No. 18-328

IN THE

Supreme Court of the United States

KEVIN ROTKISKE,

Petitioner,

v.

PAUL KLEMM, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Respondent Paul Klemm

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

Page(s)

CASES

STATUTES

INTRODUCTION

The petition asks this Court to review the Third Circuit's holding that the "discovery rule" does not apply to the statute of limitations under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.* The question presented implicates, at most, a one-to-one split. The answer, moreover, is unlikely to be outcome-determinative in many cases. That is because there is little daylight, at least in this context, between the discovery rule and equitable tolling—which the Third Circuit agrees *does* apply to the FDCPA. The petition should be denied.

Statutes of limitation establish the time by which a legal claim must be asserted—or else forfeited. They are "vital to the welfare of society" because they create "certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Gabelli v. S.E.C.*, 568 U.S. 442, 448–49 (2013). In fixing both the length of a limitations period and the point at which it begins to run, Congress "strike[s] the balance between remediation of all injuries and a policy of repose." *TRW Inc. v. Andrews*, 534 U.S. 19, 38 (2001) (Scalia, J., concurring).

Congress generally sets a limitations period's starting point in one of two ways. First, "[t]he standard rule is that a statute of limitations 'commences when the plaintiff has a complete and present cause of action.'" Pet.App. 5 (quoting *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). Second, in some cases, "Congress may delay the start of the limitations period until the date the aggrieved party knew or should have known of the injury, that

is, the 'discovery rule.' " *Id.* at 6 (internal quotation marks omitted).

As the en banc Third Circuit unanimously concluded below, the limitations provisions of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692k(d), falls squarely in the first camp. That provision states that "[a]n action to enforce any liability created by this subchapter may be brought in any appropriate United States district court . . . within one year *from the date on which the violation occurs*." *Id.* (emphasis added). The statute thus answers the question presented here: The discovery rule does not apply to the FDCPA's limitations provision because the limitations clock begins ticking on "the date on which the violation occurs." *Id.*

Although the petition identifies contrary decisions by the Fourth and Ninth Circuits, that narrow division of authority does not warrant a grant of certiorari. First, the split is far from entrenched: The Fourth Circuit decision is unpublished, and the split Ninth Circuit decision hinged on conflicting circuit precedents that may well be revisited en banc. Notably, moreover, neither decision engaged the relevant statutory text. Second, few cases are likely to turn on the question presented because, as the Third Circuit recognized, equitable tolling may be available in cases where the violation was concealed from the plaintiff. Finally, the decision below is correct. The petition should be denied.

STATEMENT

1. Petitioner Kevin Rotkiske failed to pay his credit card bill. Pet.App. 16. The credit card issuer

closed the card, and referred the debt for collection to a now-defunct law firm previously managed by Respondent Paul Klemm.[1] *Id.*

In March 2008, Klemm tried to collect by filing a lawsuit against Mr. Rotkiske in Philadelphia Municipal Court. *Id.*; C.A. App. 19a. It is not clear, however, whether Mr. Rotkiske was properly served: The municipal court docket contains both an affidavit of service stating that personal service had been accomplished and a letter signed by a third party stating that Mr. Rotkiske did not reside at the address where service was attempted. C.A. App. 19a. The lawsuit was subsequently withdrawn without prejudice. *Id.*; Pet.App. 16.

In January 2009, Klemm filed a second lawsuit, attempting service at the same address. Pet.App. 16. For this suit, the municipal court docket contains only the affidavit of service, though Mr. Rotkiske claims that, as before, an individual unknown to him accepted service. *Id.*; C.A. App. 21a. After Mr. Rotkiske failed to appear to defend himself, the court entered a default judgment against him for $1,182.39. Pet.App. 16; C.A. App. 21a. Notice of that judgment would have been sent by the court.

Klemm made efforts to collect on the judgment, C.A. App. 21a, and it would have appeared on Mr. Rotkiske's credit report. Nonetheless, Mr. Rotkiske

---

[1] Each of the Respondent entities—all of which were formerly managed by Paul Klemm—is now defunct. Paul Klemm, accordingly, is the only Respondent with an ongoing interest in these proceedings. This brief, like Petitioner's, refers to Respondents collectively as "Klemm."

claims that he was somehow unaware of the judgment—and any resultant lien on his real property—until September 2014, when he applied for a mortgage. Pet.App. 16.

2. In June 2015—more than six years after the judgment was entered and more than four years after the last collection effort—Mr. Rotkiske sued in the Eastern District of Pennsylvania, alleging that the default judgment had been obtained in violation of the FDCPA. *Id.* at 17. He never asserted, however, that there had been any fraud or concealment in connection with the judgment. (Of course, Klemm had every incentive *not* to conceal the judgment so as to collect on it.)

Klemm moved to dismiss. He argued, among other things, that Mr. Rotkiske had filed suit long after the FDCPA's one-year limitations period had expired. In response, Mr. Rotkiske argued that his suit was timely, despite 15 U.S.C. § 1692k(d)'s one-year limitations period, because of the so-called "discovery rule," which delays the beginning of some statutory limitations periods until the plaintiff knew or should have known of the violation. *Id.* In the alternative, Mr. Rotkiske asked the court to equitably toll the limitations period "to the same effect." *Id.* at 21–22.

