

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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KEVIN C. ROTKISKE, )  
                    ) Petitioner, )  
                    ) v. ) No. 18-328  
PAUL KLEMM, ET AL., )  
                    ) Respondents. )  
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Pages: 1 through 64  
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Date: October 16, 2019

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3 KEVIN C. ROTKISKE, )

4 Petitioner, )

5 v. ) No. 18-328

6 PAUL KLEMM, ET AL., )

7 Respondents. )

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9 Washington, D.C.

10 Wednesday, October 16, 2019

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12 The above-entitled matter came on for  
13 oral argument before the Supreme Court of the  
14 United States at 11:07 a.m.

15

16 APPEARANCES:

17

18 SCOTT E. GANT, ESQ., Washington, D.C.; on behalf  
19 of the Petitioner.

20 SHAY DVORETZKY, ESQ., Washington, D.C.; on behalf of  
21 the Respondents.

22 JONATHAN C. BOND, Assistant to the Solicitor General,  
23 Department of Justice, Washington, D.C.;  
24 for the United States, as amicus curiae,  
25 supporting the Respondents.

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P R O C E E D I N G S

(11:07 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-328, Rotkiske versus Klemm.

Mr. Gant.

ORAL ARGUMENT OF SCOTT E. GANT

ON BEHALF OF THE PETITIONER

MR. GANT: Mr. Chief Justice, and may it please the Court:

While this case is about the FDCPA, it is also fundamentally about the relationship between this Court and Congress. That relationship has long been governed in part by two important presumptions relevant here: first, that Congress legislates against the backdrop of the common law and, second, that Congress legislates aware of this Court's decisions.

When Congress enacted the FDCPA in 1977, this Court had long ago adopted a common law rule eventually known as the discovery rule applicable to cases of fraud and concealment.

Citing to and quoting the Bailey decision of this Court from 1875, in Holmberg in

1 1946, this Court stated that it had long ago  
2 adopted as its own the old chancery rule, that  
3 where a plaintiff has been injured by fraud and  
4 remains in ignorance of it without any false or  
5 want of diligence or care on his part, the bar  
6 of the statute does not begin to run until the  
7 fraud is discovered, though there will be no  
8 special circumstance or efforts on the part of  
9 the party committing the fraud to conceal it  
10 from the knowledge of the other party.

11 The Court then continued in Holmberg  
12 explaining unequivocally this equitable doctrine  
13 is read into every federal statute of limitation  
14 and added even those where "an explicit statute  
15 of limitation for bringing suit."

16 The United States concedes, as it has  
17 in prior cases, that there is a common law  
18 discovery rule applicable to fraud and  
19 concealment.

20 In the decision below, the Third  
21 Circuit never mentioned the Holmberg case. Its  
22 analysis began and ended with two words in  
23 Section 813(d), "violation occurred." The Third  
24 Circuit understood that those two words by  
25 implication, not expressly, but by implication

1 -- that's at appendix page 8 -- displaced the  
2 common law discovery rule applicable to fraud.

3           In reaching this conclusion, the Third  
4 Circuit deployed what I believe is a false  
5 dichotomy, what the Third Circuit described on  
6 the one hand as an occurrence rule and on the  
7 other hand a common law discovery rule. And in  
8 the view of the Third Circuit, if a -- Congress  
9 deploys in a statute a so-called occurrence  
10 rule, a common law discovery rule is presumed to  
11 be displaced.

12           The Third Circuit cited no decision of  
13 this Court in setting forth this dichotomy  
14 between an occurrence rule and a common law  
15 discovery rule. The analysis is at page 6 of  
16 the appendix. That conclusion of the Third  
17 Circuit is also in opposition to this Court's  
18 decision in 1918 in the Exploration case, which  
19 is discussed at length in our brief and the  
20 briefs of the other parties.

21           There, that is, I think, fairly  
22 characterized as an occurrence rule. The  
23 statute in Exploration ran from the date of  
24 issuance of a land patent. So that was a date  
25 certain tied to facts.

1           That, under the theory of the Third  
2           Circuit and my friends, is an occurrence rule,  
3           and there the Court determined that the common  
4           law discovery rule should apply.

5           JUSTICE SOTOMAYOR: Mr. Gant, you keep  
6           saying fraud and self-concealing as if they're  
7           alternative rules. I -- I think of there being  
8           multiple equitable doctrines, equitable tolling,  
9           equitable estoppel, and what I call the  
10          self-concealing fraud, which was the one  
11          mentioned in Exploration, argued by the  
12          government in Gabelli and in other cases.

13          Are you creating a fourth --

14          MR. GANT: We're not --

15          JUSTICE SOTOMAYOR: -- that -- that --  
16          that every case, every federal statute  
17          inherently says for whatever reason, if you  
18          didn't discover the fraud, equity could let you  
19          have a discovery rule?

20          MR. GANT: No. I'm -- we're not  
21          intending to proffer a rule. In fact, what  
22          we're attempting to do is advance the  
23          application of the already established rule, the  
24          Bailey/Holmberg rule, and my refrain --

25          JUSTICE SOTOMAYOR: I call it the

1 self-concealing rule. Is there -- that the  
2 fraud you committed is by its nature  
3 self-concealing. Is that an accurate way of --

4 MR. GANT: I --

5 JUSTICE SOTOMAYOR: -- stating that  
6 rule?

7 MR. GANT: -- I think so. We're not  
8 intending to differentiate it.

9 JUSTICE SOTOMAYOR: All right. Then  
10 what do you make of Footnote 5 in the Third  
11 Circuit's opinion? Because four of the -- I  
12 guess they're justices or judges there, judges,  
13 would have remanded to allow the district court  
14 to consider whether he would be entitled to rely  
15 on this doctrine, being the self-concealing  
16 rule, because our precedent had not previously  
17 recognized that a defendant's self-concealing  
18 conduct may be a basis for equitable tolling.

19 That seems to me that they understood  
20 the same thing I did, which is that there might  
21 be a self-concealing rule but that you had  
22 waived it, and that's why those four judges  
23 weren't voting to remand.

24 How do you read that any differently?

25 MR. GANT: This is as good a time as



1 any to get to an important issue here, which is  
2 the confusion -- understanding the relationship  
3 between what I'm calling the common law  
4 discovery rule, the Bailey/Holmberg rule, and  
5 the refrain I was using of -- of fraud or  
6 concealment comes from TRW directly, which is  
7 why I was using it but not intending to create a  
8 different doctrine.

9 All of the parties here and the  
10 scholars' amicus brief that was submitted all  
11 agree that there has been at times confusing use  
12 of terminology. And I think it is impeding an  
13 understanding of what is really going on in the  
14 courts below and this case and in the Third  
15 Circuit's discussion of these issues, including  
16 in Footnote 5 that you referred to, Your Honor.

17 So let me, if I may, set -- in trying  
18 to answer your question, set forth what I think  
19 is the best understanding of the discovery rule  
20 on the one hand, the equitable tolling rule on  
21 the other hand, and then try and bring it  
22 directly to your question of what I understand  
23 the Third Circuit to have been doing in Footnote  
24 5.

25 Our view is that the best

1 understanding of the discovery rule is that it  
2 applies when the plaintiff is unaware of their  
3 cause of action or the facts giving rise to the  
4 cause of action, here the violation, because of  
5 fraudulent conduct or self-concealing conduct by  
6 the defendant. And in that situation, the clock  
7 for the statute of limitations does not begin to  
8 run at all.

9 Equitable tolling, on the other hand,  
10 applies, we think, best understood, in a  
11 situation where the plaintiff is aware of the  
12 violation giving rise to a cause of action but,  
13 for some reason, in applying the elements set  
14 forth in this Court, exercised due diligence or  
15 was -- diligently pursued his or her rights but  
16 was unable because of some extraordinary  
17 circumstance to timely file suit. Then, if the  
18 doctrine is deemed to apply, then the untimely  
19 filing is forgiven.

20 And in that circumstance, the statute  
21 of limitations is best understood to have begun  
22 to run but then be tolled or abated because of  
23 the circumstances.

