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 RESPONDENTS

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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*.

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INTRODUCTION

This case presents a straightforward interpretive question: When does the statute of limitations for the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq*, begin to run? Does the clock start, as Congress provided, when the FDCPA "violation occurs"? *Id.* § 1692k(d). Or does it begin, as Petitioner contends, when the FDCPA violation is discovered?

As their name suggests, statutes of limitations are statutes. This Court reaffirmed in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), that questions about their scope are like any other question of statutory interpretation. The text comes first. The FDCPA says, in plain English, that the limitations period begins to run on "the date on which the violation occurs." 15 U.S.C. § 1692k(d). That means the clock starts when the violation happens—not when it is discovered. Congress could not have spoken more clearly. By tying the FDCPA's limitations clock exclusively to when the "violation occurs," Congress answered the question presented.

Petitioner does not engage with the statutory text at all. Instead, he argues that this Court should apply a presumption in favor of the discovery rule. In fact, the presumption cuts against the discovery rule, as this Court has recognized in five cases just since *TRW*. But the default rule makes no difference here anyway because the text is unambiguous.

Petitioner also suggests that the discovery rule should apply to *his* FDCPA claim, but perhaps not others, because of his particular factual allegations. That is not how statutory interpretation works. If

anything, Petitioner's argument is for equitable tolling, not a discovery rule. But that is not the question on which he sought certiorari. He also waived it below, as the Third Circuit recognized. This case is about "[w]hether the 'discovery rule' applies … under the Fair Debt Collection Practices Act" as a whole. Pet. i. It does not, because Congress started that limitations period on "the date on which the violation occurs." 15 U.S.C. § 1692k(d).

STATEMENT

A. The Fair Debt Collection Practices Act

1. The American economy depends on the collectability of consumer debts. Lenders can offer credit to people investing in their futures or facing temporary setbacks because, in most cases, those individuals pay back what they borrowed (plus interest). Likewise, healthcare providers, telecommunications companies, and utilities can provide services up front because they know consumers will pay later.

Usually, consumers pay what they owe, on time. But sometimes they don't. And then, neither side is without recourse. Consumers who cannot pay their debts may be able to discharge them in bankruptcy. But where repayment is possible, lenders can use various mechanisms—including obtaining and enforcing a court judgment—to collect.

That is a good thing. If debts go unpaid, lenders must raise prices—or else stop lending to some consumers altogether. *Cf.* Ernst & Young, *The Impact of Third-Party Debt Collection on the US National and State Economies in 2016*, at p.i, *available at* https://bit.ly/2N1Skz5 ("Ernst & Young Report")

(explaining that "[u]npaid debt can affect consumer prices, borrowing costs, and business performance").

Because collecting unpaid debts requires time and expertise, many creditors rely on professional debt collectors. Small businesses, which often lack "the resources or manpower to collect … debts on their own," depend especially heavily on these professionals. William P. Hoffman, *Recapturing the Congressional Intent Behind the Fair Debt Collection Practices Act*, 29 ST. LOUIS U. PUB. L. REV. 549, 557 (2010). So do hospitals, which struggle "to effectively manage the complexity and sheer number of accounts." *Id.* at 558. In 2016 alone, third-party debt collectors recovered an estimated $67.6 billion. Ernst & Young Report at 2. By doing so, they help ensure that consumers who *do* pay their debts can continue to obtain the credit they need, at a reasonable price. *See id.* at 1.

2. The FDCPA is the primary statute that regulates debt collection. Congress enacted the FDCPA to halt "abusive debt collection practices," including harassing phone calls and threats of violence. 15 U.S.C. § 1692(e); *id.* § 1692d (describing prohibited conduct). As Congress recognized, however, only a minority of debt-collection professionals engaged in these troubling practices. *See* S. Rep. No. 95-382, at 2 (1977) (emphasizing that "unscrupulous debt collectors comprise only a small segment of the industry"). "[T]he instances of abusive practices are far less than those occasions where the independent debt collectors perform a valuable service." *The Debt Collection Practices Act: Hearing on H.R. 11969 Before the H. Subcomm. on Consumer Affairs*, 94th Cong. 26 (1976) (statement of Rep.

Wylie). By going after the bad apples, Congress protected consumers and ensured "that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e); *see also The Debt Collection Practices Act: Hearing on H.R. 29 Before the H. Subcomm. on Consumer Affairs*, 95th Cong. 21 (1977) (statement of Rep. Wylie) (explaining that the legislation's goal was to "stop the heartless and insensitive debt collectors without hurting those who carry on debt collection as a respectable profession").

The FDCPA achieves these twin goals by prohibiting abusive practices and sanctioning permissible ones. *See* 15 U.S.C. §§ 1692b–j. It also gives consumers tools to respond to problematic collection efforts. Even before a violation occurs, the FDCPA authorizes consumers to demand that a collector refrain from contacting them, contact them at a particular time and place, or provide details necessary for the consumer to verify a debt's validity. *See id.* §§ 1692c, 1692g. And if a violation does occur, consumers can sue to recover actual damages and, at the court's discretion, statutory damages. *See id.* § 1692k. The United States also has the power to investigate and punish FDCPA violations, including by permanently banning bad actors from the industry. *See id.* § 1692l; FTC, "Banned Debt Collectors," https://www.ftc.gov/enforcement/cases-proceedings/banned-debt-collectors.

At the same time, the FDCPA protects debt collectors, too. Collectors are not liable for unintentional violations resulting from good-faith mistakes. *See* 15 U.S.C. § 1692k(c). FDCPA plaintiffs have to cover the defendants' attorney's fees for

lawsuits brought in bad faith. *Id.* § 1692k(a)(3). And FDCPA actions—without statutory exception—must be filed "within one year from the date on which the violation occurs." *Id.* § 1692k(d).

B. Background

Petitioner Kevin Rotkiske opened a credit card, accumulated debt, and defaulted on his bill. The card issuer closed his account. It then referred the debt for collection to a now-defunct law firm managed by Respondent Paul Klemm.[1] Pet.App. 15–16; C.A. App. 18a.

In March 2008, Klemm sued Petitioner in Philadelphia Municipal Court to collect on that debt. Pet.App. 16; C.A. App. 19a. It is not clear, however, whether Petitioner received service of the complaint. On the one hand, the municipal court docket contains an affidavit from a process server stating that personal service had been accomplished; on the other hand, it also contains a letter purportedly signed by a third party stating that Petitioner did not live at the address where service was attempted. *See* C.A. App. 19a. In any event, the lawsuit was withdrawn without prejudice. *Id.*; Pet.App. 16. Court records do not say whether the court acted at Klemm's request or on its own. C.A. App. 19a–20a.

Klemm then accepted a position at another law firm. *Id.* at 20a. Because the two firms had different software programs, however, some data from his original files did not transfer to the new ones. *Id.* The

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[1] The Respondent entities—all formerly managed by Paul Klemm—are now defunct, so Paul Klemm is the only Respondent with an ongoing interest in these proceedings. This brief refers to Respondents collectively as "Klemm."

new file for Petitioner's account correctly noted that there was no pending lawsuit or enforceable judgment against him; it included no record of the withdrawn lawsuit. *Id.*

In January 2009, Klemm filed a second lawsuit against Petitioner. He used a court-authorized process server, who attempted service at the same address. Pet.App. 16; D.Ct. Dkt. 16-6 Ex. B (Aff. of Service). For this second suit, the municipal court docket contains only the affidavit of service, completed by the process server. C.A. App. 21a; D.Ct. Dkt. 16-6 Ex. B (Aff. of Service). Petitioner claims, however, that an individual unknown to him accepted service. Pet.App. 16; C.A. App. 21a. When Petitioner failed to respond to the summons, the court entered a default judgment for $1,182.39. Pet.App. 16; C.A. App. 21a.

