by establishing periods of repose to cut off claims for frauds not discovered until long after they had been committed. In other instances, Congress clarified that the discovery rule applies only to the fraud-based causes of action created by a statute, but not to the non-fraud causes of action created in the same statute. In still other instances, Congress extended the traditional rule to causes of action not sounding in fraud. These express provisions left untouched the domain of the traditional background rule in suits under other statutes.

Indeed, even if Congress's only purpose in enacting one of these statutory discovery rules had been to restate or enhance the common law rule, that would not indicate Congress's intent to abrogate the common law rule in all other domains *not* covered by the statute. "Congress' obvious desire to enhance the

common law in specific, well-defined situations does not signal its desire to extinguish the common law in other situations." *United States v. Texas*, 507 U.S. 529, 535 n.4 (1993).

The Court of Appeals thus erred in inferring, from the absence of an express discovery rule, the intent of Congress that a cause of action is not governed by a discovery rule. It would be more accurate to say that Congress legislates against a background in which all claims sounding in fraud are governed by the discovery rule. Statutes that neither expressly include nor expressly preclude a discovery rule are best read to include a discovery rule in cases of fraud.

B. The Court of Appeals drew a second erroneous inference as well. The Court of Appeals observed that in some statutes, the limitations period begins with the occurrence of an event, while in other statutes, the limitations period begins when a claim "accrues" or "arises." Pet. App. 6-7. The Court of Appeals concluded that "Congress's explicit choice of an occurrence rule implicitly excludes a discovery rule." *Id.* at 8. This might be a sensible inference if one were reading the U.S. Code in isolation, without knowledge of the background against which Congress legislates. When one takes that background into account, the inference loses all its force.

The traditional doctrine delaying the start of the limitations period in cases of undiscoverable fraud applied to *all* statutes of limitations, without regard to differences in their text. Courts and commentators drew no distinction between "occurrence" statutes and "accrual" statutes, because the rationale for the

doctrine did not depend on the precise wording of the statute. Rather, the rationale was the principle that a person should not profit from his own fraud.

For example, in *Exploration Co. v. United States*, 247 U.S. 435, 445 (1918), the Court considered a limitations period that began with "the date of the issuance of such patents." To use the Court of Appeals' terminology, this was an "occurrence rule." Nevertheless, this Court held that "the true rule is established in federal jurisprudence by the decision of this court in *Bailey v. Glover*," *id.* at 446, "that for the purpose of such statutes the cause of action did not accrue until the discovery of the fraud," *id.* at 447. The Court explained "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.*

The Court of Appeals mistakenly found support for its erroneous inference in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001). But *TRW* did not alter the traditional rule. In *TRW*, the Court considered the Fair Credit Reporting Act, one of the statutes mentioned above in which Congress created multiple causes of action, only some of which were based on fraud, and clarified that the discovery rule would apply only to the fraud-based causes of action. The Court applied the canon against superfluity and held that where a statute includes an express discovery rule only for certain causes of action, the discovery rule does not apply to the other causes of action. *Id.* at 28 ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one.").

The holding of *TRW* tells us little about how to interpret a statute that neither expressly includes nor

expressly precludes a discovery rule. Where Congress has said nothing at all about a discovery rule, the best reading of the statute is that it incorporates the traditional discovery rule in cases of fraud.