24 That's our understanding of the -- of  
25 these rules, and that's the same understanding I

1 think that the scholars' brief sets forth. And  
2 it's -- under that view, equitable tolling would  
3 be best understood as not applicable to this  
4 situation.

5 Now this Court, I respectfully submit,  
6 has sometimes used the label of "equitable  
7 tolling" to describe circumstances that I think  
8 are best understood as the Bailey/Holmberg  
9 discovery rule, and that has caused confusion  
10 here and -- and in courts below. And I think it  
11 did cause confusion in the Third Circuit.

12 And the Third Circuit appeared to  
13 operate under the view, at the time this case  
14 was decided, that self-concealing conduct did  
15 not qualify, that there had to be some separate  
16 act, apart from the elements of the offense, in  
17 addition that was concealing.

18 An example that I'm familiar with from  
19 my own practice is in antitrust cases, where  
20 although they use the label of fraudulent  
21 concealment, which I think is best understood  
22 separately as a close cousin of the discovery  
23 rule, in those circumstances, you have a  
24 violation alleged of, say, Section 1 of the  
25 Sherman Act, a conspiracy.

1           And most cases, when there's a statute  
2 of limitations argument that the conduct went  
3 back more than the four years provided in the  
4 statute, there's an argument about whether the  
5 conspiracy was concealed.

6           Most courts there require some  
7 additional action in addition to the -- the --  
8 there the conspiracy itself.

9           JUSTICE KAVANAUGH: Is the --

10          MR. GANT: Here, what -- no please --

11          JUSTICE KAVANAUGH: -- discovery --  
12 I'm sorry to interrupt -- is the discovery rule  
13 equitable?

14          MR. GANT: I believe it is. But I  
15 think it -- it is equitable but also properly  
16 understood as an exercise in statutory  
17 interpretation. I don't think they're mutually  
18 exclusive.

19          JUSTICE KAVANAUGH: I grant you that.  
20 So the discovery rule could be part of a  
21 statute, but, if it's not part of a statute,  
22 there exists, I think you're saying, an  
23 equitable discovery rule as well that is akin to  
24 but maybe not the same as equitable tolling.

25                 Is that your argument?

1 MR. GANT: Yes to the last part of  
2 that, that equitable --

3 JUSTICE KAVANAUGH: Can you just give  
4 me real clear on the answer?

5 MR. GANT: Yes.

6 JUSTICE KAVANAUGH: Because clarity,  
7 we do need clarity. Yeah.

8 MR. GANT: I -- I will do my best and  
9 I -- I agree that that's useful for everybody.  
10 There's a distinction between statutory  
11 discovery rule, obviously, and the common law  
12 discovery rule.

13 The statutory discovery rule is  
14 employed by Congress from time to time. It was  
15 present in the TRW, for example. That was in my  
16 understanding the basis for the ruling in that  
17 case, principally, was that Congress had -- had  
18 decided to statutorily write in a discovery rule  
19 and then, applying traditional tools of  
20 statutory interpretation, determine that it  
21 wouldn't then also add on the common law  
22 discovery rule.

23 So, when there is an absence like here  
24 of a statutory discovery rule, then the question  
25 becomes did Congress intend to permit or

1       displace the addition or, in the words of  
2       Gabelli, the grafting on to, which I don't view  
3       as pejoratively, but I think my friends on the  
4       other side attempt to use that way, grafting on  
5       or -- on to or importing into the statute a  
6       common law discovery rule.

7                   JUSTICE KAVANAUGH:  When you use  
8       common law discovery, is that equivalent to  
9       equitable discovery?

10                   MR. GANT:  I -- I think it's the --  
11       the doctrine that originated in equity, but also  
12       applied to cases of law, the Court said that  
13       back in Bailey, the doctrine had its origins in  
14       equity, applied to law, and it is applied, and I  
15       -- and here is where I think that it -- that  
16       it's both equitable in origins and I think in  
17       nature, but -- but also fundamentally an  
18       exercise in statutory interpretation, because  
19       the touchstone is whether or not intended --  
20       Congress intended to foreclose or permit the  
21       application of the common law doctrine to the  
22       statute in the absence of some express  
23       indication.

24                   JUSTICE GINSBURG:  Well, if -- if you  
25       are arguing an across-the-board discovery rule

1 applies to the FDCPA, I think that TRW weighs  
2 very heavily against you. So you could -- you  
3 could be arguing across-the-board discovery rule  
4 or you could accept that there is a fraud  
5 exception.

6 You seem to be arguing the first, that  
7 in -- that -- that the -- there's a discovery  
8 rule for all FDCPA cases.

9 MR. GANT: Justice Ginsburg, we -- we  
10 mean the latter. So -- I -- I --

11 JUSTICE GINSBURG: Before you --  
12 except the fraud exception. But then the  
13 government tells us that this case doesn't fit  
14 within the fraud exception.

15 MR. GANT: And -- and it clearly does.  
16 So, just to be clear, we're -- we're not arguing  
17 that every FDCPA action is timely so long as the  
18 plaintiff was unaware. What we're saying is  
19 that, if they were unaware, because of  
20 circumstances that fit within the  
21 Bailey/Holmberg framework, fraud that prevented  
22 the plaintiff from knowing about their cause of  
23 action, under that long-standing doctrine, then  
24 the plaintiff is permitted to file out of time.

25 JUSTICE GINSBURG: Is it -- it's not a

1 violation -- what -- what happened here serving  
2 the debtor at an address that was not the  
3 debtor's, that's not a violation of the FDCPA,  
4 is it?

5 MR. GANT: Unto itself it might not  
6 be, but we have a very different circumstance in  
7 this case. So the facts that are alleged -- and  
8 you'll recall that this case comes to the Court  
9 on a ruling on a 12(b)(6) motion.

10 So, of course, the Court construes the  
11 allegation -- accepts the allegations as true.  
12 The allegations as made and as understood by the  
13 lower courts were as follows: The Respondent  
14 retained a process server to serve -- file the  
15 complaint against my client. There was an  
16 affidavit of service filled out that said that  
17 the head of the household had been served.

18 And that was false. And they had --  
19 and we allege and the facts below assert that  
20 they had reason to know that that was false.

21 So they filed a false affidavit of  
22 service, and that false affidavit of service was  
23 then the basis for a default judgment. So it's  
24 those two actions together, the filing of a  
25 false affidavit of service and then obtaining a



1 default judgment on that basis, that we contend  
2 violates Sections 807 and 808 of the statute  
3 which are codified at Section 1692(e) and (f).

4 Those prohibit -- (e) prohibits any  
5 false, deceptive, or misleading representation  
6 or means of pursuing a debt.

7 JUSTICE BREYER: That isn't the issue.  
8 I don't think the issue is, is your basic claim  
9 a claim of fraud. And it doesn't sound it.

10 I mean, did you -- who did you fraud?  
11 The judge?

12 MR. GANT: Yes. The -- it was --

13 JUSTICE BREYER: Have you ever heard  
14 of a case brought under this where the fraud --  
15 you -- I mean, the cases that were brought where  
16 somebody said give me your land and I will,  
17 because the land has gold or something on it,  
18 that was a lie, so buy my land, it has gold on  
19 it, and they sell the land and it doesn't have  
20 gold on it. That sort of fraud. Okay?

21 But I've never heard of a fraud case.  
22 I'm not saying you -- it may be actionable. I  
23 mean, it may be that you recover under the  
24 statute, it may be a bad thing, but it doesn't  
25 sound like common law fraud to me.

1                   So is there something that -- where  
2                   the person defrauded is a judge because the  
3                   process server rightly or wrongly filed the  
4                   wrong name? But that's what you're saying is a  
5                   common law fraud?

6                   MR. GANT: Yes. The --

7                   JUSTICE BREYER: And what is the --  
8                   what is the case that says a process server who  
9                   fills in the wrong name and fools the judge is  
10                  -- the person who hired the process server is --  
11                  has committed common law fraud?

12                  MR. GANT: Well, it's not -- with  
13                  respect, Justice Breyer, it's not just the  
14                  process server and -- and the allegations go  
15                  further than an innocent mistake.