The district court rejected both arguments. As to the discovery rule, the court held that the plain language of § 1692k(d) controls—and it provides that the limitations period runs "from the date on which the violation occurs," rather than from the date of discovery. Pet.App. 22–26. The court also declined to equitably toll the limitations period because "there are no allegations of active misleading on the part of

the Defendants." *Id.* at 26–29. The court thus concluded that Mr. Rotkiske's suit was time-barred, and granted Klemm's motion to dismiss.

3. Mr. Rotkiske appealed only the district court's determination that the discovery rule does not apply to the FDCPA. Mr. Rotkiske did not challenge the district court's ruling that he had failed to make any allegation of active concealment—and, accordingly, that he was not entitled to equitable tolling. After argument before the panel and prior to issuing a decision, the Third Circuit panel *sua sponte* ordered rehearing en banc. *Id.* at 4.

Every member of the en banc Third Circuit agreed with the district court that the FDCPA's limitations period runs, as the statutory text provides, from "the date on which the violation occurs," 15 U.S.C. § 1692k(d), not from the date of discovery. Pet.App. 2. In so construing the statute, the Third Circuit relied on this Court's decision in *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001). *TRW* explained that courts "must parse each limitations period using ordinary principles of statutory analysis," rather than simply "imply a discovery rule by rote" in the absence of a clear indication to the contrary. Pet.App. 12–13.

The Third Circuit rejected Rotkiske's contention that failing to apply the discovery rule would thwart the FDCPA's "principal purpose" of combatting "abusive debt-collection practices," which "may involve fraud, deception, or self-concealing behavior." *Id.* at 8. For one thing, the court explained, "the collection practices the FDCPA proscribes" do not always involve fraud or concealment. *Id.* at 9. To the contrary, many FDCPA "violations will be

apparent to consumers the moment they occur." *Id.* (citing various prohibitions against forms of communication with consumers). In addition, the court emphasized, if a particular violation *does* involve self-concealing conduct, "nothing in the Act impairs the discretion district courts possess to avoid patent unfairness" by applying 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. Four judges noted that, if that question had been preserved, they would have remanded for the district court to reconsider the doctrine's applicability in light of the court's clarification that it can extend to "self-concealing" conduct. *Id.* at 14 n.5.

In the course of reaching this result, the Third Circuit recognized that the Ninth and Fourth Circuits had previously "implied a discovery rule in the Act's statute of limitations." *Id.* at 10; *see Lembach v. Bierman*, 528 F. App'x 297 (4th Cir. 2013) (per curiam); *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935 (9th Cir. 2009). It noted, however, that neither of those courts had engaged with the FDCPA's operative language. Pet.App. 10. In addition, the Fourth Circuit had not considered whether equitable tolling would resolve any apparent unfairness in cases in which the wrongful act had been concealed. *Id.* at 11.

REASONS FOR DENYING THE PETITION

This Court's review is unwarranted for three reasons. First, the split is both shallow and unsettled: The Fourth Circuit's opinion is unpublished (and therefore not binding). And the Ninth Circuit's opinion turned on circuit precedent,

such that the court might reach a different result if it were to consider the question en banc. Second, the question presented is unimportant because, as the decision below acknowledged, equitable tolling is likely to be available in many of the same cases where the discovery rule would have applied. Finally, the decision below is correct: The FDCPA unambiguously provides that the limitations period begins to run when the violation occurs, not when it is discovered. The petition should be denied.

I. THE SPLIT IS SHALLOW AND TENUOUS.

The split of authority about the question presented is far shallower and more tenuous than the petition acknowledges. It does not warrant this Court's review.

Only three courts of appeals—the Third, Fourth, and Ninth Circuits—have ever opined on the question presented. *See* Pet.App. 1–14; *Lembach*, 528 F. App'x 297; *Mangum*, 575 F.3d 935. Of those, only the Third and Ninth Circuits have done so in published opinions. *See* Pet.App. 1–14; *Mangum*, 575 F.3d 935. And only the Third Circuit has engaged with the relevant statutory language. Pet.App. 10 (observing that neither the Fourth Circuit nor the Ninth Circuit "analyzed the 'violation occurs' language of the FDCPA").