That judgment would have appeared on Petitioner's credit report, and Klemm tried to collect on it. *See* C.A. App. 21a. Even so, Petitioner claims that he did not know about the judgment until September 2014, when he applied for a mortgage. Pet.App. 16.

Petitioner sued Klemm in the Eastern District of Pennsylvania. He did so in June 2015—more than six years after the default judgment, more than four years after Klemm's last attempt to collect, and nine months after Petitioner alleges he learned of the judgment. *See* C.A. App. 21a. He claimed that Klemm violated the FDCPA in obtaining the judgment. Pet.App. 17. He never alleged, however, that Klemm took any steps to conceal it. That makes sense because Klemm was trying to *collect* on the judgment, not hide it.

C. The Discovery Rule and Equitable Tolling

Because Petitioner brought his FDCPA suit well over a year after the alleged "violation occur[red]," 15 U.S.C. § 1692k(d), two separate questions arose: whether the discovery rule applies to the FDCPA, and whether Petitioner was entitled to equitable tolling. Some background on these concepts is helpful.

1. A statute of limitations begins to run when Congress says it does. "Ordinarily," Congress starts the limitations clock "when the plaintiff has a complete and present cause of action." *Green v. Brennan*, 136 S. Ct. 1769, 1776 (2016) (quoting *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 418 (2005)) (internal quotation mark omitted). Alternatively, however, Congress may choose to apply the discovery rule, which changes when a statute of limitations for a cause of action "*begins* to run." *TRW*, 534 U.S. at 28 (emphasis added); *see also, e.g., Rotella v. Wood*, 528 U.S. 549, 554 (2000) (same). If Congress has adopted the discovery rule, courts ask when the plaintiff learned the facts constituting a violation, and whether "a hypothetical reasonably diligent plaintiff would have discovered them" sooner. *Merck & Co. v. Reynolds*, 559 U.S. 633, 646–47 (2010) (quotation mark omitted). The earlier of those two dates "trigger[s]" the limitations period. *TRW*, 534 U.S. at 30.

Courts apply "ordinary principles of statutory analysis" to determine whether Congress has chosen the discovery rule. Pet.App. 12. Like other questions about what statutory language means, the answer does not differ based on the facts of the case. It

depends on the words Congress has chosen. *See, e.g., Gabelli v. S.E.C.*, 568 U.S. 442, 447 (2013) ("This case centers around the meaning of 28 U.S.C. § 2462[.]"). And the answer applies to that statute of limitations across the board. *See, e.g., TRW*, 534 U.S. at 23 ("We hold that a discovery rule does not govern § 1681p."); *Gabelli*, 568 U.S. at 454 ("Given the lack of textual, historical, or equitable reasons to graft a discovery rule onto the statute of limitations of § 2462, we decline to do so."). Depending on Congress's command, courts either ask in every case under a statute, or in no case under a statute, whether the limitations period begins to run upon discovery of the violation.

2. Equitable tolling, by contrast, has to do with whether a statute of limitations should be "*pause[d]*" in a particular case to account for "extraordinary circumstance[s]." *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014) (emphasis added). Equitable tolling allows a plaintiff to make an individual, case-specific showing that equity should excuse his late filing. Unless Congress has foreclosed the availability of equitable tolling, a plaintiff may try to prove that he is entitled to it. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (explaining that there is a presumption in favor of the availability of equitable tolling but "Congress, of course, may provide otherwise"). The plaintiff must prove "that he has been pursuing his rights diligently." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). In addition (and unlike for the discovery rule), he must show "that some extraordinary circumstance stood in his way and prevented timely

filing." *Id.* (quoting *Holland*, 560 U.S. at 649) (internal quotation mark omitted).

3. The "fundamental difference" between the discovery rule and equitable tolling thus stems from the divergent goals of the two doctrines:

> The purpose of the discovery rule is to determine the accrual date of a claim, for ultimate purposes of determining, as a legal matter, when the statute of limitations begins to run. Equitable tolling … presumes claim accrual. Equitable tolling steps in to toll, or stop, the running of the statute of limitations in light of established equitable considerations.

Forbes v. Eagleson, 228 F.3d 471, 486 (3d Cir. 2000) (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1390 (3d Cir. 1994)); *cf. also Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 198 (1997) (Scalia, J., concurring in part and concurring in the judgment) (explaining that it is "illogical even to resolve the question whether a statute should be tolled by fraudulent concealment without having resolved the antecedent question of when the statute begins to run").

D. Procedural History

1. Klemm moved to dismiss Petitioner's lawsuit on statute-of-limitations grounds. Pet.App. 18. Petitioner maintained that his suit was timely, despite 15 U.S.C. § 1692k(d)'s one-year statute of limitations, for two independent reasons. First, he argued that the statute incorporates the "discovery rule," so the limitations period did not even begin to

run until he discovered the violation. Pet.App. 21. Second, and alternatively, Petitioner asked the court to equitably toll the limitations period. *Id.* at 21–22.

The district court rejected both arguments. The court explained that § 1692k(d) provides that the limitations period runs "from the date on which the violation occurs," not from the date of discovery. Pet.App. 22–26. And the court declined to equitably toll the limitations period because "there [were] no allegations of active misleading on the part of the Defendants." *Id.* at 26–29. The district court thus found that Petitioner's suit was time-barred and granted Klemm's motion to dismiss. *Id.* at 29.

2. Petitioner appealed only the district court's determination that the discovery rule does not apply to the FDCPA's statute of limitations. He did not challenge the district court's ruling that he could not avail himself of equitable tolling. After oral argument but before issuing a decision, the Third Circuit sua sponte ordered rehearing en banc. *Id.* at 4.

In an opinion by Judge Hardiman, the en banc court held unanimously that the FDCPA's limitations period runs, as the text says, from "the date on which the violation occurs," 15 U.S.C. § 1692k(d), not from the date on which it is discovered. Pet.App. 2. In crafting a statute of limitations, the court explained, Congress generally chooses from "two basic models": the "occurrence rule" and the "discovery rule." *Id.* at 6 (quoting *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d 601, 613 (3d Cir. 2015)). Although Congress does not always make its choice crystal clear, this time it did. The "occurrence rule plainly applies." *Id.* And "Congress's explicit choice of an occurrence rule implicitly excludes a discovery rule." *Id.* The court

gave a simple example: "When a bill states that payment is timely if it is 'received at the bank by 5:00,' it goes without saying that a check arriving at 6:00 is late even if it was postmarked a week earlier." *Id.* Indeed, the court found it "hard to imagine how Congress could have more clearly foreclosed the discovery rule" than it did in the FDCPA. *Id.* at 8.

The court rejected Petitioner's contention that the discovery rule is necessary to achieve the FDCPA's "principal purpose" of combatting "abusive debt-collection practices." *Id.* Many FDCPA violations, the court explained, "will be apparent to consumers the moment they occur." *Id.* at 9. And if they are not, "nothing in the Act impairs the discretion district courts possess to avoid patent unfairness" through equitable tolling. *Id.* at 9–10. Indeed, the court declined to "reach the [equitable tolling] question in this case only because Rotkiske failed to raise it on appeal." *Id.* at 13. And four judges noted that, if properly preserved, they would have remanded for the district court to reconsider the availability of equitable tolling for so-called "self-concealing" conduct. *Id.* at 14 n.5.

