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 THE NATIONAL CREDITORS BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

Misha Tseytlin
Counsel of Record
David N. Anthony
Jonathan P. Floyd
TROUTMAN SANDERS LLP
One North Wacker Drive, Suite 2905
Chicago, Illinois 60606
(312) 759-5947
misha.tseytlin@troutman.com

Counsel for Amicus Curiae

Dated: July 19, 2019

THE LEX GROUP^DC ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The National Creditors Bar Association ("NCBA") is a nationwide, not-for-profit bar association of attorneys who represent creditors. Its members include over 500 law firms, all of whom must meet the NCBA's high ethical standards, which impose an obligation of self-discipline beyond the requirements of applicable laws and regulations.[2] The NCBA's members also follow the obligations of their state supreme courts and bar associations.

NCBA members regularly take part in the lawful collection of consumer debts, but nevertheless still find themselves subject to lawsuits under the Fair Debt Collection Practices Act ("FDCPA" or the "Act"), 15 U.S.C. §§ 1692 *et seq.*, often alleging technical or otherwise benign mistakes. NCBA members thus have a strong interest in ensuring that the courts correctly interpret the FDCPA, including its one-year statute of limitations, to allow collection attorneys to carry out their ethical duties, in order to advance their clients' legitimate interests.

The NCBA has participated as *amicus curiae* in other cases impacting the ability of its member to serve their clients' legitimate needs. *See, e.g., Jerman*

---

[1] Counsel for the parties have consented to this brief. Under Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

[2] The NCBA was formerly known as the National Association of Retail Collection Attorneys ("NARCA").

v. Carlisle, McNellie, Rini, Kramer & Ulrich L.P.A., 559 U.S. 573 (2010); *Marx v. Gen. Revenue Corp.*, 568 U.S. 371 (2013); *Taggart v. Lorenzen*, 139 S. Ct. 782 (2019).

INTRODUCTION AND SUMMARY OF ARGUMENT

"[G]rafting the discovery rule onto" the FDCPA's one-year statute of limitations, *Gabelli v. S.E.C.*, 568 U.S. 442, 452 (2013), would undermine the careful balance that Congress struck, subjecting debt collectors—including attorneys—to belated, uncertain litigation exposure. The FDCPA, like many statutes, involves a delicate balance of "competing values." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam). On one hand, Congress created an expansive liability and damages regime that encourages the filing of meritorious lawsuits, including enumerating a broad swath of unlawful debt collection practices, permitting debtors to bring suit and collect statutory damages without showing that they suffered any tangible harm, and authorizing debtors to recover attorney's fees through a generally one-sided fee-shifting regime.

On the other hand, Congress sought to protect debt collectors from overbroad liability by, as relevant here, limiting the FDCPA's temporal reach with a strict, one-year statute of limitations. If this Court were to now subject this one-year limitations period to virtually unlimited temporary expansion through an atexutal discovery rule, that would fundamentally transform the FDCPA's "calibrated scheme." *Jerman*, 559 U.S. at 603. Debt collectors, including attorneys, would then be hauled into court to answer years'-old allegations, even where attorneys have no reason to recall often-benign collection actions, such as a single phone call or single written communication. The risk of such belated lawsuits would fall largely upon the debt collector, as the debtor would likely be entitled to attorney's fees if the debtor prevailed in the case.

Petitioner's policy argument that adding a discovery rule to the FDCPA would protect debtors from unfair harm should be directed to Congress, but is, in any event, greatly overstated. To begin with, given the open and obvious nature of the vast majority of FDCPA violations, instances where violations will go undetected for greater than one year, after reasonable diligence, will be rare. Even for those few cases that escape immediate detection after reasonable diligence, debtors, especially those who actually suffer harm from debt collectors' actions, will generally have multiple other avenues for redress, under other federal and state statutes that often require both a showing of tangible harm and have a longer limitations period. And given these considerations, there is no reason for this Court to consider here whether and when equitable tolling would be appropriate in an exceptional case under the FDCPA.

ARGUMENT

I. Undermining The FDCPA's One-Year Statute Of Limitations With An Atextual Discovery Rule Would Disrupt The Careful Balance That Congress Struck When It Enacted A Statute That Encourages The Immediate Filing Of Meritorious Lawsuits

The FDCPA is an overwhelmingly debtor-friendly statute, including a capacious definition of infringing conduct, no requirement that the plaintiff have suffered tangible harm, and a generally one-sided fee-shifting provision. Congress concluded that these features were palatable because the statute also includes a strict, one-year limitation period, which ensures that allegations of technical, often harmless, violations are brought to court quickly or not at all. If this Court were now to undermine that limitations period with an atextual discovery rule, it would multiply the practical impacts of the FDCPA's pro-debtor features, thereby undermining the "calibrated" balance that Congress struck. *Jerman*, 559 U.S. at 603.

