No. 18-328

In The
Supreme Court of the United States

KEVIN C. ROTKISKE,

Petitioner,

v.

PAUL KLEMM, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICUS CURIAE* ACA INTERNATIONAL IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

ACA International ("ACA") is the leading trade association for the debt collection industry.[1] Founded in 1939, ACA brings together approximately 2,000 collection agencies, attorneys, asset buyers, creditors, and their vendors. It produces a wide variety of products, services, and publications, including educational and compliance-related information.

Ranging from mom-and-pops to international corporations, ACA's members are integral to the American economy. An arm of every community's businesses, they recover billions of dollars for companies every year. Their work returns money to businesses for reinvestment in the economy, eases consumers' access to credit, and keeps the cost of goods and services down.

SUMMARY OF ARGUMENT AND INTRODUCTION

Petitioner urges the Court to reverse an *en banc* decision of the Third Circuit holding that the discovery rule does not toll the limitations period under Section 813(d) of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692k(d). He does so by relying

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

on irrelevant and anecdotal references to misconduct in the debt collection industry to distract from a straightforward reading of Section 813(d). These arguments, such as they are, should be rejected. Section 813(d) of the FDCPA plainly states that the one-year limitations period to commence an action starts "from the date on which the violation occurs" and, as the Third Circuit recognized, a plain language interpretation provides the debt collection industry with much needed certainty about a plaintiff's opportunity for recovery and a defendant's potential for liability.

Certainty about potential liability is of paramount importance to the debt collection industry, whose efforts annually result in the recovery of billions of dollars that are returned to creditors, significantly improving consumers' access to credit and strengthening the broader U.S. economy. Expanding the scope of liability beyond the one-year limitations period is particularly problematic considering that the FDCPA does not have a statute of repose – meaning claims could be brought several years after the alleged misconduct occurred, with no backstop. Further, the debt collection industry is already highly regulated; debt collectors are subject to myriad state and federal laws designed to protect consumers, which also provide consumers with private rights of action. Applying the discovery rule to the FDCPA would substantially increase litigation costs arising from claims brought well beyond the plainly-defined limitations period, which costs ultimately will be passed on to consumers. This untenable result, which is inconsistent with clear Congressional

intent, would negatively impact consumers, the availability of credit, and the debt collection industry – precisely the result the plain meaning rule of statutory interpretation was designed to prevent.

For these reasons, and those stated more fully below, ACA respectfully requests that the Court affirm the decision of the Third Circuit.

ARGUMENT

I. The Debt Collection Industry Benefits Consumers, Government Agencies, and the U.S. Economy.

The debt collection industry serves a vital function to consumers, the American economy, and government agencies. As a recent report published by Ernst & Young concluded, unpaid debt can have a substantial impact on consumer prices, borrowing costs, consumer access to credit, and business performance.[2] Further, uncollected taxes and government-issued fines can negatively impact government budgets, preventing agencies from providing necessary resources to the public. EY Report at 1. The debt collection industry serves consumers and government entities by recovering these unpaid obligations, which amount to tens of billions of

[2] Ernst & Young, *The Impact of Third-Party Debt Collection on the U.S. National and State Economies in 2016* ("EY Report") (Nov. 2017) at i, https://www.acainternational.org/assets/ernst-young/ey-2017-aca-state-of-theindustry-report-final-5.pdf (last visited July 11, 2019).

dollars in debt each year that may otherwise go uncollected.

Notably, debt collection agencies returned to creditors a staggering $67.6 billion in debt in 2016 alone. EY Report at i. Of this total, a substantial portion (16%) was government-related debt, which includes taxes, court fees, and utility debt, among other funds essential to a functioning government. *Id*. at 6. By recovering this delinquent debt, the debt collection industry also generates significant consumer benefits, including reduced prices for consumers that pay their debts, lower bad debt costs for businesses that diminish financial insolvency risks, and decreased future tax and fee increases or spending cuts on the part of government agencies.