3. As Petitioner explained in his petition for certiorari, the Third Circuit's decision created a circuit split on whether the FDCPA incorporates the discovery rule. *See, e.g.*, Pet.4 ("[T]he Third Circuit held the discovery rule does not apply to the FDCPA's one-year statute of limitations."); *id.* at 5 ("Contrarily, the Fourth Circuit has held the discovery rule does apply to the FDCPA."); *id.* ("[T]he Ninth Circuit likewise embraces the discovery rule as applicable to the FDCPA."). This Court granted certiorari to resolve that split and decide "[w]hether the 'discovery

rule' applies to the one-year statute of limitations under the Fair Debt Collection Practices Act." Pet.Br. i & 15 n.15.

SUMMARY OF THE ARGUMENT

I. The FDCPA's limitations period begins to run, as the statute says, on "the date on which the violation occurs." 15 U.S.C. § 1692k(d).

A. A limitations period that begins to run when the "violation occurs" starts when the defendant commits the violation—not when the plaintiff discovers it. Congress has repeatedly distinguished between these two points in time. It has even used the FDCPA's exact language—"violation occurs"—when it has differentiated in a single statute between starting the clock upon violation and discovery. *See, e.g.,* 12 U.S.C. § 3416 (providing that a suit must be filed "within three years from the date on which the violation occurs *or* the date of discovery of such violation, whichever is later" (emphasis added)). There is thus no doubt what Congress meant when it wrote "violation occurs" in the FDCPA.

B. Two of this Court's recent precedents confirm that conclusion.

In *TRW*, this Court considered the statute of limitations in the Fair Credit Reporting Act ("FCRA"). The FCRA provided that suits alleging a violation must be filed "within two years from the date on which the *liability arises*," 15 U.S.C. § 1681p (2000) (emphasis added). Relying on ordinary tools of statutory construction, the Court held that this language does not incorporate the discovery rule. *TRW*, 534 U.S. at 28–29. The Court stressed that Congress knows how to adopt a discovery rule when it

wants to—that is, by using language that refers to discovering the injury. Indeed, the Court concluded that Congress had *so plainly* rejected the discovery rule in the FCRA that there was no need to decide whether there is ordinarily a presumption favoring that rule. *See id.* at 28–29.

In *Gabelli*, this Court held that the statute of limitations for the civil-penalties statute, which provides that suits must be "commenced within five years from the date when the claim first accrued," 28 U.S.C. § 2462, likewise foreclosed the discovery rule. 568 U.S. at 448, 454. As in *TRW*, the Court applied ordinary principles of statutory interpretation. And it refused "to graft a discovery rule onto the statute" because Congress had spoken clearly. *Id.* at 454.

C. Adhering to the plain text of the FDCPA also advances the purposes of limitations periods and the goals of the FDCPA. Statutes of limitations foster "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555. Taking Congress at its word serves all of those ends—and prevents courts from having to routinely answer difficult questions about what a plaintiff knew (or should have known) when.

Congress enacted the FDCPA, moreover, not only to protect consumers from a few bad actors, but also to ensure that responsible debt collectors do not face unfair competition. *See supra* 3–5. It is no secret that the FDCPA created incentives for lawyers to file a high volume of flimsy FDCPA suits to win a few quick settlements. Reading the discovery rule into the statute would only exacerbate this problem and increase the costs of defense.

II. Petitioner's contrary arguments are unavailing.

A. Petitioner ignores the statutory text altogether. He does not try to explain how "violation occurs," 15 U.S.C. § 1692k(d), can mean "violation is discovered." He does not acknowledge that Congress often distinguishes between "violation occurs" language and "discovery" language. And he barely even mentions *TRW*.

B. Instead, Petitioner's primary argument seems to be that there is a common-law default presumption in favor of the discovery rule. *See* Pet.Br. 21–28. Just as in *TRW*, however, this Court does not need to decide that question. Even if there were such a presumption, the FDCPA's plain text unambiguously overrides it. In fact, however, the interpretive default rule is just the opposite. As this Court has restated at least five times since *TRW*, the "standard rule" is "that the limitations period commences when the plaintiff has a complete and present cause of action." *See Graham*, 545 U.S. at 418 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal*, 522 U.S. 192, 201 (1997) (internal quotation marks omitted)).

This Court has applied a different presumption only to statutes that "govern an area of the law that cries out for application of the discovery rule." *TRW*, 534 U.S. at 28. Debt collection hardly fits that bill. To the contrary, "the conduct proscribed by the FDCPA"—which includes many different forms of harassment—"will usually be obvious to its victims." Pet.App. 9 n.3. Petitioner's own statistics bear that out. At least 90 percent of complaints made to the

CFPB relate to alleged FDCPA violations that would be immediately known to any reasonable consumer.

C. Petitioner falls back on the argument that, no matter all of the principles above, the facts of his particular case excuse his untimely filing. That is an argument for equitable tolling, which turns on extraordinary circumstances in an individual case. It does not justify interpreting the same statutory language—"violation occurred"—to incorporate the discovery rule on one set of facts but not another. The distinction between the discovery rule and equitable tolling best explains Petitioner's principal authorities. *See, e.g., Lozano v. Montoya Alvarez*, 572 U.S. 1, 10–11 (2014) (characterizing *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), and *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1875), as equitable tolling cases).

But equitable tolling is not the question on which Petitioner sought certiorari. He also waived reliance on equitable tolling below, as the Third Circuit recognized. On the facts of Petitioner's case, that was understandable. Petitioner sued Klemm six years after the default judgment and nine months after Petitioner claims that he learned of it. *See* Pet.App. 21–22. And Petitioner never showed that Klemm—who relied on a court-authorized process server to effect service—made any misrepresentation that might create extraordinary circumstances. It is therefore, at best, highly dubious that equitable tolling would apply even if properly preserved.

ARGUMENT

I. The FDCPA's Limitations Period Begins to Run, as the Statute Provides, on "the Date on Which the Violation Occurs."

Just as Congress decides the duration of a limitations period, so too is it free to choose the date on which that period begins. If there is some question about what limitations rule Congress has chosen, courts resolve it using "ordinary" tools of statutory interpretation. Pet.App. 12; *see TRW*, 534 U.S. at 28–33. "Statutory interpretation … begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). "When the words of a statute are unambiguous," it ends there as well—"this first canon [also becomes] the last," *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992).

The FDCPA's statute of limitations begins to run on "the date on which the violation *occurs*," not the date on which the violation is *discovered*. 15 U.S.C. § 1692k(d) (emphasis added). Congress's unambiguous statutory language should end this case. Indeed, this Court has recently held that other statutes of limitations (triggered when the "cause of action accrues" or "liability arises") foreclose the discovery rule. Short of expressly calling out and rejecting a discovery rule in the FDCPA—which this Court has said is not required—Congress could not have been more emphatic that the occurrence rule governs. Finally, the purposes of statutes of limitations generally, and the FDCPA in particular, support interpreting the statute in line with its plain meaning.

A. The FDCPA's Plain Language Answers the Question Presented.

The FDCPA 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) (emphasis added).

In plain English, a "violation occurs" when a defendant commits the violation—not when the victim discovers (or ought to have discovered) it. For example, if police officers enter an empty home without a warrant and remove the homeowner's possessions, the Fourth Amendment "violation occurr[ed]" at that moment. No one would say that the "violation occur[red]" only later, when the homeowner returned to her property and discovered what had taken place. Likewise, if someone dumps waste into navigable waters without obtaining the proper permit, it would be clear that the Clean Water Act "violation occur[red]" right then—even if no one discovered what had happened until months later. The same is true here. Any English speaker would say that an FDCPA "violation occurs" when it occurs—not when it is discovered.