A. The FDCPA creates an exceedingly broad regime of liability for debt collectors, prohibiting "any" harassing or abusive conduct, "any" deceptive or misleading representation, and all "unfair or unconscionable means" used by debt collectors. 15 U.S.C. §§ 1692c–1692f. These restrictions are intended to be cumulative, meaning that a "collection practice could be unfair without necessarily being deceptive." *Currier v. First Resolution Inv. Corp.*, 762 F.3d 529, 534 (6th Cir. 2014). The FDCPA lists dozens of forbidden, abusive, misleading, or unfair debt collection practices. 15 U.S.C. §§ 1692c–1692f. This includes limiting the times when and places where debt collectors can call (between 8 a.m. and 9 p.m. local time, and only at "[]convenient" places), *id.* § 1692c(a), regulating the number and contents of calls ("meaningful disclosure of the caller's identity"), *id.* § 1692d(5), (6), forbidding references to certain collection activities (no "implication that accounts have been turned over to innocent purchasers for value"), *id.* § 1692e(12), and so on. The listed examples are, of course, just examples, and "courts, where appropriate [can] proscribe other improper conduct which is not specifically addressed." S. Rep. No. 95-382, at *4 (1977); *see Currier*, 762 F.3d at 536.

In deciding if particular collection actions violate the FDCPA's broad terms, courts often employ a "least sophisticated consumer" standard, thereby further expanding debt collectors' liability. *See, e.g.*, *Pollard v. Law Office of Mandy L. Spaulding*, 766 F.3d 98, 103 (1st Cir. 2014); *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993); *Jensen v. Pressler & Pressler*, 791 F.3d 413, 419 (3d Cir. 2015); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 408 (4th Cir. 1999); *McMurray v. ProCollect, Inc.*, 687 F.3d 665, 669 (5th Cir. 2012); *Smith v. Transworld Sys., Inc.*, 953 F.2d 1025, 1028 (6th Cir. 1992); *Strand v. Diversified Collection Serv., Inc.*, 380 F.3d 316, 317 (8th Cir. 2004); *Afewerki v. Anaya Law Group*, 868 F.3d 771, 775 (9th Cir. 2017); *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174–75 (11th Cir. 1985). And because this standard is an objective one, the plaintiff need not even show that he was actually misled by a letter or phone call, but only that the objective least sophisticated consumer would have been. *See, e.g.*, *Pollard,* 766 F.3d at 103.

The FDCPA permits debtors to collect a broad range of damages, including statutory damages of up to $1,000 even where the debtor has suffered no tangible harm. 15 U.S.C. § 1692k(a)(2); s*ee Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (holding "that intangible injuries can nevertheless be concrete" so as to constitute an injury-in-fact); *Linehan v. AllianceOne Receivables Mgmt., Inc.*, No. 15-cv-1012, 2016 WL 4765839, at *7–8 (W.D. Wash. Sept. 13, 2016) (analyzing whether an FDCPA violation confers standing under *Spokeo*). The statute also includes a generally one-sided fee-shifting provision, which permits "successful" plaintiffs to collect attorney's fees and costs from defendant debt collectors. 15 U.S.C. § 1692k(a)(3). "Lower courts have taken different views about when, and whether, §1692k requires an award of attorney's fees." *Jerman*, 559 U.S. at 598 n.16; *compare Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1032 (9th Cir. 2012) ("mandatory" for prevailing plaintiffs), *with Davis v. Credit Bureau of the South*, 908 F.3d 972, 981 (5th Cir. 2018) (per curiam) (can be denied to prevailing plaintiffs in "special and unusual circumstances").

Congress provided for administrative enforcement of the FDCPA by multiple federal agencies, including the Consumer Financial Protection Bureau ("CFPB") and the Federal Trade Commission, *see* 15 U.S.C. § 1692l, as well as a "calibrated scheme of statutory incentives to encourage self-enforcement" by affected consumers. *Jerman*, 559 U.S. at 603. These private-enforcement provisions authorize debtors to pursue remedies against "any debt collector who fails to comply with any provision" of the Act. 15 U.S.C. § 1692k(a).