Debt collectors serve another important function by providing information to consumers regarding the status of their outstanding debt and ways to resolve their delinquency. Without this information, consumers would suffer serious adverse consequences, including an inability to access credit, being restricted to only expensive credit, and the risk of facing litigation rather than having the opportunity to work out a payment arrangement.

Petitioner points out that the "third-party debt collection industry governed by the FDCPA is enormous." Br. for Pet. at 4. Petitioner is correct about the size and significance of the debt collection industry. Indeed, the debt collection industry is a major creator of U.S. jobs, supporting a total of 218,324 jobs and a total

payroll of approximately $12.6 billion. EY Report at i-ii. These industry jobs directly support government institutions as well: estimates show that debt collection agencies directly contributed nearly $1.5 billion in federal, state, and local taxes in 2016. *Id.* at ii.

II. An Interpretation of Section 813(d) that is Faithful to the Plain Language of the Statute Benefits Consumers and the Broader U.S. Economy.

Section 813(d) of the FDCPA clearly states that the one-year limitations period to commence an action starts "from the date on which the violation occurs." The Third Circuit rightly found that this language expressly precludes application of the discovery rule to toll the limitations period. Not only is this interpretation consistent with well-settled rules of statutory interpretation, but also it provides much-needed certainty to well-intentioned debt collectors who nevertheless face exposure resulting from meritless lawsuits. As the Third Circuit explained, "[s]tatutes of limitation provide 'security and stability to human affairs' and are 'vital to the welfare of society.'" *Rotkiske v. Klemm*, 890 F.3d 422, 425 (3d Cir. 2018) (citation omitted). Given the importance of the debt collection industry, a reasonable limitation on the temporal scope of FDCPA claims allows participants in the industry to budget for litigation expenses, and better anticipate the scope of any potential liability.

On the other hand, if the Court were to find that the discovery rule applies to FDCPA claims, there would be significant consequences for third-party debt collectors. First, allowing the discovery rule to apply to FDCPA actions would expose debt collectors to potential liability and litigation costs for an indefinite period of time after the alleged offense has occurred. Second, and relatedly, the FDCPA does not have a statute of repose; so, if the discovery rule applies, there would be no outer limit to when a potential plaintiff could commence an action. This could lead to cases being filed many years after the alleged occurrence, when facts and evidence are unavailable or otherwise unreliable. Third, the defense of claims under the FDCPA would become more costly and complicated, as the discovery rule would require courts to determine, each time a statute of limitations defense is raised, when a particular consumer discovered or should have discovered an alleged violation of the FDCPA. Fourth, the one-year limitations period provides an important protection to well-intentioned debt collectors, by requiring that any claims be filed within a discrete period of time.

III. Affirming the Third Circuit's Decision Will Not Lead to a Proliferation of Abuse and Fraud by Third-Party Debt Collectors.

Petitioner reasons that skirting the plain language of the FDCPA would be consistent with the Act's purpose "to eliminate abusive debt collection practices by debt collectors." Br. for Pet. at 29. Going one step further, Petitioner contends that affirming the Third

Circuit's decision would "effectively render[] immune broad swaths of misconduct" and "would not only harm consumers, but it also would undermine Congress's express objective of leveling the competitive playing field between law-abiding and unscrupulous debt collectors." *Id.* at 38. These arguments must be rejected.

First, as Petitioner points out, Congress drafted the FDCPA to protect consumers and included in that statute a one-year limitations period – demonstrating that Congress itself believed that one year from the time of any alleged violation was sufficient to allow an aggrieved consumer to bring an action. Second, Petitioner's purported concern that enforcing the one-year limitations period drafted and adopted by Congress would somehow render debt collectors "immune" from consumer complaints utterly ignores the larger framework of consumer protections against fraudulent and abusive debt collection practices that exists beyond the FDCPA. Third, an overwhelming majority of alleged FDCPA violations are such that any reasonable consumer would immediately be aware of the violation. Finally, in cases of deliberate, self-concealing conduct, the Third Circuit has left open the possibility that consumers may invoke equitable tolling.

a. Consumers are protected by a robust framework of state and federal laws that include the FDCPA and extend beyond it.