16                  And the other side argues that this  
17                  was an innocent mistake.

18                  JUSTICE BREYER: I'm asking you what  
19                  here brings your case within the rubric of  
20                  common law fraud. So, if we had Lord Coke in  
21                  front of us, you see, he would say, oh, I  
22                  recognize this old man still recognizes that --  
23                  that this is common law fraud.

24                  MR. GANT: Right.

25                  JUSTICE BREYER: That's what I want to

1 know.

2 MR. GANT: And our allegation is that  
3 the -- the -- the knowing misrepresentation on  
4 the affidavit of service or reckless  
5 representation, we cite to laws like --

6 JUSTICE BREYER: Who -- who  
7 represented, who writes the representation? The  
8 process server or the -- your -- your -- or the  
9 other person?

10 MR. GANT: The process server signs --  
11 signs under -- effectively under penalty of  
12 perjury --

13 JUSTICE BREYER: Yeah.

14 MR. GANT: -- that the representations  
15 are true. They were false. And we contend --

16 JUSTICE BREYER: And who makes the  
17 representations?

18 MR. GANT: The process server makes  
19 the representation.

20 JUSTICE BREYER: Oh, so is -- are your  
21 client the process server?

22 MR. GANT: No. That -- that's what I  
23 was getting to.

24 JUSTICE BREYER: Is that their client?

25 MR. GANT: It -- it is not. That was

1 the next point, which was that then the  
2 attorneys are the ones who file the affidavit of  
3 service, which we contend they had reason to  
4 know was false, and then the -- the attorneys  
5 then prosecute the case in obtaining a court to  
6 judge --

7 JUSTICE BREYER: No, I know the latter  
8 part.

9 MR. GANT: Right.

10 JUSTICE BREYER: I -- I -- I got the  
11 latter part. That's the harm. But -- but the  
12 -- the -- the fraud consists of an attorney  
13 making a -- knowingly accepting the false  
14 statement of a process server?

15 MR. GANT: Yes.

16 JUSTICE BREYER: Now the closest case  
17 that you have found that calls that activity  
18 common law fraud is?

19 MR. GANT: We didn't look for a  
20 specific case, Your Honor.

21 JUSTICE BREYER: Oh, you didn't  
22 because it's so obvious that it's common law  
23 fraud?

24 MR. GANT: Well, if -- if -- you may  
25 not find this satisfactory, but we weren't the

1 only ones here who thought that this constituted  
2 fraud. The solicitor general's brief, I believe  
3 it's at page 26 --

4 JUSTICE BREYER: No, no, I'm not --  
5 I'm not -- I'm just trying to find out for  
6 myself. And I -- and I'm not certain.

7 MR. GANT: Okay, well --

8 JUSTICE BREYER: That's why I'm  
9 asking.

10 MR. GANT: Right. And -- and so the  
11 solicitor general called this akin to fraudulent  
12 concealment.

13 JUSTICE BREYER: Akin to. Now wait.  
14 Well, that's a totally different thing. Your  
15 discovery -- look, I -- my bible on this is  
16 Judge Posner's opinion in the Cada case. So, if  
17 that's wrong, you better stop me now. But I've  
18 read that about --

19 MR. GANT: I don't know whether it's  
20 wrong because I haven't read it, so I won't --

21 JUSTICE BREYER: Well, it's a very  
22 good list of all these different doctrines,  
23 equitable estoppel, equitable this, and there  
24 are like six of them or something, and one of  
25 them, the thing that you're talking about now,

1 is a special thing called -- what's it called?  
2 Undiscovered fraud.

3 I thought an element of that is that  
4 the basic underlying thing is common law fraud.  
5 And that's what I'm trying to investigate now.  
6 But, if you have nothing more to say, I have  
7 nothing more --

8 MR. GANT: I -- I --

9 JUSTICE BREYER: -- to say because, if  
10 I knew more about it, I wouldn't ask the  
11 question.

12 MR. GANT: I -- I don't have a case.  
13 I wish I did. Obviously, that is something that  
14 could be and we respectfully submit should be  
15 addressed on remand.

16 The -- not only the solicitor general  
17 but one of the amici, the trade -- the major  
18 trade association for the creditors, the ACA,  
19 also acknowledged in their brief that what's --  
20 what's at issue here -- it has a name, it's  
21 called "sewer service" -- it's so prevalent that  
22 it has a name. There was testimony before  
23 Congress when the FDCPA was enacted. A  
24 representative from the FTC came to Congress at  
25 the beginning of the hearings that led to the

1 enactment of the statute and, in August of 1976,  
2 said that this phenomenon, which is at issue  
3 here, sewer service, is a major problem in many  
4 urban areas. There --

5 JUSTICE GINSBURG: But you said -- you  
6 said the statement was the process server. The  
7 process server was told by the creditor serve  
8 process at this address. So it wasn't -- the  
9 process server didn't make it up. The process  
10 server was told where the process should be  
11 served.

12 MR. GANT: The -- the process server  
13 -- and I think it's helpful to understand for  
14 context here, there was an original suit that  
15 was withdrawn which also had a defective  
16 affidavit of service and then a subsequent one  
17 that led to the default judgment at issue here.

18 It was the same process --

19 JUSTICE GINSBURG: But it was still --  
20 the prosecutor -- the process server was just  
21 following the directions of the person who --  
22 who engaged the process server.

23 MR. GANT: Well, they were certainly  
24 following the direction to serve process. We  
25 don't know -- there's nothing in the record that

1 indicates the substance of the discussion. We  
2 do know that the first service was attempted at  
3 an address and it falsely represented that the  
4 defendant -- the plaintiff was personally  
5 served. He was not. It also represented he was  
6 black, according to the affidavit of service.  
7 He's not. He's Caucasian. It represented he  
8 was 51 years old. He was in his late 30s at the  
9 time. That was at a -- and so they had reason  
10 -- and then that suit was withdrawn, we believe  
11 because they knew that the affidavit of service  
12 was false and that the plaintiff didn't actually  
13 live at that address.

14 Then a new suit was filed and a new  
15 affidavit of service, the one at issue, was --  
16 was filed.

17 JUSTICE SOTOMAYOR: Mr. Gant.

18 MR. GANT: Yes.

19 JUSTICE SOTOMAYOR: I -- I note it is  
20 terribly confusing because of the confusion of  
21 the use of terms. That's why I -- I called it a  
22 self-concealing fraud.

23 MR. GANT: Yes.

24 JUSTICE SOTOMAYOR: It's not the  
25 violation at issue that's self-concealing. It's



1       how the violation came about that's -- that  
2       could be by self-concealing fraud, correct?

3               MR. GANT:  Yeah.

4               JUSTICE SOTOMAYOR:  Isn't that your --  
5       your point?

6               MR. GANT:  Yes.  We -- we believe that  
7       the common law discovery rule, the  
8       Bailey/Holmberg rule, can apply either if the  
9       fraud is an element of the offense --

10              JUSTICE SOTOMAYOR:  Right.

11              MR. GANT:  -- which it effectively is  
12       here under our view under subsections (e) and  
13       (f), or it can be separate and apart, in  
14       addition to the elements of the offense.  So,  
15       here, this seems -- there have been several  
16       questions, so I want to, if I could, just make  
17       this clear because I think the facts are  
18       important and they should be addressed on  
19       remand.  We're not saying we win on remand.  
20       We're -- the other side will get to make its  
21       arguments, including that we don't fit within  
22       the contours of fraud.

23              But we believe that this is close --  
24       what -- the decision below was you don't get a  
25       -- a common law discovery rule applied to this

1 statute, period. That was wrong. That should  
2 be reversed, and we should have an opportunity  
3 then to have arguments about these issues,  
4 whether the approach of -- the view of Justice  
5 Breyer is right or at least -- or you're --  
6 you're arguing, hypothetically, you know, for  
7 argument's sake, the view of Judge Posner, that  
8 this might fall outside common law fraud.

9           We don't think it does. We cited  
10 Black's Law Dictionary. In -- in my view, this  
11 falls squarely within the contours of common law  
12 fraud as described in Black's Law Dictionary,  
13 which is a misrepresentation. It was a knowing  
14 misrepresentation of the court. They served at  
15 an address that they knew was not his. They  
16 said they served the head of the household. And  
17 that was false. And then they used that false  
18 affidavit, made -- sworn under oath. The  
19 attorneys then went into court and used it as  
20 the basis for obtaining a default judgment,  
21 which then prevented my client from obtaining a  
22 mortgage, which he still doesn't have to this  
23 day.