The FDCPA's broad liability regime is particularly burdensome for debt collection attorneys. Given the statute's broad reach, the least sophisticated consumer standard, and no requirement to show tangible damages, a large number of actions taken by debt collection attorneys are potentially subject to the FDCPA's provisions. *See, e.g.*, *Keasey v. Judgment Enforcement Law Firm, PLLC*, No. 13-cv-420, 2014 WL 1744268, *3-4 (W.D. Mich. Apr. 30, 2014) (use of the name "Judgment Enforcement Law Firm" on envelope to debtor violated the FDCPA); *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939 (9th Cir. 2011) (affirming FDCPA violation against law firm even though the firm relied on its client's initial representation that the action was not time-barred and subsequently dismissed the action); *Miljkovic v. Shafritz & Dunkin, P.A.*, 791 F.3d 1291 (11th Cir. 2015) (representations made by an attorney in court filings during the course of debt-collection litigation actionable under the FDCPA). As commentators have noted, "[e]thical duties to the client require the assertion of the client's best case. This collides with [the] strict liability [framework of the FDCPA] if the legal argument loses." Janet Flaccus, *Fair Debt Collection Practices Act: Lawyers and the Bona Fide Error Defense*, 2001 ARK. L. NOTES 95, 97 (2001). Courts have struggled with balancing attorneys' ethical obligations against the framework of the FDCPA, noting that, for example, if an attorney could be held liable for acting with zeal to collect a debt on a legally flawed theory, the attorney would be placed "between the proverbial rock and hard place." *Johnson v. Riddle*, 305 F.3d 1107, 1123 (10th Cir. 2002) (citations omitted).

In all, the FDCPA has become a minefield for debt collectors, including debt collection attorneys who only seek to fulfill their ethical obligations to zealously advance their client's interests. As Judge Cogan has explained, in words that mirror NCBA's experience, "[t]he majority of [FDCPA] cases that I see under the statute . . . seize on the most technical alleged defects in collection notices or telephone communications, often raising claims of 'confusion' or 'deception' regarding practices as to which no one, not even the least sophisticated consumer, could reasonably be confused or misled." *Huebner v. Midland Credit Mgmt, Inc.*, 85 F. Supp. 3d 672, 673 (E.D.N.Y. 2015). And even when liability is found, it is often the result of a disputed understanding of ambiguous communications. *See, e.g.*, *Pollard*, 766 F.3d at 109 (Baldock, J., dissenting) ("the letter as a whole is relatively straightforward and does not 'overshadow' or contradict the disclosure of consumer rights").

B. The FDCPA, like most statutes, does not pursue its goal of protecting consumers "at all costs," without regard for other "values." *Rodriguez*, 480 U.S. at 526. To the contrary, because Congress recognized that "unscrupulous debt collectors comprise only a small segment of the industry," S. Rep. No. 95-382, at *2 (1977), "the FDCPA contains several provisions that expressly guard against abusive lawsuits, thereby mitigating the financial risk to creditors' attorneys." *Jerman*, 559 U.S. at 597.

Perhaps the most important of FDCPA's protections for debt collectors—which serves as a vital counterbalance to the scheme of broad liability, statutory damages, and one-sided fee-shifting—is the statute's strict, one-year statute of limitations. The FDCPA provides, in some of the most unambiguous terms available to Congress, that "[a]n action to enforce any liability created by this title [15 U.S.C. §§ 1692 *et seq.*] may be brought in any appropriate United States district court . . . within one year from the *date on which the violation occurs*." 15 U.S.C. § 1692k(d) (emphasis added). This statutory text is clear: the plaintiff has one year—and no more—from the date when the "violation occurs," not from when the debtor discovers the violation, to bring a lawsuit. Notably, this Court explained in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001), that if Congress had used virtually identical "occurrence of the violation" language in Fair Credit Reporting Act, that it would "plainly establish[]" that Congress intended no discovery rule extension to the limitations' period. *Id.* at 32 (citation omitted).

C. If this Court were to depart from the clear statutory text and "graft[] the discovery rule onto" the FDCPA's one-year statute of limitations, *Gabelli*, 568 U.S. at 452, that would disrupt Congress' "calibrated scheme," *Jerman*, 559 U.S. at 603, beyond even generically undermining "the basic policies of all limitations provisions: repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Gabelli*, 568 U.S. at 448 (citation omitted).

Again, the FDCPA combines several features that make it exceedingly onerous to defendants: from the expansive list of violations, to the broad language that courts have further expanded through the "least sophisticated consumer" standard, to provisions for statutory damages without any showing of tangible harm, to generally one-way attorney's fee-shifting.