Other statutes show that, at least when it comes to phrases like "violation occurs," Congress also speaks English. It knows how to adopt a discovery rule when it wants to, and it did not do so in the FDCPA. For example, Congress passed the Right to

Financial Privacy Act in 1978, a year after the FDCPA. It allows suit "within three years from the date on which the violation occurs *or* the date of discovery of such violation, whichever is later." 12 U.S.C. § 3416 (emphasis added). The Credit Repair Organizations Act similarly provides that lawsuits must be filed by the "later of … the end of the 5-year period beginning on the date of the occurrence of the violation" or, in cases involving "material[] and willful[] misrepresent[ations]," "the end of the 5-year period beginning on the date of the discovery by the consumer of the misrepresentation." 15 U.S.C. § 1679i. Many other statutes likewise contrast "violation occurs" language and discovery provisions. *See, e.g.*, 50 U.S.C. § 4611(k)(3) ("An action under this subsection shall be commenced not later than 3 years after the violation occurs, or one year after the violation is discovered, whichever is later."); 15 U.S.C. § 78u-6(h)(1)(B)(iii) (prohibiting suits brought "more than 6 years after the date on which the violation … occurred" or "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known" by the plaintiff). If referring to the date on which a violation occurs were the same as referring to the date on which a violation is discovered, these provisions would make no sense.

Indeed, Petitioner seems to agree. Like Congress, he consistently distinguishes between the *occurrence* of a violation and its *discovery*. *See, e.g.*, Pet.Br. 11 (arguing that FDCPA "violations … are likely to occur without immediate awareness by the victim"); *id.* at 13 (arguing that Petitioner "was blamelessly ignorant of the violation until more than one year after it

occurred"); *id.* at 33 (arguing that "the prospective plaintiff is unlikely to be aware of a violation at the time it occurs"); *id.* at 38 (discussing the possibility of different outcomes depending on "whether the victim learns of the violation before or after the one-year anniversary of its occurrence"). Petitioner's own understanding of what it means for a violation to occur thus gives his case away.

There is little more to say about the statutory text—no need to comb through old dictionaries or resort to interpretive canons with difficult-to-pronounce names. "The date on which the violation occurs" means—and can only mean—the date on which the violation occurs. Petitioner offers no alternative interpretation of that language. And "it is hard to imagine how Congress could have more clearly foreclosed the discovery rule." Pet.App.8.

As this Court has "stated time and again," "courts must presume that [Congress] says in a statute what it means and means in a statute what it says there." *Germain*, 503 U.S. at 253–54. The "judicial inquiry," therefore, should be "complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981).

B. This Court's Precedents Confirm that the FDCPA Means What It Says.

This Court's recent decisions in *TRW* and *Gabelli* cement this reading of the FDCPA. Even when faced with "the less-determinate language" of the statutes in those cases, Pet.App. 7, this Court held that Congress had foreclosed the discovery rule. The same is true here.

1. *TRW* construed the statute of limitations in the Fair Credit Reporting Act. That statute was not

"silent on the issue of when the statute of limitations begins to run." 534 U.S. at 28 (internal quotation mark omitted). Instead, it provided that suits alleging a violation must be filed "within two years from *the date on which the liability arises*." 15 U.S.C. § 1681p (2000) (emphasis added). The statute also included an exception. If the defendant makes a "material[] and willful[]" misrepresentation, a lawsuit "may be brought at any time within two years after discovery by the individual of the misrepresentation." *Id.*

The Court rejected the plaintiff's argument that the phrase "date on which the liability arises" incorporated a discovery rule for all FCRA violations. If read in a vacuum, the Court acknowledged, that phrase might "support either party's position." 534 U.S. at 32. But that would be the wrong way to read a statute. Congress can reject the discovery rule "implicitly." *Id.* at 28. And that is what it did. By showing that it knows how to adopt a "discovery"-based limitations period (for willful violations) when it wants to, Congress "evince[d] [its] intent to preclude judicial implication of a discovery rule" elsewhere. *Id.* Indeed, having seen what real discovery-rule language looks like, the Court concluded that the "liability arises" formulation was so clear that it did not need to decide whether a default presumption favoring the discovery rule would otherwise apply. *See id.* at 27–28.

The Court also addressed an earlier draft of the FCRA that "keyed the start of the limitations period to 'the date of the occurrence of the violation.'" *Id.* at 32 (quoting S. 823, 91st Cong., 1st Sess., § 618 (1969); H.R. 16340, 91st Cong., 2d Sess., § 27 (1970); H.R. 14765, 91st Cong., 1st Sess., § 617 (1969)). Congress

deleted that language from the final version of the statute, replacing it with the "liability arises" language. *See id.* The plaintiff in *TRW* argued that the Court should infer from that change that Congress intended the discovery rule to apply. *See id.* The Court declined to make that inference. It did not dispute, however, that "the deleted words"—"occurrence of the violation"—"would have plainly established" a limitations period that began to run at the time of the violation, rather than the time of discovery. *Id.*

The lessons of *TRW* confirm the plain meaning of the FDCPA. *TRW* reiterated that ordinary principles of statutory interpretation apply to statutes of limitations. It recognized that Congress uses "discovery" language when it intends to incorporate a discovery rule. *See id.* at 28–29. It effectively acknowledged that language nearly identical to that in the FDCPA ("occurrence of the violation") would have clearly expressed "a congressional intent to reject the [discovery] rule." *Id.* at 32. And it held that the FCRA so unambiguously foreclosed the discovery rule that there was no need to decide whether a presumption in favor of that rule applied. *See id.* at 27–28. It did so even though "liability arises" (unlike "violation occurs") at least arguably speaks to the time at which a claim "become[s] apparent" to the plaintiff. *Id.* at 32 (quoting Webster's Third New International Dictionary 117 (1966)). In the FDCPA, as well, Congress could have written a discovery rule if it wanted to. By instead adopting the strongest possible formulation of an occurrence rule, and starting the limitations clock when the defendant commits the

violation, Congress "preclude[d] judicial implication of a discovery rule." *Id.* at 28.

2. *Gabelli* is also instructive. There, the Court addressed the limitations period for the civil-penalties statute. 568 U.S. at 445. That statute provides that suits must be "commenced within five years from *the date when the claim first accrued*." 28 U.S.C. § 2462 (emphasis added). "[T]he most natural reading" of that language, the Court held, is that "the five-year clock begins to tick … when a defendant's allegedly fraudulent conduct occurs," not when it is discovered. *Gabelli*, 568 U.S. at 448. That interpretation, the Court explained, comports with "the 'standard rule' … that a claim accrues 'when the plaintiff has a complete and present cause of action.'" *Id.* (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)).

The Court reached that result even though the Government sought civil penalties for violating an anti-fraud statute. *See id.* at 445; 15 U.S.C. § 80b-6(1), (2) (making it unlawful for an investment advisor "to employ any device, scheme, or artifice to defraud any client or prospective client" or "to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client"). The Court noted a traditional "'exception' to the standard rule" by which the limitations period for a fraud statute presumptively begins to run at the time of discovery. *Gabelli*, 568 U.S. at 449. But the Court declined to apply that presumption "to graft a discovery rule onto the statute of limitations" in the *civil-penalties* statute. *Id.* at 454.

Here, it is even clearer than it was in *Gabelli* that Congress foreclosed the discovery rule. The "claim

first accrued" language in the civil-penalties statute, like the "liability arises" language in the FCRA, might be susceptible to the discovery rule because it focuses on the *plaintiff's* ability to sue. "Violation occurs," by contrast, ties the limitations period to the *defendant's* conduct. Moreover, like the civil-penalties statute in *Gabelli*, the FDCPA is not a fraud statute. If the accrual language in *Gabelli* started the limitations clock when the defendant's "conduct occur[red]," *id.* at 448, then the "violation occurs" language in the FDCPA must do so as well.

C. Adhering to the FDCPA's Text Serves the Purposes of Statutes of Limitations Generally, and of the FDCPA in Particular.