24           JUSTICE KAVANAUGH: You've referred to  
25 remand a few times. I think the other side's

1 argument is that the statute itself does not  
2 have a discovery rule and that any equitable  
3 discovery rule or, as you're terming it, common  
4 law discovery rule that might exist, unless  
5 Congress expressly displaces it, was not raised  
6 in the Third Circuit. Your response to that?

7 MR. GANT: I'm sorry, what wasn't  
8 raised in the Third Circuit Justice Kavanaugh?

9 JUSTICE KAVANAUGH: Equitable --  
10 equitable discovery.

11 MR. GANT: It is true that equitable  
12 tolling per se was not addressed in the Third  
13 Circuit. But Holmberg and Bailey were both  
14 cited to the Third Circuit, and at the time, it  
15 was clear in the Third Circuit --

16 JUSTICE KAVANAUGH: But I think what  
17 they're saying -- and this may not be a winning  
18 argument, but I just want to get your response  
19 to it. I think what they're saying is those  
20 were raised in the context of statutory  
21 interpretation. Reading the statute, it does  
22 not contain a discovery rule.

23 There may be still an equitable  
24 discovery rule, but you didn't separately -- I  
25 think they're saying this. You didn't

1 separately raise that kind of equitable  
2 discovery argument.

3 MR. GANT: Right.

4 JUSTICE KAVANAUGH: Your response to  
5 that? Is that wrong?

6 MR. GANT: Under -- they are wrong in  
7 their understanding of the operation of the two  
8 words "violation occurred" and its effect on  
9 whether the common law discovery rule applies.

10 We say that that language is  
11 inconclusive with respect to the question of  
12 whether or not Congress intended to permit or  
13 preclude the application of the common law  
14 discovery rule, and we then urge the Court to  
15 apply traditional tools of statutory  
16 interpretation, to look to the statute's purpose  
17 to eliminate these Debt Collection Practice Act  
18 practices that are prohibited, the structure of  
19 the statute. We discussed this at length in our  
20 briefs. And based on those factors, we believe  
21 it's clear that Congress would have intended for  
22 the common law discovery rule to apply to this  
23 issue.

24 JUSTICE KAGAN: And -- and what about  
25 your petition in this Court? Because, as I read

1 your petition in this Court, it was more about  
2 the general statutory interpretation question,  
3 whether there is a discovery rule that applies  
4 generally in this statute, than it is about  
5 whether certain equitable exceptions might  
6 continue to exist.

7 MR. GANT: Yes. You're referring to  
8 the petition for certiorari? Yeah. The  
9 petition for certiorari clearly presented the  
10 discovery rule for consideration. And that --

11 JUSTICE KAGAN: Well, but, again, what  
12 did that mean?

13 MR. GANT: Well, I think --

14 JUSTICE KAGAN: As I read the  
15 petition, it really did not address whether  
16 there was an equitable exception of -- of -- of  
17 the -- of the kind that the Third Circuit might  
18 have thought had been waived.

19 MR. GANT: Well, that certainly wasn't  
20 how it was intended. And though -- and you may  
21 know, I didn't draft that, as I -- I don't read  
22 it that way, and I -- I know for certain that  
23 that's -- what was not intended to exclude that.

24 What -- may I finish?

25 CHIEF JUSTICE ROBERTS: Sure.

1           MR. GANT: What was intended with the  
2 petition was to raise the question precisely as  
3 I attempted to present it this morning, which is  
4 whether or not Congress intended to permit or  
5 foreclose the application of the common law  
6 discovery rule to the statute. And we contend  
7 that Congress clearly did not intend to  
8 foreclose it.

9           CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11          MR. GANT: Thank you.

12          CHIEF JUSTICE ROBERTS: Mr. Dvoretzky.

13                    ORAL ARGUMENT OF SHAY DVORETZKY  
14                    ON BEHALF OF THE RESPONDENTS

15          MR. DVORETZKY: Mr. Chief Justice, and  
16 may it please the Court:

17           Mr. Gant and I agree that this case is  
18 about the relationship between this Court and  
19 Congress. Congress provided in the FDCA that  
20 the statute of limitations would begin to run  
21 when the violation occurs, not when it is  
22 discovered.

23           That answers the question presented in  
24 the cert petition. The plain meaning of  
25 "violation occurs" concerns when the defendant

1 commits the violation, not when the plaintiff  
2 learns of it. Unlike more ambiguous phrases,  
3 like "claim accrues" or "liability arises,"  
4 "violation occurs" simply can't be read any  
5 other way.

6           And we know Congress itself  
7 understands "violation occurs" that way because,  
8 in other statutes, including the 1978 Right to  
9 Financial Privacy Act, Congress used the phrase  
10 "violation occurs" to distinguish an  
11 occurrence-based limitations period from a  
12 discovery-based one.

13           But --

14           JUSTICE SOTOMAYOR: Is your position  
15 simply -- did I let you finish?

16           CHIEF JUSTICE ROBERTS: I -- I think  
17 you still have a little time left, don't you?

18           JUSTICE SOTOMAYOR: Oh, sorry.

19           MR. DVORETZKY: Like Justice Ginsburg  
20 and Justice Kagan, I understand the question  
21 presented here to be whether an across-the-board  
22 discovery rule applies to the FDCA. The --  
23 that's the only issue that the Third Circuit  
24 decided.

25           The cert petition does not cite Bailey

1 or Holmberg, doesn't mention the word "fraud."  
2 If it had, we might have had an argument in our  
3 brief in opposition for why this case doesn't  
4 present a fraud case and, therefore, would be an  
5 inadequate vehicle to consider that question.

6 So the only question before this Court  
7 is whether -- should be whether there's an  
8 across-the-board discovery rule.

9 Despite all of that, Mr. Gant focuses  
10 his argument this morning on the fraud cases.  
11 There are a number of reasons why the fraud  
12 cases don't ultimately help him. I'd like to  
13 start out focusing on one, which is those cases  
14 are properly understood as equitable tolling  
15 cases, not as discovery rule cases.

16 That's how this Court most recently  
17 characterized them in cases like ANZ and in  
18 Lozano. And it matters for four reasons that  
19 the terminology be used correctly and that we  
20 distinguish between discovery rule and equitable  
21 tolling.

22 The four reasons are the following.  
23 First, the -- the two doctrines, the discovery  
24 rule and equitable tolling, are different  
25 concepts with different sources. The discovery



1 rule was about how to read the words Congress  
2 writes in a statute. It's a statutory  
3 interpretation question. That's the exercise  
4 that TRW was engaged in.

5 Equitable tolling is about excusing  
6 noncompliance with the words that Congress has  
7 chosen. It is an application of courts'  
8 inherent equitable powers, confirmed in the  
9 Judiciary Act, which exist independent of what  
10 Congress has said in any particular statute of  
11 limitations.

12 As a result of that -- and this is my  
13 second point -- the discovery rule and equitable  
14 tolling have different scopes. The discovery  
15 rule --

16 JUSTICE GINSBURG: But I thought --  
17 but I thought that the -- Justice Scalia and my  
18 opinion in TRW spoke about the discovery rule,  
19 not equitable tolling, exception to the  
20 discovery. The discovery rule could apply in  
21 cases of fraud.

22 MR. DVORETZKY: Well, I think what TRW  
23 is talking about was that the discovery rule  
24 might apply to fraud statutes. That's different  
25 from saying that there is a discovery rule in

1 any case of fraud that happens to arise under a  
2 non-fraud statute, like the FDCPA.

3 The words "violation occurred" --  
4 "occurs," have to mean the same thing no matter  
5 what the underlying type of FDCPA violation. It  
6 can't mean violation occurs in a non-fraud  
7 claim, but violation occurs or is discovered in  
8 a fraud claim.