C. Third, the Court of Appeals erroneously assumed that a discovery rule must apply to all claims under a statute or to none of them. Pet. App. 9 (citing, as a reason for refusing to imply a discovery rule, the fact that most claims under the FDCPA do not sound in fraud). This assumption finds no support in the cases, all of which describe the traditional doctrine as applying to *actions* founded on fraud rather than to *statutes* aimed at preventing fraud. *See, e.g.*, *Sherwood v. Sutton*, 21 F. Cas. 1303, 1303 (C.C.D.N.H. 1828) (Story, J.) ("actions founded on fraud"); *Meader v. Norton*, 78 U.S. 442, 458 (1870) ("where the relief sought is grounded on a charge of secret fraud"); *Bailey v. Glover*, 88 U.S. 342, 349 (1874) (where fraud "is the foundation of the suit"); *Kirby v. Lake Shore & M.S.R. Co.*, 120 U.S. 130, 136 (1887) ("where relief is asked on the ground of actual fraud"); *Amy v. City of Watertown*, 130 U.S. 320, 324 (1889) ("where one person has been injured by the fraud of another"); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) ("where a plaintiff has been injured by fraud"); Joseph K. Angell, *A Treatise on the Limitation of Actions at Law, and Suits in Equity* 193 (1829) ("where there is fraud"); 2 Joseph Story, *Commentaries on Equity Jurisprudence* 739 (2d ed. 1839) ("[i]n cases of fraud"); H.G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity* 332 (1883) ("where the action is predicated upon the fraud of a party").

The relevant question is thus not whether the FDCPA as a whole is primarily concerned with fraud, but rather whether the plaintiff's claim sounds in fraud. In this case, for example, if petitioner's suit is understood to be premised on fraud, it would make no difference that most of the FDCPA addresses other matters. Petitioner's suit would be governed by a discovery rule, even though most suits under the FDCPA would not be.

For this reason, the Question Presented is not worded as precisely as it might have been. It is worded in all-or-nothing terms, as if the discovery rule must apply to every claim under the FDCPA or to no claim. This is a false choice, because the truth is somewhere between the two. The answer to the Question Presented, as it is worded, is not "yes" or "no" but "sometimes."

III. Equitable tolling does not apply in this situation.

The Court of Appeals held that petitioner should have invoked the doctrine of equitable tolling rather than the discovery rule. Pet. App. 9-10, 13-14. This was error as well. Equitable tolling does not apply in this situation.

The discovery rule delays the commencement of the limitations period where the plaintiff does not know he has been injured because the injury is undiscoverable. Charles Alan Wright et al., *Federal Practice & Procedure* § 1056 (4th ed. Westlaw) (text at nn. 43-44). Equitable tolling, by contrast, pauses an already-commenced limitations period where the plaintiff knows he has been injured and is diligently pursuing his rights but for some good reason does

not file his suit on time. *Id.* (text at n. 38). The two doctrines apply to different situations because they address different problems.

In this case, petitioner would not be entitled to equitable tolling. "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Menominee Indian Tribe v. United States*, 136 S. Ct. 750, 755 (2016) (citation and internal quotation marks omitted); *see also United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014); *Holland v. Florida*, 560 U.S. 631, 649 (2010). For example, equitable tolling may be appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96 (1990).

Where the victim of an injury does not know he has been injured, he cannot satisfy the first element of equitable tolling—that he has been pursuing his rights diligently. A victim in this circumstance has not been pursuing his rights at all, because he has not yet discovered that his rights have been violated. A victim who is unaware of his injury "cannot take any steps to obtain redress." *Amy v. City of Watertown*, 130 U.S. 320, 325 (1889). In this case, petitioner appears not to have pursued his rights diligently, or indeed at all, because he did not realize he had been injured.

It must be acknowledged that the Court has on occasion used the terms "tolling" and "equitable toll-

ing" too loosely, to refer to the discovery rule. *See California Pub. Emps.' Ret. Sys. v. ANZ Securities, Inc.*, 137 S. Ct. 2042, 2055 (2017) ("Tolling may be of great value to allow injured persons to recover for injuries that, through no fault of their own, they did not discover."); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (referring to the "venerable principle" of "equitable tolling" but describing the discovery rule). This case would be a good occasion to clarify the distinction between the two doctrines. Of course, if equitable tolling and the discovery rule were synonymous, the decision below would still be wrong. It would make no sense to say that petitioner should have invoked equitable tolling rather than the discovery rule, if the two doctrines are the same.

CONCLUSION

Regardless of who wins this case, the Court should adhere to the traditional principle that where a statute is silent on the subject, in causes of action based on fraud the limitations period does not begin until the plaintiff discovers or should reasonably discover that he has been injured.

Respectfully submitted,

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