Interpreting "violation occurs" to mean what it says would set "a fixed date when exposure" to FDCPA liability ends—rather than subjecting debt collectors to potentially boundless liability. *Gabelli*, 568 U.S. at 448. Enforcing Congress's choice would advance both "the basic policies of … limitations provisions," *Rotella*, 528 U.S. at 555, and the FDCPA's goal of "insur[ing] that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," 15 U.S.C. § 1692(e).

1. As this Court has long recognized, statutes of limitations are "vital to the welfare of society" and provide "security and stability to human affairs." *Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Grounded in a recognition that "even wrongdoers are entitled to assume that their sins may be forgotten," *Wilson v. Garcia*, 471 U.S. 261, 271 (1985), statutes of limitations reflect several interrelated values. These include "repose, elimination of stale claims, and

certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella*, 528 U.S. at 555. Limitations periods also "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348–349 (1944).

Interpreting the FDCPA's statute of limitations as Congress wrote it serves those ends. "[G]rafting the discovery rule onto" it would not. *Gabelli*, 568 U.S. at 452. To the contrary, it would mean that some FDCPA claims could "be brought at any distance of time"—a result that, in Chief Justice Marshall's words, would be "repugnant to the genius of our laws." *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805). And it would require courts to adjudicate "not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff *would have known*." *Merck*, 559 U.S. at 648 (emphasis added).

That can be difficult. This case proves the point. Even assuming Petitioner did not learn of the judgment against him until years later, a court applying the discovery rule would have to decide whether he could have done so sooner by exercising "reasonable diligence." Did Petitioner ignore correspondence related to the judgment? What did Klemm do to collect on it, and why did those efforts not put Petitioner on notice? Did Petitioner ever check his credit report? Would a reasonable consumer have done so at least once every six years? Courts undertake these sorts of inquiries when Congress directs them to apply the discovery rule. But

Congress chose a far simpler trigger by starting the FDCPA's limitations period when the "violation occurs."

2. Boundless liability, moreover, would be particularly problematic considering the FDCPA's goals. As already explained, Congress enacted the FDCPA *both* to protect consumers against the (distinct minority) of unscrupulous debt collectors *and* to protect ethical collectors from unfair competitive practices. *See supra* 3–5; 15 U.S.C. § 1692(e) (describing both goals). Consistent with that latter goal, "the FDCPA contains several provisions that expressly guard against abusive lawsuits" leveled against law-abiding professionals. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 597 (2010). The one-year statute of limitations is one such provision. *See* 15 U.S.C. § 1692k(d).

These protections have turned out to be even more important than Congress might have anticipated. The FDCPA has birthed a "cottage industry" of lawyers who file many FDCPA cases to obtain quick settlements and attorney's fees. *Murphy v. Equifax Check Servs., Inc.*, 35 F. Supp. 2d 200, 204 (D. Conn. 1999); *see also id.* at 204 n.11 (quoting an *ABA Journal* article about an FDCPA lawyer who admitted that he "relies on technical violations of the law to bring a case, makes arbitrary settlement demands irrespective of damages and earns far more in attorneys' fees than his clients are entitled to collect"). This has caused a "proliferation of litigation" under the Act. *Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir. 2007) (quoting *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138 (E.D.N.Y. 2006)). And, in that environment, collectors

may have to settle disputes even before a lawsuit is filed to avoid the costs of defense, which "can easily reach $10,000 or more." Hoffman, *supra*, at 562.

If, despite the statutory text, plaintiffs could bring FDCPA claims *years* after the alleged violation occurs, that would prompt even more litigation. It would also afford unscrupulous lawyers more leverage to coerce settlements. The "passage of time" makes it difficult to defend against even meritless lawsuits because "memories … fade[]," circumstances change, and "evidence is lost." *Wilson*, 471 U.S. at 271. And the potential for litigation on discovery-rule issues would only increase defense costs for the law-abiding debt collectors Congress intended to protect. *See* 15 U.S.C. § 1692(e). Here, for example, the firms originally involved in collecting Petitioner's debt no longer exist, so Klemm must personally defend himself against allegations from over six years ago.

3. To be sure, the FDCPA also protects consumers. *See supra* 3–4. And there might be individual cases in which excusing an untimely filing serves the statute's goals. But that is an argument for equitable tolling—an issue not presented by this case. It is not a reason to graft a discovery-rule inquiry onto every FDCPA case.

Statutes of limitations, as opposed to statutes of repose, "are 'customarily subject to "equitable tolling,"' "unless tolling would be 'inconsistent with the text of the relevant statute.'" *Young v. United States*, 535 U.S. 43, 49–50 (2002) (citation omitted). Most courts to have considered the question—including the Third Circuit—have held that 15 U.S.C. § 1692k(d) is a non-jurisdictional statute of limitations and, as a result, subject to equitable

tolling. *See, e.g.,* Pet.App. 13; *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939–40 (9th Cir. 2009); *Marshall-Mosby v. Corp. Receivables*, 205 F.3d 323, 327 (7th Cir. 2000); *but see Mattson v. U.S. West Comm'ns*, 967 F.2d 259, 262 (8th Cir. 1992).

Applying the statute of limitations as written, but leaving room for traditional equitable considerations in individual cases, might serve the FDCPA's purposes of protecting both consumers and law-abiding debt collectors. *See supra* 3–5. But the availability of equitable tolling under the FDCPA is a question for another day, because, as explained below, the only question presented here is whether the discovery rule applies to the FDCPA. *See infra* Part II.C.2–3. Congress answered that question. The FDCPA does not incorporate the discovery rule because Congress started the limitations clock when the "violation occurs."

II. PETITIONER'S CONTRARY ARGUMENTS ARE WRONG.

Petitioner's brief is perhaps most notable for omitting any analysis whatsoever of the statutory text. His failure to explain how "violation occurs" can mean "violation is discovered" should be the beginning and end of this case.

Instead of textual arguments, Petitioner makes two central points. First, in keeping with the question presented, he argues that the discovery rule should govern every FDCPA case because courts should presumptively read the discovery rule into *every* federal statute. Second, he argues that he is entitled to the discovery rule in this particular case because he

characterizes his FDCPA claim as "fraud." Both arguments are wrong.

A. Petitioner Cannot Explain the FDCPA's Text.

This is a case about the meaning of a statute. But reading Petitioner's brief, you would not know that. Petitioner refers to the statutory language—"violation occurs"—just once, in the section of his brief setting forth the relevant statutory provisions. Pet.Br. 2. He suggests no way in which "the date on which the violation occurs," 15 U.S.C. § 1692k(d), can be interpreted to mean "the date on which the violation is discovered." He does not acknowledge Congress's regular use of "violation occurs" language in direct contrast with "discovery" language. And his own use of "violation occurs" language makes clear that Petitioner, like Congress, recognizes the plain import of that phrase. *See supra* Part I.A.

Petitioner also skips right past *TRW*—the precedent that every court to have addressed the question presented considered most relevant—which undertook exactly the sort of interpretive analysis Petitioner omits. *See TRW*, 534 U.S. at 28–33. He mentions that decision only in footnotes. *See* Pet.Br. 24 n.22; *id.* at 28 n.25. And he offers no way to reconcile his wish that "violation occurs" be construed as a discovery rule with *TRW*'s holding that the FCRA forecloses that rule.

Petitioner does not make a textual argument because he has none. To the contrary, if "violation occurs" adopts the discovery rule, then Congress can only foreclose it by "stat[ing] *in haec verba* that 'the discovery rule shall not apply.'" Pet.App. 7. That is

not the law. *See TRW*, 534 U.S. at 28 (recognizing that Congress can reject the discovery rule "implicitly").