9 And -- and that's why the way to think  
10 of excusing noncompliance with a limitations  
11 period in a situation that did present fraud  
12 would be as equitable tolling, because equitable  
13 tolling is a case-by-case doctrine in which  
14 courts use their inherent equitable powers to  
15 excuse noncompliance with the statute --

16 JUSTICE KAGAN: But --

17 MR. DVORETZKY: -- on a particular  
18 fact.

19 JUSTICE KAGAN: -- I mean, there might  
20 be variants of equitable tolling, mightn't  
21 there? I mean, one -- one variant is there were  
22 extraordinary circumstances, an earthquake hit,  
23 and so I couldn't file this suit in time, and so  
24 you should toll the statute of limitations until  
25 I can. I mean, that would be one.

1                   And then a different one would be this  
2 kind of: I couldn't possibly have known that  
3 the statute of limitations had even started to  
4 run because there was fraud committed against  
5 me. Is that right?

6                   I mean, you can put them all under an  
7 umbrella label, but those are two different  
8 things, aren't they?

9                   MR. DVORETZKY: I agree that they  
10 would be under the same category of equitable  
11 relief because, in both situations, what a court  
12 would be doing is not applying the language that  
13 Congress wrote. Congress didn't say anything  
14 about earthquakes.

15                   But Congress would be excusing  
16 compliance with the language that Congress --  
17 I'm sorry, the court would be excusing  
18 compliance with the language that Congress  
19 wrote, based on either the earthquake or fraud.

20                   What those have in common is that they  
21 are under the bucket of equitable relief from  
22 what Congress wrote --

23                   JUSTICE KAGAN: And is your --

24                   MR. DVORETZKY: -- rather than in --

25                   JUSTICE KAGAN: -- and is your view

1 that those are foreclosed by this statute, or is  
2 your view simply that those arguments were  
3 waived and this case has nothing to do about  
4 them -- with them?

5 MR. DVORETZKY: Our argument is that  
6 those arguments were waived. They're not  
7 properly before this Court. The only question  
8 before this Court is how to read the words that  
9 Congress wrote.

10 And when Congress wrote the words  
11 "violation occurred," it didn't leave the door  
12 open to read that across the board in every  
13 FDCPA case as violation occurs or is discovered.

14 JUSTICE KAGAN: So you're --

15 CHIEF JUSTICE ROBERTS: Not --

16 JUSTICE KAGAN: -- not taking a  
17 position one way or the other about whether  
18 those equitable defenses can be raised?

19 MR. DVORETZKY: I -- I don't think  
20 that is presented by this -- by this case. The  
21 issue hasn't been briefed. The Third Circuit  
22 didn't -- the Third Circuit held that it was  
23 waived. It's not presented in the cert petition  
24 and it's simply not --

25 JUSTICE KAVANAUGH: But that's --

1 MR. DVORETZKY: -- not part of this  
2 case.

3 CHIEF JUSTICE ROBERTS: So -- so it's  
4 an open question, if you have a typical -- I  
5 don't know if it's typical -- but equitable  
6 tolling situation, the hurricane, you know,  
7 whatever, the -- even the courthouse is closed  
8 sort of thing, even though you're dealing with a  
9 statute of the sort you have here, that those  
10 claims could certainly be raised? Or at least  
11 you think it's an open question?

12 MR. DVORETZKY: We are not arguing  
13 that that's foreclosed by this statute. We're  
14 saying that issue is simply not presented by  
15 this case.

16 JUSTICE KAVANAUGH: So --

17 JUSTICE KAGAN: And, similarly, the  
18 Bailey kind of equitable rule? You're also  
19 saying where -- you're -- you're also saying  
20 that you're just not saying?

21 (Laughter.)

22 MR. DVORETZKY: Well -- we're saying  
23 that it wasn't preserved and, therefore, is not  
24 properly before this Court at this stage.  
25 There's no -- there's no reason to remand on a

1 question that all -- all members of the en banc  
2 Third Circuit Court held was waived. Four  
3 members went out of their way to point out in  
4 Footnote 5 that they would have remanded if only  
5 it had been preserved, but -- but it wasn't.

6 CHIEF JUSTICE ROBERTS: But I suppose  
7 what you have to maintain, though, is that  
8 equitable tolling has a higher or different  
9 threshold than simply a discovery rule?

10 MR. DVORETZKY: And -- and that is  
11 actually -- I said I had four reasons why I  
12 think the discovery rule and equitable tolling  
13 are different doctrines. That's the third of  
14 them, is that I think equitable tolling has a  
15 higher bar.

16 Equitable tolling applies only in  
17 extraordinary circumstances, which, as this  
18 Court said in *Rotella*, which distinguished  
19 between the discovery rule and equitable  
20 tolling, that's a virtue of equitable tolling,  
21 that it's the exception, not the rule.

22 If -- if the Court is going to  
23 exercise its inherent equitable powers to  
24 override the language that Congress has written,  
25 that should be something that only happens in

1 unusual, exceptional circumstances.

2 JUSTICE BREYER: Should -- look, my  
3 recollection of Cada and so forth, one, the  
4 statute might provide for tolling. That's the  
5 argument in front of us. You say no; he says  
6 yes. You're going on the words.

7 A second basis would be equitable  
8 tolling. The -- the courthouse blows up or  
9 something, hurricane. That's not here. Forget  
10 it.

11 The third is sometimes called  
12 equitable estoppel, and that's no man should  
13 benefit from his own wrong. Hmm, that might  
14 apply here, except for the fact that the Third  
15 Circuit said absolutely waived, he never raised  
16 it, and so forth, and he doesn't even claim he  
17 raised that one.

18 But there is a fourth one. And the  
19 fourth one, which Justice Scalia said in this  
20 case, is out of Bailey, which applied from Lord  
21 Coke or something and his -- the ancient  
22 origins, and that's if your basic claim is a  
23 claim of fraud. If your basic claim is a claim  
24 of fraud, there is a tolling rule.

25 Now, one, was that ever raised

1 clearly? Probably not. Two, is the basic claim  
2 here was a claim that this is a -- an  
3 uncollectible debt, not that it was a fraudulent  
4 debt? I take it that the basic claim was not  
5 fraud, but I'm not sure on either of those  
6 points.

7 So should we send it back on those  
8 points?

9 MR. DVORETZKY: No. And -- and let me  
10 unpack that question and make three different  
11 points about it.

12 First, the Bailey -- the Bailey line  
13 of authority, as Judge Posner described it in  
14 that Seventh Circuit case, still fits within the  
15 category of equitable relief from the statute,  
16 rather than interpreting the statute.

17 JUSTICE BREYER: Yes.

18 MR. DVORETZKY: And the only question  
19 presented in the cert petition, set aside even  
20 what happened in the Third Circuit, in the cert  
21 petition here is the question of statutory  
22 interpretation.

23 The cert petition doesn't cite --  
24 Bailey doesn't mention fraud. It -- it would be  
25 quite out of the ordinary for this Court to



1 remand for consideration of a question that the  
2 lower court considered waived and didn't decide  
3 and that the Petitioner didn't even raise in the  
4 cert petition itself. So that's one answer.

5 JUSTICE GINSBURG: But --

6 MR. DVORETZKY: And the second --

7 JUSTICE GINSBURG: -- but if we don't  
8 agree with you that this is under the rubric of  
9 equitable tolling, I mean, I thought Justice  
10 Scalia was very clear when he said the discovery  
11 rule as a general matter doesn't toll when your  
12 statute of limitation triggered by the -- what  
13 was the occurrence -- of the violation, but, he  
14 said, there is an exception to the  
15 non-application of the discovery rule for fraud.  
16 We have recognized historical -- historical  
17 exception for cases based on fraud.

18 MR. DVORETZKY: Justice Ginsburg, the  
19 Court -- and it pains me to say this -- Justice  
20 Scalia, were not -- have not always been precise  
21 in their use of this terminology, but where it  
22 has mattered --

23 JUSTICE SOTOMAYOR: He's turning over  
24 in his grave hearing that.

25 (Laughter.)

1 JUSTICE SOTOMAYOR: Battle wordsmith.

2 MR. DVORETZKY: Where it has mattered,  
3 where it has been dispositive of an issue, such  
4 as in ANZ, the Court has been careful to  
5 distinguish between equitable doctrines,  
6 equitable tolling, and the discovery rule.