Moreover, the Fourth and Ninth Circuits may well correct course without this Court's intervention. The Fourth Circuit's per curiam opinion in *Lembach* does not bind future panels or district courts in the Fourth Circuit. 528 F. App'x at 299 ("Unpublished opinions are not binding precedent in this circuit."). And the dueling opinions in *Mangum* suggest that

the Ninth Circuit may well reach a different result if it were to consider the issue en banc. The panel majority relied heavily on *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260 (9th Cir. 1998). *See Mangum*, 575 F.3d at 940–41. Although the majority acknowledged that this Court reversed the Ninth Circuit's application of *Norman-Bloodsaw* to the Fair Credit Reporting Act in *TRW*, it believed that *TRW* had not "overrule[d]" *Norman-Bloodsaw*'s "general approach to the point that [the panel could] now ignore preexisting Ninth Circuit law." *Id.* (citing *TRW*, 534 U.S. at 33). The majority thus considered itself "required to hold," in light of pre-existing circuit precedent, that the discovery rule applies to the FDCPA. Judge O'Scannlain, in a special concurrence, disagreed—though he too relied primarily on circuit precedent. In his view, "applying the discovery rule in the face of unequivocal statutory language to the contrary" conflicted with the court's en banc decision in *Garcia v. Brockway*, 526 F.3d 456 (9th Cir. 2008). *Mangum*, 7 F.3d at 944. "[T]he majority's contrary conclusion," he reasoned, had "create[d] a stark intracircuit conflict." *Id.* at 946.

The split, accordingly, is both shallow and tenuous. Further percolation is warranted.

II. THE QUESTION PRESENTED IS UNIMPORTANT GIVEN THE AVAILABILITY OF EQUITABLE TOLLING.

The question presented, in any event, is not important enough to merit this Court's attention.

As the Third Circuit recognized below, many FDCPA violations—including those involving

harassment "by overzealous or unscrupulous debt collectors"—will be immediately apparent to the consumer. Pet.App. 9. In those cases, it makes no difference whether the discovery rule applies: the date of the violation and the date of discovery will be the same.

In cases that do involve fraudulent or concealed conduct, the doctrine of equitable tolling will usually prevent any "patent unfairness"—and, again, make the discovery rule largely irrelevant. *Id.* at 10. Under this Court's precedents, "a litigant is entitled to equitable tolling of a statute of limitations" if he establishes "(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 States,* 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 646 (2010)). In many cases where the discovery rule would be applicable—that is, "when the litigant first knows or with due diligence should know facts that will form the basis for an action" only after the limitations period would otherwise have expired, *Merck & Co. v. Reynolds*, 559 U.S. 633, 646 (2010)—both of those elements should often be present. Indeed, four judges noted that, absent Mr. Rotskiske's forfeiture of the argument on appeal, they "would have remanded to allow the District Court to consider," in light of the court's clarification that self-concealing conduct (as opposed to fraud or active concealment) can justify equitable tolling, whether he himself "would be entitled to rely on this doctrine." Pet.App. 14 n.5.

To be sure, equitable tolling may not be available in every case of delayed discovery. In particular, to establish "extraordinary circumstances" for purposes of equitable tolling, a litigant will have to "show an external obstacle to timely filing, *i.e.*, that the circumstances that caused a litigant's delay [were] beyond its control." *Menominee Indian Tribe*, 136 S. Ct. at 756 (internal quotation marks and alteration omitted). But given that the discovery rule applies only when the plaintiff *could not, with reasonable diligence*, have known of the violation, *see Merck*, 559 U.S. at 644–45 (emphasis added), the overlap is substantial. And this Court ought not deploy its limited resources on a question that will rarely prove outcome determinative.

III. THE DECISION BELOW IS CORRECT.

Finally, the en banc Third Circuit got it right. Judge Hardiman's careful opinion for the unanimous court undertook exactly the inquiry this Court endorsed in *TRW*. The court began by surveying this Court's precedents regarding statutes of limitations and outlining the two basic rules from which Congress ordinarily chooses. Pet.App. 4–7. Unlike the Fourth or Ninth Circuit opinions on this issue, the Third Circuit then "us[ed] ordinary principles of statutory analysis—beginning with the statutory text and then proceeding to consider its structure and context"—to determine whether Congress intended the discovery rule to apply. Pet.App.12–13 (citing *TRW*, 534 U.S. at 28–33). And it correctly determined that all interpretive signs here point in the same direction. The statutory text itself provides that the limitations period begins to run on "the date on which the violation occurs." 15 U.S.C. § 1692k(d).

Nothing in the structure of the FDCPA suggests that Congress had something different in mind. And, particularly given the availability of equitable tolling, the Third Circuit's conclusion does no damage to the FDCPA's overriding purpose. *See* Pet.App. 9–10, 13–14.

Judge O'Scannlain's special concurrence in *Mangum* likewise undertook the textual analysis that this Court's precedent demands. The statutory language, he emphasized, "is not ambiguous." 575 F.3d at 945. "A 'violation' is 'an infringement or transgression'; it is not the discovery of an infringement or a transgression." *Id.* (quoting Webster's Third New Int'l Dictionary 2554). So, he reasoned, "[t]he 'date on which the violation occurs' must refer to the date on which the 'infringement' or 'transgression' complained of by the plaintiff took place." *Id.*

The question presented is as simple as these opinions suggest. Section 1692k(d) speaks clearly. And there is no basis to conclude that Congress meant anything other than what it said.

CONCLUSION

The petition for certiorari should be denied.

January 4, 2019

Respectfully submitted,

Shay Dvoretzky
Counsel of Record
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939
sdvoretzky@jonesday.com

Amanda K. Rice
JONES DAY
150 W. Jefferson Ave.
Suite 2100
Detroit, MI 48226

Counsel for Respondent Paul Klemm