B. The Default Interpretive Presumption Is Irrelevant in Light of the FDCPA's Plain Language and, in Any Event, Is Not the Discovery Rule.

Petitioner's central claim appears to be that Congress drafted the FDCPA against a common-law background in which the discovery rule usually applied. *See* Pet.Br. 21–28. As a result, he seems to suggest that the FDCPA, along with every other contemporary statute, should be presumed to incorporate the discovery rule. *See id.* At other points, Petitioner appears to disclaim his own primary argument. *See id.* 28–29 n.25 ("Petitioner here is not advocating for a generally applicable discovery rule like the Ninth Circuit's version rejected in *TRW*[.]"). Whatever Petitioner really means, however, it would make no difference even if there were some default presumption in favor of the discovery rule because the FDCPA's plain text would override it. In any event, the interpretive default is the *opposite* of what Petitioner suggests. Absent a contrary indication, a limitations period begins to run when the plaintiff has "a complete and present cause of action." *Bay Area Laundry*, 522 U.S. at 201 (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)) (internal quotation marks omitted). The only exception is for statutes governing fraud or areas of law that otherwise "cry out" for a discovery rule. *See TRW*, 534 U.S. at 28. The FDCPA is no such thing.

1. First, as in *TRW*, this Court need not decide whether there is a default presumption about the discovery rule because the FDCPA is unambiguous.

In *TRW*, the Ninth Circuit had presumed "that all federal statutes of limitations, regardless of context, incorporate a general discovery rule 'unless Congress has expressly legislated otherwise.'" *Id.* at 27 (quoting *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000)). The Court declined to decide whether "such a presumption exists," *id.*, because, even if it did, "the text and structure" of the FCRA's statute of limitations "evince[d] Congress' intent to preclude judicial implication of a discovery rule," *id.* at 28. So too here. The FDCPA's text is irreconcilable with the discovery rule. Indeed, Congress spoke even more clearly in the FDCPA than it did in the FCRA. *See supra* Part I.B.1.

2. In any event, as Justice Scalia explained in his *TRW* concurrence, this Court has already recognized that the "*standard rule*" is, in fact, "that the limitations period commences when the plaintiff has a complete and present cause of action." 534 U.S. at 36 (Scalia, J., concurring) (quoting *Bay Area Laundry*, 522 U.S. at 201) (emphasis in original) (internal quotation mark omitted). This Court said so in *Bay Area Laundry*. And, in *TRW*'s wake, this Court has dispelled any doubt by restating the *Bay Area Laundry* rule at least five separate times. *See Graham*, 545 U.S. at 418 (quoting *Bay Area Laundry*'s formulation of the "standard rule"); *Wallace*, 549 U.S. at 388 (same); *Gabelli*, 568 U.S. at 448 (same); *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 106 (2013) (same); *Green*, 136 S. Ct. at 1776 (same).

That "standard rule" is also "unquestionably the traditional rule." *TRW*, 534 U.S. at 36–37 (Scalia, J., concurring). It dates back at least to *Clark v. Iowa*

City, 87 U.S. (20 Wall.) 583 (1874), which recognized that "[a]ll statutes of limitation begin to run when the right of action is complete." *Id.* at 589; *see also Gabelli*, 568 U.S. at 448 (explaining that the "standard rule" "has governed since the 1830s"). Old treatises say the same thing. *See, e.g.,* 1 H. Wood, Limitation of Actions § 122a, p. 684 (4th ed. 1916) ("Statutes of limitation commence to run against a cause of action … from the time when the holder thereof has the right to apply to the court for relief, and to commence proceedings to enforce his rights."); *id.* at 2, § 276c(1), p. 1410 ("Ignorance of right does not prevent the running of limitations.").

Congress, therefore, "has been operating against the background rule recognized in *Bay Area Laundry* for a very long time." *TRW*, 534 U.S. at 38 (Scalia, J., concurring). While some courts of appeals may have applied the opposite presumption for a brief period before *TRW*, that "bad wine of recent vintage" has since been replaced by the traditional varietal. *Id.* at 37; *see, e.g.,* Pet.App.5 (quoting the "standard rule"); *Wike v. Vertrue, Inc.*, 566 F.3d 590, 593 (6th Cir. 2009) (same); *Foudy v. Indian River Cty. Sheriff's Office*, 845 F.3d 1117, 1123 (11th Cir. 2017) (same); *Ladd v. United States*, 630 F.3d 1015, 1024 (Fed. Cir. 2010) (same).

3. This Court has deviated from the *Bay Area Laundry* presumption only when it comes to fraud statutes and those that otherwise "govern an area of the law that cries out for application of the discovery rule." *TRW*, 534 U.S. at 28; *see also id.* at 37–38 (Scalia, J., concurring). Nothing about the FDCPA "cries out" for a discovery rule—though, again, it would make no difference even if it did because

Congress spoke clearly enough to override a discovery-rule default.

The FDCPA comprehensively regulates debt collection. A particular violation of the FDCPA (just like the FCRA, and nearly any federal statute) could conceivably involve a misrepresentation or other fraudulent act. But fraud is not a required element of, or otherwise inherent in, an FDCPA claim. Aside from fraud, this Court has recognized only "two contexts" that "cr[y] out" for a discovery rule: "latent disease and medical malpractice." *Id.* at 27 (citing *United States v. Kubrick*, 444 U.S. 111 (1979), and *Urie v. Thompson*, 337 U.S. 163 (1949)). Debt collection—which is no better a candidate for this characterization than was credit reporting in *TRW*, *see* 534 U.S. at 28—should not be the third.

Unlike classic fraud, latent disease, and medical malpractice, "the conduct proscribed by the FDCPA will usually be obvious to its victims." Pet.App. 9 n.3. That is apparent from the "language of the FDCPA" itself. *Id.* at 9. The Act prohibits, for example, communication by debt collectors "at any unusual time or place," 15 U.S.C. § 1692c(a)(1); various forms of harassment, including "[t]he use of obscene or profane language," *id.* § 1692d; and "[t]he advertisement for sale of any debt to coerce payment of the debt," *id.* It is hard to imagine a circumstance in which a violation of these (or most other) FDCPA provisions would go undetected. Although Petitioner conjures up fanciful FDCPA violations that, he says, "could plausibly escape a consumer's detection," Pet.Br. 35, nothing about debt collection generally, or the FDCPA in particular, cries out for a discovery rule.

In addition, although questions of statutory interpretation should not become counting exercises, Petitioner's own data undermine his characterization of the FDCPA.[2]

- The largest category of complaints received by the Consumer Finance Protection Bureau in each of the last five years, accounting for about 40 percent of complaints each year, relates to "[a]ttempts to collect debt not owed." That includes debts never incurred by a consumer, debts that have already been paid, and debts that have been discharged in bankruptcy.[3] The facts underlying those violations would be known to the consumer—indeed, even more so than to the collector—from the moment the violations occur.
- The next largest category of complaints involves defects in the "[w]ritten notification

[2] While Petitioner cites the most recent data when discussing government enforcement actions under the FDCPA, *see* Pet.Br. 30, he quotes statistics from an earlier period (2009–2013) when discussing private complaints, *see id.* at 11 n.12. That earlier period had 50 percent more complaints than the one that followed, largely because of a temporary spike following the financial crisis. This brief focuses on the most recent data, but the patterns discussed are also present in the older data on which Petitioner relies.