The stated purpose of the FDCPA is to (i) "eliminate abusive debt collection practices by debt collectors," (ii) "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged," and (iii) "promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). To achieve those ends, Congress granted consumers the ability to file a private cause of action against debt collectors for violating the FDCPA. 15 U.S.C. § 1692k. Private enforcement of the FDCPA has, indeed, proven an effective tool for consumers.

For instance, the FDCPA does not require consumers to show that a debt collector's misconduct was intentional. *See, e.g, Russell v. Equifax A.R.S.*, 74 F.3d 30, 33 (2d Cir. 1996) ("Because the Act imposes strict liability, a consumer need not show intentional conduct by the debt collector to be entitled to damages."); *Beuter v. Canyon State Prof'l Servs., Inc.*, 261 F. App'x 14, 15 (9th Cir. 2007) (holding that the FDCPA imposes strict liability on debt collectors and that they "are liable for even unintentional violations of the FDCPA"). Likewise, the FDCPA incentivizes consumers and their attorneys to diligently monitor debt collector's behavior by allowing the recovery of "any actual damage," statutory damages up to $1,000, as well as the consumers' attorney's fees and costs. 15 U.S.C. § 1692k.

As Petitioner correctly points out, Congress intended for the Act to be enforced "primarily" through private lawsuits filed by wronged consumers. *See* S. REP. NO. 95-382, 5, 1977 U.S.C.C.A.N. 1695, 1699 ("The committee views this legislation as primarily self-enforcing; consumers who have been subjected to collection abuses will be enforcing compliance."). Congress did not, however, intend for the FDCPA to be the only protection afforded to consumers against abusive debt collection practices. To the contrary, private enforcement of the FDCPA was intended to be one aspect of a larger tapestry of protections afforded to consumers subject to debt collection.

i. The FDCPA is enforced not only through private lawsuits but also through administrative actions.

The FDCPA itself is not only enforced through private lawsuits but also through administrative actions. With some exceptions, violations of the Act are deemed to be unfair or deceptive acts or practices under the Federal Trade Commission Act, 15 U.S.C. §§ 41, *et seq*., and are enforced by the Federal Trade Commission ("FTC") and the Consumer Financial Protection Bureau ("CFPB"). *See* § 1692. As a result, a debt collector who acts with "actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is [prohibited under the FDCPA]" is subject to civil penalties of up to $40,000 per day. §§ 45(m)(1)(A), (C); 81 FED. REG. 42476 (2016) (amending 16 C.F.R. § 1.98(d)).

Notably, the FTC has been and continues to be active in prosecuting debt collectors for abuses. For example, in the past few years, the FTC has engaged in an aggressive campaign against "phantom debt collectors" – that is, debt collectors that "engage in unfair, deceptive, or otherwise unlawful conduct by attempting to collect on debts that either do not exist or are not owed to the phantom debt collector" – initiating several actions aimed to halt the proliferation of phantom debt collection schemes. *See* CFPB FDCPA Annual Report 2019, pp. 27–31, https://bit.ly/2ukaKip.

Relying on this framework of federal enforcement, Petitioner asserts that the debt collection industry "generates large numbers of complaints to the federal government each year." Br. for Pet. at 5. This argument, however, only confirms that consumers *already* have access to significant existing mechanisms to address any alleged misconduct. Despite Petitioner's concession that there exist substantial avenues through which consumers may pursue alleged abuses by industry participants, Petitioner urges the Court to ignore a limitations period that is clearly defined in order to expand potential liability to debt collectors for an indefinite period of time. This result would be untenable.

ii. State law provides significant protection to aggrieved consumers.