7 And that is -- that is really the only  
8 way to read these cases, Bailey and Holmberg and  
9 Exploration Co. They are best understood as  
10 equitable cases because throughout those  
11 opinions the Court is talking about the exercise  
12 of the -- of traditional equitable powers.

13 And -- and those cases are not engaged  
14 in statutory interpretation. If you look at a  
15 case like Bailey or Holmberg, it is not doing  
16 the same thing as TRW. It's not even --  
17 Holmberg, for example, was not even asking the  
18 question how do we parse the words "liability  
19 arises" or -- or, in Bailey, I think it was  
20 "cause of action accrued."

21 It's not even a question of what that  
22 language means. It's simply creating an  
23 exception to it. And that is the better way to  
24 understand those -- those cases.

25 In -- in any event, even if there were

1 some sort of a fraud discovery rule, that still  
2 wouldn't help here for three reasons, one of  
3 which is the waiver, which I've talked about.  
4 Two, even if there is a background -- even if  
5 there were a background fraud discovery rule,  
6 Congress could still overcome that. It would  
7 still only be a presumption.

8 And the language that Congress used  
9 here, "violation occurs," would overcome any  
10 common law discovery rule.

11 JUSTICE SOTOMAYOR: Well, how --

12 JUSTICE KAVANAUGH: Do you really  
13 think that? I'm --

14 JUSTICE SOTOMAYOR: If a patent --

15 JUSTICE KAVANAUGH: Go ahead.

16 JUSTICE SOTOMAYOR: -- issued, which  
17 is like what a violation -- when a violation  
18 occurs, we still apply the equitable doctrine,  
19 the concealment doctrine in Exploration, even  
20 though the languages are almost identical.

21 So how do you separate Exploration  
22 from here?

23 MR. DVORETZKY: Because I think what  
24 the Court was doing in Exploration Co. is best  
25 understood as equitable tolling, not as reading

1 that language about the patent issuing to mean  
2 patent issuing or is discovered.

3 This -- this goes to the fundamental  
4 question, what is the Court doing? Is it  
5 interpreting the language like "patent issued"  
6 or "violation occurred" to mean something other  
7 than what it says, or is it exercising the  
8 Court's inherent equitable power to override  
9 what the language says? And that --

10 JUSTICE SOTOMAYOR: So are you saying  
11 there's no self-concealing fraud whatsoever?  
12 That the very act that you do -- this is what  
13 they're claiming -- the very act that they --  
14 that you are alleged to have done doesn't --  
15 wouldn't qualify?

16 Assuming -- and I know that you take  
17 issue with whether you really knew that was his  
18 address or not and whether the lawyer just made  
19 a mistake in not seeing his regular files. I  
20 want to put all of that aside.

21 Let -- let us assume for the sake of  
22 argument that the lawyer knew this wasn't the  
23 address, that the lawyer knew the process server  
24 had effected sewage service, and yet he lied,  
25 intentionally lied, to the court and held on to

1 his judgment until the statute of limitation  
2 passed. Do you believe that there's no common  
3 law self-concealing fraud there?

4 MR. DVORETZKY: I don't think that  
5 that is common law self-concealing fraud. I  
6 think that that might well qualify for equitable  
7 tolling. You don't need to put the fraud label  
8 on it for it to be equitable tolling in a case  
9 where the court actually decided that equitable  
10 tolling was properly presented and preserved.  
11 But I don't think that that would be common law  
12 fraud because it does not involve an intentional  
13 misrepresentation. That's -- that's not alleged  
14 here --

15 JUSTICE SOTOMAYOR: Not to the  
16 defendant but to the court. It's still conduct  
17 that would be fraudulent, maybe not on the -- on  
18 -- on -- on the defendant but certainly on the  
19 court. And why should that deprive the  
20 defendant of a cause of action?

21 MR. DVORETZKY: Well, perhaps it  
22 shouldn't if that's what's actually alleged and  
23 if it's dealt with as equitable tolling rather  
24 than -- rather than reading language like  
25 "violation occurs" to trigger the limitations

1 period upon anything other than when the  
2 violation occurs.

3 With -- with respect to this case,  
4 though, it's not just the waiver in this Court  
5 and in the Third Circuit. I'd also direct the  
6 Court to the complaint in this case. It's a  
7 three-page complaint, and it's in the court of  
8 appeals appendix at 6a.

9 The -- the operative complaint itself  
10 does not allege what is now being described as  
11 so-called sewer service. The -- the operative  
12 complaint alleges that the -- the debt  
13 collection lawsuit here was filed out of time  
14 and that, as a result of the -- as a result of  
15 what happened with the improper service, the --  
16 the plaintiff was entitled to equitable tolling  
17 on that claim because he didn't learn of the  
18 untimely lawsuit.

19 So, on a 12(b) motion, which is what  
20 we're dealing with here, we are miles removed  
21 from the sorts of allegations in some of the  
22 amicus briefs about different cases involving  
23 sewer service.

24 JUSTICE KAVANAUGH: Can I make sure --

25 MR. DVORETZKY: The --

1 JUSTICE KAVANAUGH: -- I have the  
2 terminology correct -- sorry -- on a couple of  
3 the legal points? So, on the discovery rule,  
4 there's a discovery rule linked to fraud, as  
5 Justice Ginsburg said. You first look to  
6 whether it's in the statute. You say no.

7 If it's not in the statute, if you're  
8 correct about that, you see if there's some kind  
9 of -- there's an equitable discovery doctrine,  
10 also linked to fraud, that can apply. But your  
11 argument is that no equitable doctrines were  
12 raised here and, therefore, we shouldn't  
13 consider the scope of how that might apply. Is  
14 that accurate?

15 MR. DVORETZKY: I think that would be  
16 a good opinion.

17 JUSTICE KAVANAUGH: Okay. The other  
18 part of that is you were making an argument that  
19 the words of the statute here expressly  
20 displaced equitable discovery. And I think  
21 that's a shakier argument because that would  
22 mean any time it's not in the statute itself,  
23 it's also -- meaning discovery, it's also  
24 expressly displaced.

25 You don't need this argument to win,

1 but you are giving it as an alternative, and I  
2 want to press you on that.

3 MR. DVORETZKY: That -- so that's  
4 actually not the argument that I am intending to  
5 make.

6 JUSTICE KAVANAUGH: Okay.

7 MR. DVORETZKY: I don't think that  
8 Congress needs to expressly say no discovery  
9 rule in order to foreclose the discovery rule.  
10 If you had more ambiguous --

11 JUSTICE KAVANAUGH: Well --

12 MR. DVORETZKY: -- language --

13 JUSTICE KAVANAUGH: -- I --

14 JUSTICE KAGAN: In order to foreclose  
15 --

16 JUSTICE KAVANAUGH: -- I know you're  
17 not saying that --

18 JUSTICE KAGAN: -- an equitable  
19 doctrine. You don't think that Congress has to  
20 say no equitable doctrines?

21 MR. DVORETZKY: But even for the  
22 statutory discovery rule, I don't think Congress  
23 has to expressly foreclose a statutory discovery  
24 rule.

25 JUSTICE KAGAN: Oh, sorry.



1 MR. DVORETZKY: In -- in a situation  
2 where, let's say, you had language like --

3 JUSTICE KAVANAUGH: Yeah. I agree  
4 with you on that, on the statutory discovery.

5 MR. DVORETZKY: Oh.

6 JUSTICE KAVANAUGH: Okay? So just  
7 assume I'm with you.

8 MR. DVORETZKY: Okay.

9 JUSTICE KAVANAUGH: But there still  
10 exists, I think you just said, a kind of  
11 equitable discovery rule unless Congress has  
12 displaced that. And I would assume there's a  
13 higher bar for Congress to expressly displace  
14 the equitable discovery than there is for  
15 whether it's in the statute in the first place.

16 MR. DVORETZKY: I -- I agree, and --  
17 and the only tweak that I would make to, I  
18 think, the way that you've formulated all of  
19 that, I view the equitable discovery rule just  
20 as a species of equitable tolling.