[3] *See* CFPB FDCPA Annual Report 2019, p. 15–18 https://bit.ly/2ukaKip; CFPB FDCPA Annual Report 2018, p. 14–17 https://bit.ly/2S5SHYc; CFPB FDCPA Annual Report 2017, p. 14–19 https://bit.ly/2NKLuOZ; CFPB FDCPA Annual Report 2016, p. 16–20 https://bit.ly/2Jtj8Vg; CFPB FDCPA Annual Report 2015, p. 11–15 https://bit.ly/2XBgHUo.

about debt."[4] This refers to the FDCPA's requirement that, "[w]ithin five days after the initial communication with a consumer," a debt collector must provide a written notice containing "the amount of the debt," "the name of the creditor to whom the debt is owed," and an explanation of the consumer's ability to dispute the debt. 15 U.S.C. § 1692g. Nearly three-quarters of complaints in this category are allegations that the consumer did not "receive[] enough information to verify the debt," a flaw that would be immediately apparent.[5]

- The third-largest category of complaints relates to "[c]ommunication tactics," like "frequent or repeated calls," "continued contact attempts despite requests to stop contact," "obscene, profane, or abusive language," or "call[s] outside of the FDCPA's assumed convenient calling hours."[6] The whole problem with that conduct is that it is immediately and unpleasantly apparent to a consumer.

These three complaint categories, taken together, account for more than 70 percent of all debt-collection complaints filed with the CFPB. And virtually all of them involve violations that would be immediately apparent.

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[4] *See* CFPB FDCPA Annual Report 2019, p. 16.

[5] *Id*. at 17.

[6] *Id*. at 16–17.

The same pattern holds even within the smaller categories of complaints. For example, most complaints within the category "Took or threatened to take negative or legal action" involved threats to harm a consumer's credit score or sue over an old debt.[7] Again, nothing about those claims is inherently unknowable to the consumer. Moreover, even within the category of "False statements or representations," nearly three-quarters of complaints involve "attempts to collect the wrong amount from the consumer."[8] A reasonably diligent consumer could identify such an error almost immediately.

All told, at least 90 percent of CFPB complaints appear to relate to alleged violations that would be immediately known to (or readily knowable through the exercise of reasonable diligence by) consumers.

As to the remaining 10 percent, equitable tolling may well be available in appropriate cases. *See supra* Part I.C.3. If the "blamelessly ignorant" plaintiffs that Petitioner posits pursue their rights diligently but are prevented from timely filing by a debt collector's efforts "to conceal [the] FDCPA violation[]," Pet.Br. 37, a court might exercise its discretion to equitably toll the statute of limitations. To be sure, that will not be true in every case in which a plaintiff does not immediately discover a violation. If, for example, a plaintiff does not undertake a reasonable investigation—or unduly delays in "search[ing] for, and then consult[ing] with, an attorney," Pet.Br. 37

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[7] *Id.*

[8] *Id.*

n.30—equitable tolling will not save an untimely claim.[9]

That is as it should be. Congress could have chosen to trigger the limitations period for an FDCPA violation when the plaintiff discovers the violation. It did not. That decision serves not only those interests that always underlie limitations periods, but also the FDCPA's goal of protecting law-abiding debt collectors from excess liability. *See supra* Part I.C; 15 U.S.C. § 1692(e). The traditional common-law doctrine of equitable tolling may well serve as a backstop, on a case-by-case basis, to prevent bad actors from taking advantage of "blamelessly ignorant" consumers. Pet.Br. 36. But where the criteria for equitable tolling are not satisfied (or, as here, the plaintiff waives any argument about equitable tolling), the statute of limitations bars untimely lawsuits.

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[9] The *amici* filing in support of neither party suggest that equitable tolling may not be available in cases of fraud because a plaintiff who "does not know he has been injured … cannot satisfy the first element of equitable tolling—that he has been pursuing his rights diligently." Amicus Br. of Bray, et al. 22. But as Petitioners' other *amici* acknowledge, courts do not generally apply the diligence prong in that way—including in FDCPA cases involving fraudulent service of process. *See* Amicus Br. of Nat. Consumer Law Ctr. 15–16 (describing cases "appl[ying] equitable tolling because the defendants had concealed plaintiffs' cause of action, and plaintiffs had not failed to act diligently"). Indeed, this Court has made clear that, in the fraud context more broadly, equitable tolling applies so long as "the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991) (quoting *Bailey*, 88 U.S. (21 Wall.) at 348).

C. Petitioner's Case-Specific Arguments Speak to Equitable Tolling and, However Labeled, Are Both Outside the Question Presented and Waived.

Because Petitioner has no good answer to the question presented (which is about whether the discovery rule applies to the FDCPA as a whole), many of his arguments address a very different question—whether something about the facts of his individual case might justify a different result. Those arguments speak to equitable tolling, not the discovery rule. However categorized, moreover, none of Petitioner's cases suggests that courts may apply the discovery rule in the face of language as clear as "violation occurs." In any event, Petitioner's case-specific arguments are both waived and outside the scope of the question presented. And Petitioner did not plead facts sufficient to justify equitable tolling anyway.

1. The discovery rule addresses when a limitations clock first starts ticking; whether the rule applies is a question of statutory interpretation to be answered only once for any given statute. *See supra* 7–8. Equitable tolling, by contrast, is about whether there are good reasons, in any individual case, to pause that clock to account for extraordinary circumstances. *See supra* 8.

Most of Petitioner's cases are best understood as applying the doctrine of equitable tolling. That is true, for example, of *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), which described an "equitable doctrine" that courts "read into every federal statute of limitation," *id.* at 397. Indeed, after holding that equitable tolling is available under the statute at

issue in *Holmberg*, the Court remanded for the lower courts to consider whether and how it applied on the facts of that case. *See id.* at 397–98; *see also, e.g., Lozano*, 572 U.S. at 10–11 (citing *Holmberg* for the proposition that "[e]quitable tolling[] [is] a long-established feature of American jurisprudence derived from 'the old chancery rule'"). That is also true of *Exploration Co. v. United States*, 247 U.S. 435 (1918), and *Bailey*, 88 U.S. (21 Wall.) 342, on which *Exploration Co.* relied. Both cases analyzed the relevant facts to determine whether, as a matter of equity, the applicable limitations period should be tolled until the cause of action was discovered. *See Exploration Co.*, 247 U.S. at 446 (explaining that the "frauds were concealed until after six years had elapsed from the issuance of the patents"); *Bailey*, 88 U.S. (21 Wall.) at 348 (describing the case as involving "a suit in equity" involving a "distinct allegation that the defendants kept secret and concealed from the parties interested the fraud"); *see also, e.g., McQuiggin v. Perkins*, 569 U.S. 383, 409 (2013) (Scalia, J., dissenting) (characterizing *Bailey* and *Exploration Co.* as addressing "the doctrine of equitable tolling").

Other cases that Petitioner cites are even further afield. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), addresses a form of equitable tolling applicable only to class actions. *See California Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.,* 137 S. Ct. 2042, 2051 (2017) (holding that "the source of the tolling rule applied in *American Pipe* is the judicial power to promote equity, rather than to interpret and enforce statutory provisions"). And *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231 (1959), did not involve

the discovery rule or equitable tolling, but rather "the doctrine of equitable estoppel." *See id.* at 234–35. Estoppel applies when, as in *Glus*, a defendant induces the plaintiff to delay suing—most often by "promising not to plead the statute of limitations." *Shropshear v. Corp. Counsel of City of Chicago*, 275 F.3d 593, 595 (7th Cir. 2001). Plaintiff has never invoked that doctrine, which has no bearing here.

To be sure, this Court has not always spoken perfectly clearly in this area. The discovery rule and equitable tolling are "frequently confused." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). Their overlapping domains—particularly in cases of fraud—has often made it unnecessary to carefully distinguish between them. *See, e.g., Klehr*, 521 U.S. at 192–93 (noting that the "legal questions involved" in distinguishing between these doctrines "may be subtle and difficult" and declining to resolve a question about their interaction where the distinction would not "make a significant legal difference"). But the distinction sometimes matters—not least because the Court applies a presumption in favor of the availability of equitable tolling, and because equitable tolling and the discovery rule turn on different substantive standards. *See supra* 7–9.