Moreover, state law provides consumers with robust protections against abusive practices. Congress originally passed the FDCPA in response to a 1977

finding by the Committee on Banking, Housing, and Urban Affairs that the then-existing state laws and procedures for redressing injuries caused by debt collectors were inadequate to protect consumers. *See* S. Rep. No. 95-382, at 2. In 1977, the Committee noted that thirteen states had no debt collection laws whatsoever with another eleven states having laws with "little or no effective protection," leaving "[eighty] million Americans, nearly 40 percent of our population," with "no meaningful protection from debt collection abuse." *Id.*

That is no longer the case, as many states have expanded their existing consumer protection laws since the enactment of the FDCPA.[3] Currently, all fifty states and the District of Columbia have enacted consumer protection statutes that regulate debt collectors on some level, with many states having enacted multiple layers of statutory protections regulating debt collectors and separately prohibiting debt collectors from engaging in unfair, deceptive, or abusive trade practices.[4]

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[3] *See, e.g.*, Ala. Code §§ 8-19-1, *et seq.* (Alabama Deceptive Trade Practices Act) (enacted in 1981); Ind. Code § 24-5-0.5-2(a)(1)(C) (amended in 2011 to explicitly apply to collecting or attempting to collect a debt owed or due, or asserted to be owed or due, to another person); R.I. Gen. Laws §§ 19-14.9-1, *et seq.* (Rhode Island Fair Debt Collection Practices Act) (enacted in 2007).

[4] *See, e.g.*, Ark. Code §§ 4-88-101, *et seq.* (Arkansas Deceptive Trade Practices Act); Ark. Code §§ 17-24-501, *et seq.* (Arkansas Fair Debt Collection Practices Act); Ga. Code § 7-3-25 (Georgia Industrial Loans Act); Ga. Code §§ 10-1-390, *et seq.* (Georgia Fair Business Practices Act of 1975); 18 Pa. Stat. § 7311; 73 Pa. Stat. §§ 201-1, *et seq.* (Pennsylvania Unfair Trade Practices and

As a result, the landscape of consumer protection laws and rules that regulate the collection of debts is now much more widespread and complex than when the FDCPA was originally enacted. Thus, contrary to Petitioner's overstated concerns, the FDCPA's one-year statute of limitations does not leave "blamelessly ignorant" consumers without any protection. Br. of Pet. at 11. Nor does it incentivize fraudulent and abusive debt collection practices. Rather, consumers are left with the level of protection that Congress intended when it first passed the FDCPA.

b. Affirming the Third Circuit's Decision Will Not Promote "Sewer Service."

Petitioner avers that affirming the Third Circuit's decision would immunize debt collectors who file fraudulent proofs or affidavits of service – that is, sworn statements that falsely inform a court that a defendant has been properly served with process. *See* Br. of Pet. at 12. These and other similar fraudulent service of process practices are sometimes referred to as "sewer service." *See id.* at 12 n.14 (citing Terry Carter, *Payback: Lawyers on Both Sides of Collection are Feeling Debt's Sting*, 96 A.B.A. J. 40, 45 (2010). According to Petitioner, when debt collectors engage in "sewer

Consumer Protection Law); 73 Pa. Stat. §§ 2270.1, *et seq.* (Pennsylvania Fair Credit Extension Uniformity Act); Wyo. Stat. §§ 33-11-101, *et seq.* (Wyoming Collection Agencies Act); Wyo. Stat. §§ 40-12-101, *et seq.* (Wyoming Consumer Protection Act).

service," they often obtain quick default judgments against consumers under false pretenses.

Although Petitioner likens Respondent's actions to those in *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 75 (2d Cir. 2015), *see* Br. of Pet. at 12 n.13, this comparison is neither fair nor helpful. The fraudulent scheme detailed in *Sykes* was particularly egregious, and included gross, deliberate, and repeated efforts to defraud recipients of service and the courts.[5]

Petitioner does not complain of any elaborate or offensive conduct that rivals the conduct alleged in *Sykes*. And, even if Petitioner's allegations *did* compare to those in *Sykes*, *Sykes* actually demonstrates that the discovery rule is not necessary to protect "blamelessly ignorant" consumers against "sewer service" practices. Notably, the district court in *Sykes* denied the defendant's motion to dismiss the FDCPA claims as time-barred "on the grounds that those claims had been equitably tolled," explaining that " 'sewer service purposefully ensures that a party is never served, [therefore] it is plausible that defendants' acts were 'of such character as to conceal [themselves]' to warrant equitable tolling.' " *Sykes*, 780 F.3d