21 JUSTICE KAVANAUGH: Got it.

22 MR. DVORETZKY: If, like Judge Posner,  
23 you want to list out all seven different kinds  
24 of equitable doctrines that allow a court to  
25 override what Congress has written, that would

1 be one of them. But I think the more helpful  
2 way to think of it is that there are two  
3 categories.

4           There's statutory interpretation.  
5 What has Congress provided as -- as the -- the  
6 rule to apply across this statute in every FDCA  
7 case. As to that question, "violation occurs"  
8 means violation occurs, not discovered.

9           Then there's another bucket of various  
10 equitable doctrines that can be invoked under  
11 the courts' authority to override statutory  
12 language.

13           JUSTICE KAGAN: So I -- I --

14           MR. DVORETZKY: None of those are  
15 presented.

16           JUSTICE KAGAN: -- I think that that  
17 distinction is helpful, but I want to push back  
18 on it a little because it's all statutory  
19 interpretation, isn't it?

20           I mean, as long as we understand that  
21 Congress could say, "and no equitable doctrines  
22 shall apply either," then, in some sense, we're  
23 doing statutory interpretation even when we say  
24 that Congress didn't displace statute --  
25 equitable doctrines, aren't we?

1           MR. DVORETZKY: Sure. There's always  
2 the question of whether Congress has overridden  
3 the long-standing equitable power of the court  
4 to itself override the statutory terms that  
5 Congress has used. So there -- there is a  
6 statutory interpretation question there.

7           But the difference between the  
8 equitable doctrines and the discovery rule, as  
9 I'm using that term, is that there is a  
10 presumption in favor of the availability of the  
11 court's equitable powers. And there's a higher  
12 bar that Congress has to use --

13           JUSTICE KAVANAUGH: You'd need a --

14           MR. DVORETZKY: -- in order to  
15 foreclose that if we're in the equitable bucket.

16           JUSTICE KAVANAUGH: -- you'd need  
17 something akin to a plain statement to get rid  
18 of the equitable doctrines in the statute. You  
19 probably are going to frown on the phrase "plain  
20 statement" but something clearer.

21           MR. DVORETZKY: Something clearer.  
22 This Court has often looked to the sort of  
23 two-part --

24           JUSTICE KAVANAUGH: Because they're --

25           MR. DVORETZKY: -- structure --

1 JUSTICE KAVANAUGH: -- equitable, so  
2 we're not going to assume silence displaces  
3 these equitable doctrines, right?

4 MR. DVORETZKY: Correct. You're not  
5 going to assume silence does. This Court has  
6 typically looked to a sort of two-part structure  
7 where you would have a shorter discovery-based  
8 limitations period, coupled with a longer  
9 statute of repose. And -- and if you have that,  
10 this Court has read into that sort of situation  
11 that Congress meant to displace equitable  
12 powers.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 MR. DVORETZKY: Thank you.

16 CHIEF JUSTICE ROBERTS: Mr. Bond.

17 ORAL ARGUMENT OF JONATHAN C. BOND  
18 FOR THE UNITED STATES, AS AMICUS CURIAE,  
19 SUPPORTING THE RESPONDENTS

20 MR. BOND: Mr. Chief Justice, and may  
21 it please the Court:

22 The question on which this Court  
23 granted review and the only question the Third  
24 Circuit decided is whether the FDCPA should be  
25 interpreted to impose a statute-wide rule that

1 the limitations period does not begin to run  
2 until a violation is discovered. That's a  
3 question about what the statute means, and the  
4 text supplies a clear answer: No.

5 Now Petitioner appears to be  
6 abandoning reliance on that broad theory and is  
7 now relying exclusively on this argument from  
8 Bailey's fraud rule. We agree with Respondent  
9 that Bailey's fraud rule does not apply in this  
10 case, at least as it's been teed up for the  
11 Court, for three reasons -- or -- or -- or three  
12 points I'd like to make.

13 Now first, we agree with Respondent  
14 that the fundamental distinction that matters is  
15 between interpreting the way a statute of  
16 limitations operates and equitable relief from  
17 that statute. It's the distinction this Court  
18 drew in ANZ in describing American Pipe. You've  
19 got interpreting and enforcing statutes, and  
20 you've got equitable relief from the -- the  
21 operation of the statute.

22 And it's true that those are all  
23 statutory interpretation questions, but they're  
24 very different questions because, on the one  
25 hand, a discovery rule that comes out of the

1 statute has to be in the text and context of the  
2 statute, whereas equitable relief, whether it's  
3 viewed as one umbrella doctrine or subdivided  
4 into several different species, are all  
5 exercises of courts' traditional free-standing  
6 powers, courts of equity, to relieve parties  
7 from the operation of a statute.

8           We -- we agree with Respondent that  
9 that difference matters, not just with respect  
10 to how clear a statute must be to displace or  
11 make clear that that doctrine doesn't apply, but  
12 also the scope of the rule that results, as the  
13 Court observed in *Rotella*.

14           So, to put it in terms of Judge  
15 Posner's opinion in *Cada*, the first category of  
16 the statute's accrual rule set forth in the  
17 statute, that's our first bucket. Everything  
18 else fits into that second bucket. And it's  
19 simply a question of whether you subdivide into  
20 -- to subsidiary categories or not.

21           Now the second point is where *Bailey*  
22 fits in this taxonomy. Now we acknowledge that  
23 language in the Court's opinions over the -- of  
24 the past number of years have sent some mixed  
25 signals. To the extent you address it here, we

1 think the better view is that those cases are  
2 understood as applications of equitable  
3 principles, whether equitable tolling or a close  
4 cousin, for three reasons.

5 First, the rule arose at equity,  
6 starting in courts of chancery, and later  
7 carried over to courts at law.

8 Second, that's really the only way to  
9 understand cases like Exploration Company, where  
10 the statute by its terms doesn't run from  
11 discovery, doesn't leave room for a discovery  
12 rule. That can't be read to impose a discovery  
13 rule, but it certainly can be understood not to  
14 displace background equitable principles.

15 And, third, the Court has repeatedly  
16 and recently cited Bailey and Holmberg and other  
17 cases, including in contexts where it mattered,  
18 as Mr. Dvoretzky was explaining, on the  
19 equitable side of the line.

20 The most recent example, as he noted,  
21 is ANZ. And in that case, it mattered whether  
22 American Pipe was equitable or statutory in  
23 nature. And the Court relied on the fact that  
24 American Pipe had cited Holmberg, which ANZ  
25 called a paradigm application of equitable

1 tolling.

2           So we think the Court's most recent  
3 and repeated word on this is that it falls on  
4 the equitable side of the line.

5           But even if you think there are cases  
6 where there -- you have an ambiguous statutory  
7 provision and you can look to equitable  
8 principles to help you figure that out, that's  
9 fine, but that -- the underlying principle is  
10 still equitable in nature. And that would be  
11 like the Court's opinion in Merck, where you had  
12 an express discovery rule and the question is  
13 what does discovery mean.

14           So the Court surveyed equitable  
15 practice, state statutes, and all manner of  
16 things that were relevant to figuring out what  
17 Congress meant in that provision.

18           JUSTICE SOTOMAYOR: Do you think that  
19 that equitable principle is the same as the way  
20 the Court has defined equitable tolling, meaning  
21 we have very -- we have very strict construction  
22 under equitable tolling and certain elements to  
23 it.

24           Do you think the same apply more  
25 broadly to all the equitable principles, or is



1 it a separate principle all together?

2 MR. BOND: So our -- our view -- and  
3 I'm not sure anything turns on it here -- is  
4 that it's a subset of that broader equitable  
5 principle. You might think of it in terms of  
6 the kind of fraud that satisfies Bailey, which  
7 is fraud that is either concealed affirmatively  
8 or self-concealing, satisfies by itself the  
9 extraordinary circumstance requirement of  
10 tolling.

11 And then the second element,  
12 diligence, is just the same across both -- both  
13 contexts.

14 So it seems like a subset of the  
15 broader principle of equitable tolling, which  
16 explains why the Court's decisions in cases  
17 where it mattered, not just in ANZ but in Lampf  
18 and in Rotella, described cases like Holmberg  
19 and Bailey as falling into this bucket.