In any event, even if the cases cited by Petitioner did involve the discovery rule, that would still not change the result here. First, this Court's more recent decisions have reaffirmed the "standard rule" time and time again. *Graham*, 545 U.S. at 418 (quoting *Bay Area Laundry*, 522 U.S. at 201); *see supra* 30. Second, Petitioner's cases generally involved language that was at least arguably susceptible to a discovery rule, unlike the FDCPA. *See, e.g., Bailey*, 88

U.S. (21 Wall.) at 344 (addressing statute of limitations that ran from "the time … the cause of action accrued") (emphasis omitted); *Glus*, 359 U.S. at 231 (addressing statute of limitations that ran from "the day the cause of action accrued"). None construed "violation occurs"—the exact language Congress often uses in juxtaposition with the discovery rule. *See supra* Part I.A. These cases cannot override Congress's unambiguous choice of an occurrence rule in the FDCPA.

2. Regardless of which doctrinal category best captures Petitioner's case-specific arguments, they are outside the scope of the question presented. That question—as formulated in both the petition for certiorari and Petitioner's brief—is "whether the 'discovery rule' applies to the one-year statute of limitations under the Fair Debt Collection Practices Act." Pet.Br. i; *see* Pet. i. It is not whether something about the particular facts of this case excuses Petitioner's untimely filing. That question, of course, would not be certworthy.

Moreover, the trajectory of this appeal confirms that Petitioner waived any argument that the meaning of "violation occurred" depends on the facts of an individual FDCPA case. In the district court, Petitioner raised two independent arguments about the timeliness of his claim. First, and primarily, he "argue[d] that the discovery rule, which delays the beginning of a limitations period until the plaintiff knew of or should have known of his injury, applies to FDCPA claims." Pet.App. 21. Second and "[i]n the alternative, [he] contend[ed] that the Court should apply the doctrine of equitable tolling." *Id.* at 21–22. His own complaint made clear that his individual

allegations of misconduct related to the latter argument, not the former. C.A. App. 8a–9a ("Because the nature of the collection lawsuit purposefully ensured that plaintiff could never properly be served at an address at which he no longer live[d], defendants' acts were 'of such character as to conceal [themselves] to warrant equitable tolling.'" (quoting *Bailey*, 88 U.S. (21 Wall.) at 349–50)).

The district court addressed the discovery rule and equitable tolling under separate headings, and rejected Petitioner's position on both. *See* Pet.App. 22–29. The court's discussion of the discovery rule, appropriately, turned on the "statutory language" and statute-wide policy considerations. *Id.* at 22–26. Its discussion of equitable tolling, by contrast, turned on Petitioner's individual "allegations." *Id.* at 27–28.

Petitioner pressed only the discovery-rule issue before the Third Circuit. *Id.* at 13. The court decided that question against him; it did "not reach the [equitable tolling] question … because [Petitioner] failed to raise it on appeal." *Id.* Four members of the en banc court, however, noted that they "would have remanded to allow the District Court to consider whether [Petitioner] [should] be entitled to rely on this doctrine" if he "had preserved reliance on equitable tolling on appeal." *Id.* at 14 n.5.

Consistent with the decision below, both versions of the question presented to this Court ask only "[w]hether the 'discovery rule' applies to the one-year statute of limitations under the Fair Debt Collection Practices Act." Pet.Br. i; *see also* Pet. i. That is the only issue discussed in the body of the petition, which does not even use the phrase "equitable tolling." And Petitioner's case for certiorari turned on a circuit split

over the applicability of the discovery rule to the FDCPA as a whole. *See, e.g.*, Pet. 4 ("[T]he Third Circuit held the discovery rule does not apply to the FDCPA's one-year statute of limitations."); *id.* at 5 ("Contrarily, the Fourth Circuit has held the discovery rule does apply to the FDCPA."); *id.* ("[T]he Ninth Circuit likewise embraces the discovery rule as applicable to the FDCPA."). Nothing in the petition suggested that Petitioner might invoke equitable tolling or otherwise argue that the discovery rule applies only to some smaller category of cases under the FDCPA. And when the brief in opposition to certiorari raised Petitioner's waiver of equitable tolling as a reason to deny review, *see* BIO 8–10, Petitioner offered no response.

Petitioner therefore waived any argument that the facts of his particular case justify tolling the limitations period—whether labeled "equitable tolling" or not. This Court should decline to consider that question. *See Gabelli*, 568 U.S. at 447 n.2 (distinguishing the discovery rule from equitable tolling and noting that the Government had waived reliance on equitable tolling).

4. Petitioner's claim to equitable tolling is weak anyway. Again, to qualify for equitable tolling a plaintiff must show both "(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*, 136 S. Ct. at 755 (quoting *Holland*, 560 U.S. at 649) (internal quotation marks omitted).

As to diligence, Petitioner filed this suit more than six years after the default judgment, more than four years after the last collection effort, and nine months

after Petitioner alleges he learned of the judgment. *See* Pet.App. 21–22; C.A. App. 21a. Petitioner did not show why he could not have discovered the judgment sooner, or why he waited nine months to bring his claim after learning of the default.

As to extraordinary circumstances, Petitioner cries "fraud," but this case looks nothing like a traditional instance of fraud that might have prevented him from pursuing his rights. As the district court found, "there [were] no allegations of active misleading on the part of the Defendants." Pet.App. 26–29; *compare, e.g., Exploration Co.,* 247 U.S. at 437 (involving an allegation that "patents had been obtained by false affidavits"). And although Petitioner implies that he was the victim of so-called "sewer service," Pet.Br. 12 n.14, he established no supporting facts. His complaint does not describe—much less attach—the affidavit Petitioner seems to believe shows fraud. *See id.* at 12 (discussing the "fraudulent Affidavit of Service"). Instead, it contains only a barebones statement that "the nature of the service of the collection lawsuit purposefully ensured that plaintiff could never be properly served at an address at which he no longer live[d]." C.A. App. 8a.

That sort of conclusory allegation does not clear the bar this Court set in *Twombly* and *Iqbal*. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining that a complaint is insufficient if it "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (brackets in original)). It certainly does not satisfy the heightened pleading standard applicable to fraud claims. *See* Fed. R. Civ. P. 9(b); *cf. also Cozzarelli v. Inspire Pharm. Inc.*, 549 F.3d 618, 629

(4th Cir. 2008) (explaining that "one of the primary purposes of Rule 9(b)" is "protecting defendants from the reputational harm that results from frivolous allegations of fraudulent conduct"). The record also belies it. Klemm used an independent, court-authorized process server. *See* D.Ct. Dkt. 16-6 Ex. B (Aff. of Service). And the only reason Klemm attempted service at the same address twice was a data-management issue related to his move from one firm to another. *See* C.A. App. 20a.

The district court thus correctly held that "the doctrine of equitable tolling by way of fraudulent concealment … cannot save [Petitioner's] time-barred FDCPA claim because he was not misled by any conduct committed by any defendant." Pet.App. 29. Petitioner made the strategic decision not to appeal that determination to the Third Circuit. Petitioner may well be having second thoughts. But his regret does not change the fact that equitable tolling is both outside the question presented and waived several times over.

The only question presented is "whether the 'discovery rule' applies to the one-year statute of limitations under the Fair Debt Collection Practices Act." Pet.Br. i; *see* Pet. i. It does not, because Congress said that the limitations period begins to run when "the violation occurs." 15 U.S.C. § 1692k(d).

CONCLUSION

The judgment below should be affirmed.

July 12, 2019

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