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[5] For instance, the process server would regularly swear to " 'executing service at two or more locations at the same time' " or executing multiple services " 'so close in time that it would have been impossible for the process server to travel from one location to the other as claimed.' " *Id.* at 76-77 (citing *Sykes v. Mel S. Harris and Assocs. LLC*, 285 F.R.D. 279, 284 (S.D.N.Y. 2012)).

at 78 (citing *Sykes v. Mel S. Harris and Associates LLC*, 757 F. Supp. 2d 413, 422 (S.D.N.Y. 2010)).

Further, although Petitioner repeatedly parades fears of the adverse impact of the Third Circuit's decision on "blamelessly ignorant" consumers, at no point does Petitioner provide an example of fraudulent service of process practices going unchecked.[6] Not only are administrative actions available and successful in eliminating "sewer service," but also equitable tolling prohibits debt collectors from avoiding liability to individual consumers under the FDCPA by concealing their fraudulent practices.

The doctrine of equitable tolling dictates that a statute of limitations be "pause[d]" where "extraordinary circumstance[s]" exist. *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014). Specifically, a plaintiff is entitled to equitable tolling of a statute of limitations if he can establish "(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 of Wisconsin v. United*

[6] Interestingly, the article that Petitioner cites for his discussion of "sewer service" contradicts his argument that the discovery rule is necessary to curtail fraudulent service of process practices by debt collectors. That article discusses an administrative action against thirty-five debt collectors that successfully protected consumers by "walking back or redoing [of] as many as 100,000 default judgments against alleged debtors in which a corrupt process service company engaged in 'sewer service,' claiming to have served complaints when it did not." Terry Carter, *Payback: Lawyers on Both Sides of Collection are Feeling Debt's Sting*, 96 A.B.A. J. 40, 45 (2010).

States, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 646 (2010)). In *Sykes*, as in other cases across the country, consumers may proceed with their FDCPA claims beyond the one-year statute of limitations in cases where there is egregious conduct or overt acts to conceal the FDCPA violation. Further, here, the Third Circuit was *very* clear that its decision does "nothing [to] impair[ ] the discretion district courts possess to avoid patent unfairness in such cases. . . . [E]quitable tolling remains available in appropriate cases." *Rotkiske*, 890 F.3d at 427. The availability of equitable tolling is a significant protection against the types of fraud and abuse of most concern to Petitioner.

Finally, looking past Petitioner's overstated concerns, an overwhelming majority of alleged FDCPA violations are such that any reasonable consumer would immediately be aware of the violation. As reported by the CFPB, obvious FDCPA violations, such as "attempts to collect a debt that the consumer reports is not owed," defects in "written notifications," and complaints concerning telephone communications, among other alleged violations, comprise between 70 and 90 percent of all consumer complaints. *See* CFPB FDCPA Annual Report 2019, pp. 16-18, https://bit.ly/2ukaKip. Indeed, the Third Circuit agreed that "the conduct proscribed by the FDCPA will usually be obvious to its victims." *Rotkiske*, 890 F.3d at 427, n.3.

CONCLUSION

Petitioner seeks to distract the Court from well-settled legal principles of statutory interpretation by relying on exaggerated and, often anecdotal, concerns about the impact that enforcing a Congressionally-mandated statute of limitations will have on consumers. In reality, Congress knew exactly what it was doing in requiring that a consumer bring a private cause of action under the FDCPA within one year "from the date on which the violation occurs." Congress sought to balance the need to protect consumers from real fraud and abuse, against the need to ensure meaningful certainty regarding litigation exposure for well-intentioned participants in the debt collection industry. This statutory limitation is all the more critical when one considers that the debt collection industry is absolutely necessary to consumers, government agencies, and the continued functioning of the U.S. economy. The Court should affirm the decision of the Third Circuit below.

Respectfully submitted,

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