20 So we -- we understand it to fall in  
21 the equitable tolling or the equitable relief  
22 side of the line, but, at the end of the day, to  
23 decide this case, I don't think you need to  
24 resolve that particular question.

25 If it's any kind of equitable relief,

1 I think Petitioner has disclaimed reliance on  
2 that and certainly didn't present that below or  
3 in the petition, but even if you think it's a --  
4 a -- a statutory rule that could be read into  
5 every statute, we don't think this falls within  
6 the category of fraud claims.

7 As Mr. Dvoretzky was explaining, I  
8 don't think the complaint here, the single  
9 allegation that concerns improper service,  
10 paragraph 14 of the complaint, doesn't allege  
11 any kind of misrepresentation, isn't premised on  
12 fraud.

13 And to the point of amendment, when  
14 the district court asked Petitioner's counsel if  
15 he would like to amend -- and this is at page  
16 104-A of the court of appeals appendix, Volume 2  
17 -- Petitioner's counsel emphatically said no.  
18 So I think that ship has sailed.

19 Ultimately, we don't have a strong  
20 interest in whether you apply that rule here or  
21 leave it to the Third Circuit, but I think  
22 respect for the court of appeals and the  
23 integrity of the certiorari process suggests  
24 that you should take the Petitioner -- the  
25 petition at its word and decide the case on

1 those terms.

2 If the Court has no further questions.

3 JUSTICE KAGAN: I have one.

4 (Laughter.)

5 JUSTICE KAGAN: Why does it matter  
6 that it is a fraud claim, rather than, whatever  
7 the claim is, fraud has been used to prevent the  
8 plaintiff from noticing it?

9 MR. BOND: So, if you understand  
10 Bailey as an application of more general  
11 equitable principles that grant relief not just  
12 from fraud but from fraudulent concealment and  
13 other kinds of extraordinary circumstances, like  
14 the earthquake, then we don't think it does  
15 matter.

16 Bailey, I think, is best understood as  
17 applying those general principles in the  
18 particular context that was recurring at the  
19 time of fraud claims.

20 So, if you understand it that way,  
21 there's no rigid boundary. Bailey is simply  
22 explaining how those general principles apply in  
23 a particular setting.

24 If instead you understand Bailey,  
25 however, as a rule of statutory interpretation

1 that departs from the way we ordinarily read --  
2 read statutes, then we'd suggest you should  
3 apply that exception, that departure on its own  
4 terms rather than expanding it, as I think  
5 Petitioner had suggested in the briefing.

6 But, again, if you understand it as an  
7 application of equitable principles, you don't  
8 need to draw a line between the gravamen of the  
9 underlying claim, which is what Bailey focused  
10 on, the object or foundation of the suit, or  
11 other examples, like Holmberg, which wasn't a  
12 fraud action but involved fraudulent  
13 concealment.

14 If you view those cases of a piece as  
15 involving general principles of equitable  
16 relief, then everything hangs together.

17 If the Court has no questions.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20 Five minutes, Mr. Gant.

21 REBUTTAL ARGUMENT OF SCOTT E. GANT

22 ON BEHALF OF THE PETITIONER

23 MR. GANT: Thank you, Mr. Chief  
24 Justice.

25 Perhaps ambitiously I will try and

1 quickly make five points that I hope address  
2 some of the questions raised by the Court this  
3 morning.

4 First, there's no question that this  
5 Court, although, when Bailey and Holmberg were  
6 decided, didn't use the label discovery rule.  
7 In more recent cases, like Merck and Gabelli,  
8 has clearly identified a discovery rule which I  
9 think under the best reading is separate from  
10 equitable tolling.

11 The second point is that there's an  
12 argument advanced in the briefs and today by  
13 both counsel for the Respondent of the United  
14 States that the issue is whether a statute is  
15 all or nothing. Either a -- a common law  
16 discovery rule applies to every claim under the  
17 statute or to none at all.

18 That -- that view is unsupported and  
19 contradicted by Bailey, Exploration, and  
20 Holmberg itself. Bailey was a bankruptcy court  
21 -- a bankruptcy act case. Exploration dealt  
22 with a statute concerning land patents. And  
23 Holmberg concerned the Federal Farm Loan Act.

24 Those were not cases -- the  
25 Holmberg/Bailey rule applied to a subset of

1 cases under the statute where the doctrine  
2 otherwise applied. It wasn't all or nothing, as  
3 my friends suggest.

4 The third point concerns confusion  
5 about the relationship of the doctrines. Mr.  
6 Bond said that the Court has in the past sent  
7 mixed signals. I think that's a fair  
8 characterization. And I think that,  
9 unfortunately, those mixed signals caused  
10 confusion both on the part of the parties and in  
11 the courts below.

12 In Gabelli in Footnote 2, this Court  
13 observed that the Second Circuit in the case  
14 being reviewed had -- had -- was adding to an  
15 equitable tolling claim the requirement that  
16 there be some action in addition to the cause of  
17 action that caused the concealment. That is the  
18 same idea that is present in Footnote 5 in the  
19 Third Circuit's decision below.

20 The Third Circuit said -- and this  
21 wasn't -- this was for the Court, it wasn't just  
22 on behalf of those four members who would have  
23 wished to review equitable tolling. The court  
24 as a whole said our precedent has not previously  
25 recognized that a defendant's self-concealing

1 conduct may be the basis for equitable tolling.

2           So the Third Circuit, which, by the  
3 way, had gone en banc sua sponte, was  
4 recognizing that previously its own cases had  
5 said that there had to be some additional acts,  
6 not that self-concealment alone wasn't  
7 sufficient for equitable tolling, that was the  
8 reason why that equitable tolling was not  
9 pressed below, because, under existing Third  
10 Circuit law, there was a requirement for some  
11 additional action, which Petitioner's counsel  
12 did not believe was present here.

13           The next point is -- concerns this  
14 question of whether the discovery rule is a  
15 matter of an exception, an equitable exception  
16 to a statute which is imposed by courts  
17 themselves, or whether it's statutory  
18 interpretation.

19           The touchstone in either case, as  
20 Justice Kagan, I believe, was -- was alluding  
21 to, is congressional intent. And we believe  
22 that Congress here, when you look at the statute  
23 as a whole, not ignoring the language in 813(d)  
24 but the statute as a whole, including its  
25 purposes, including its exhortation that it

1 wanted to eliminate the practices at issues,  
2 clearly would not have meant to foreclose a  
3 lawsuit by -- which presented facts like  
4 Petitioner's facts here.

5 The final point I'd like to raise  
6 concerns -- sorry, one final -- other point  
7 related to that.

8 I believe I heard counsel for the  
9 Respondent say that under his view the discovery  
10 rule is a subset of equitable tolling. I could  
11 understand why one would come to that view given  
12 the confusion in the doctrine. I've set out a  
13 different view, which we think is the better  
14 understanding.

15 But, if their view is correct, then I  
16 don't know how they can argue it was waived. If  
17 the discovery -- the Holmberg/Bailey rule is a  
18 subset of equitable tolling, we pressed the  
19 Bailey/Holmberg rule below. Those cases were  
20 cited in the supplemental briefing after the  
21 Court decided to go en banc.

22 So I think the assertion that the  
23 arguments that we're presenting here were waived  
24 are -- are incorrect.

25 The final point concerns Respondent's



1 challenge to the sufficiency of the complaint.

2 The district -- the district court in  
3 the Third Circuit here understood exactly what  
4 was at issue.

5 I must candidly acknowledge that the  
6 complaint here was not a paragon of clarity. It  
7 could have been done better. And if we were  
8 given the opportunity on remand, which we would  
9 because Rule 15 provides for liberal amend --  
10 amendment of pleadings, we would make clear that  
11 the challenged conduct violates 1692(e) and (f)  
12 of the statute, which we believe clearly falls  
13 within the ambit of the common law discovery  
14 rule.

15 Unless the Court has further  
16 questions, I thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. The case is submitted.

19 (Whereupon, at 12:05 p.m., the case  
20 was submitted.)

21

22

23

24

25

## Official

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