If the judiciary were now to subject debt collector defendants to liability for actions taken years earlier, the result would be expansive liability of the sort that Congress never envisioned. Already, the FDCPA's pro-debtor features have spawned a "cottage industry" of lawyers who file formulaic FDCPA complaints, forcing settlements under the threat of attorney's fees. *Murphy v. Equifax Check Servs., Inc.*, 35 F. Supp. 2d 200, 204 (D. Conn 1999). If liability is further extended to capture, for example, a single written communication or telephone call that the debt collector has no reason to recall from years in the past, and which may not have imposed tangible harm on anyone, the result will be predictable. More lawsuits will be filed against debt collectors, who will often be forced to settle rather than attempt to litigate in an already tilted playing field, while now facing additional problems where "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944). Congress, having disabled debt collector attorneys from seeking dismissal of lawsuits because the debtor can show no tangible harm, and having created one-sided attorney's fee-shifting that encourages the filing of marginal claims, never intended to pile on such additional difficulties.

Long delays in raising FDCPA claims would be particularly problematic for debt collection attorneys. These attorneys already face a growing number of FDCPA claims, subjecting them to potential liability for alleged technical collection violations. *See Huebner,* 85 F. Supp. 3d at 673. In defending against these often meritless claims, debt collection attorneys typically rely upon their client's information to defend themselves, which is particularly difficult because these attorneys are bound by their ethical confidentiality obligations under their state bar. *See, e.g.*, 204 Pa. Code § 81.4, Rule 1.6. Under a discovery rule expansion of the FDCPA, these attorneys will need to locate former clients to obtain information pertinent to the FDCPA claim and, potentially, confidentiality waivers for long-ago cases. These attorneys will often also need to seek help from clients or former clients to locate third parties that the clients retained to assist with the debt collection, such as independent process servers. In the present case, for example, to defend against Petitioner's claims, for actions taken four and six years ago, the attorney may well need to locate the client, possibly long after the representation of the client ended, to gather the necessary evidence. Resp. Br. 4. The attorney may also need to locate the process server to investigate Petitioner's claims that the lawsuit was not properly served years ago. *Id.* And all of this effort would be undertaken to avoid statutory damages and, more importantly, a substantial attorney's fee award, even if it turned out there was no reason to think that Petitioner suffered *any* tangible harm from the alleged, years' old collection actions.

II. Petitioner's Policy Concerns Provide No Justification For Grafting The Discovery Rule Onto The FDCPA

Petitioner's concern that refusing to graft a discovery rule onto the FDCPA would lead to "blameless" victims with no ability to recover for harmful actions, Pet. Br. 36–39, provides no justification for atextually "grafting the discovery rule onto" the FDCPA, *Gabelli*, 568 U.S. at 452. In any event, Petitioner's concern for "blameless" victims is overstated for at least two reasons.

First, as the Third Circuit explained below, many FDCPA violations "will be apparent to consumers the moment they occur." Pet. App. 9. The FDCPA in large part regulates representations in the collection of debts. 15 U.S.C. §§ 1692e–1692f. Representations to, and communication with, consumers are the core of debt collection. That is why, for example, the FDCPA allows debt collectors to communicate with third parties "for the purpose of acquiring location information about the consumer." *Id.* § 1692b. Indeed, as the Third Circuit noted, "[d]ebtors are often vexed by overzealous or unscrupulous debt collectors precisely because of repetitive contacts by phone or mail." Pet. App. 9. And many violations will be apparent to consumers the moment they occur or shortly thereafter. *See, e.g.*, 15 U.S.C. § 1692c(a)(1) (communication regarding debt collection "at any unusual time or place"); *id.* § 1692d ("use of obscene or profane language" and "[t]he publication of a list of consumers who allegedly refuse to pay debts"); *id.* § 1692f(7) ("[c]ommunicating with a consumer regarding a debt by post card").

Second, to the extent Petitioner seeks sympathy for "blameless" victims, those who are victims in the traditional sense—that is, having actually suffered tangible harm from the actions of debt collectors—will have other avenues of redress, under statutes with both longer limitations periods and, often, the requirement that the plaintiff show tangible harm. For example, both the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), and the Fair Credit Reporting Act, 15 U.S.C. § 1681p ("FCRA"), have statutes of limitation that exceed the FDCPA—up to four and five years, respectively. *Giovanniello v. ALM Media, LLC*, 726 F.3d 106, 107 (2d Cir. 2013) (applying generic federal statute of limitations in 28 U.S.C. § 1658 to claims brought under the TCPA).

As for state law, focusing on just the jurisdiction at issue in this case, debtors harmed by debt collections will typically have ample avenues for relief. Pennsylvania's Fair Credit Extension Uniformity Act, 73 Pa. Stat. § 2270.1 *et seq.* ("FCEUA"), and Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. § 201.1 *et seq.* ("UTPCPL"), regulate the debt collection activities of debt collectors and prohibits unfair or deceptive acts or practices while attempting to collect debts. These statutes are subject to two- and six-year statutes of limitation. Individual plaintiffs can use 73 Pa. Stat. § 201-9.2, the remedial provision of the UTPCPL, to obtain relief for violations of either statute. *Benner v. Bank of Am., N.A.*, 917 F. Supp. 2d 338, 359 (E.D. Pa. 2013); *see* FCEUA, 73 Pa. Stat. § 2270.5(a) ("If a debt collector or creditor engages in an unfair or deceptive debt collection act or practice under this act, it shall constitute a violation of [the UTPCPL.]"). There are also a variety of Pennsylvania common law causes of action that address consumer concerns. For example, consumers can pursue libel and defamation claims when debt collectors willfully furnish incorrect information to courts and credit reporting agencies. *Oates v. Wells Fargo Bank, N.A.*, 880 F. Supp. 2d 620, 627 (E.D. Pa. 2012). Although these causes of action themselves carry a one-year statute of limitations, 42 Pa. Cons. Stat. § 5523(1), they are generally subject to Pennsylvania's discovery rule for common law causes of action. *Fine v. Checcio*, 582 Pa. 253, 266 (2005).

That does not mean that, once in a while, a claim—especially from a debtor who suffered no tangible harm—might slip through the cracks. Of course, debtors will continue to seek recourse for violations of the FDCPA because the Act includes a statutory damages provision and fee-shifting regime to encourage the filing of claims. But that encouragement comes with necessary, specific temporal limitations, found in the statutory text: a strict, one-year statute of limitations. By including that strict limitation period, Congress created a "calibrated" balance, *Jerman*, 559 U.S. at 603, under which some small number of FDCPA violations—especially those where the debtor suffers no tangible harm, and only discovers the technical defects years after the fact—will not be brought.

III. This Court Should Decline To Opine In This Case On Whether And When Equitable Tolling Is Available Under The FDCPA

The Third Circuit and the parties discuss the implications of the equitable tolling doctrine for this case, in particular, and the FDCPA, in general. *See*

Pet. Br. 18–19; Resp. Br. 37–44, Pet. App. 13–14. The NCBA agrees entirely with Respondents that the availability of equitable tolling is outside of the Question Presented and was waived below, and thus should not be decided here. Rather, this Court should simply follow the approach that it has in cases like *Gabelli*, holding that the discovery rule does not apply, and simply observing the equitable tolling and similar "such doctrines" are "not before" this Court, in this case. 568 U.S. at 447 n.2.

If this Court were inclined to overlook Petitioner's waiver, it should still not decide whether and when the equitable tolling doctrine applies to the FDCPA. The question of whether a statute permits equitable tolling is often a sensitive, difficult one. *Compare United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1629 (2015), *with id.* at 1645 (Alito, S., dissenting). This is true for the FDCPA. *Compare Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 939–40 (9th Cir. 2009) (equitable tolling applies to the FDCPA), *with Mattson v. U.S. W. Comm'ns*, 967 F.2d 259, 262 (8th Cir. 1992) (equitable tolling does not apply to the FDCPA). To take just one difficulty, the FDCPA places the statute of limitations under a header titled "jurisdiction." 15 U.S.C. § 1692k(d). "[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234, (1998) (citation omitted). Petitioner asserts that this Court should ignore the "jurisdiction" header, citing to *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964), where this Court explained that the "Statutes at Large" supersede the U.S. Code. Pet. Br. 2. *Welden* is distinguishable, as the "jurisdiction" is from the margin notes of the FDCPA's Statutes at Large themselves. Pub. L. No. 95-109, § 813, 91 Stat. 874, 881 (1977), *available at* http://www.gpo.gov/fdsys/pkg/STATUTE-91/pdf/STATUTE-91-Pg874.pdf (last visited July 17, 2019). "Although margin notes are generally not used in interpreting statutes, they may be referred to as indicating the intention of Congress." *Motorola, Inc. v. United States*, 729 F.2d 765, 771 (Fed. Cir. 1984). Additional complications and insights would surely arise, if this issued is fully briefed and argued, in an appropriate case.

CONCLUSION

This Court should affirm the Third Circuit.

Respectfully submitted,

MISHA TSEYTLIN
Counsel of Record
DAVID N. ANTHONY
JONATHAN P. FLOYD
TROUTMAN SANDERS LLP
One North Wacker Drive
Suite 2905
Chicago, Illinois 60606
(312) 759-5947
misha.tseytlin@troutman.com

July 19, 2019