

No. 08-37

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In the Supreme Court of the United States

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CHECK INVESTORS, INC., ET AL.,  
PETITIONERS

v.

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE FEDERAL TRADE COMMISSION  
IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether petitioners are “debt collectors” subject to the provisions of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. 1692 *et seq.*

2. Whether the Federal Trade Commission acted within its authority by seeking injunctive and monetary relief against petitioners in district court under the FDCPA and the Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*

3. Whether the district court acted within its authority by requiring petitioners to disgorge the money they had collected from consumers through the use of abusive and deceptive debt collection practices that violated the FDCPA and the FTC Act.

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1-34) is reported at 502 F.3d 159. The opinion of the district court (Pet. App. 35-58) is not published in the *Federal Supplement* but is available at 2005 WL 1677480. The final order of the district court (Pet. App. 59-81) is unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on September 6, 2007. Petitions for rehearing were denied on February 6, 2008 (Pet. App. 82-83, 84-85). On April 24, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including



million NSF checks with an estimated face value of \$348 million. Pet. App. 3-4.

b. Petitioners routinely attempted to collect from the check writer a sum of money that was \$125 or \$130 more than the face value of the NSF check—in effect, charging a collection fee that exceeded the legal limit under the laws of most states. Petitioners' collection tactics also included aggressive dunning of consumers through letters and telephone calls demanding the full amount allegedly owed without disclosing the face amount of the check or the amount of the additional fee. Petitioners accused consumers of being criminals or "crooks" and falsely threatened consumers with arrest and criminal or civil prosecution if they failed to pay the amount owed. Petitioners also sent form collection letters purporting to be from Hutchins, their general counsel. The letters indicated that Hutchins was considering legal action when, in fact, Hutchins had not investigated the status of the debts at issue. Petitioners employed



FTC sought injunctive relief and monetary restitution for injured customers. Pet. App. 7-8.

a. The FDCPA applies to “debt collectors” and prohibits a variety of debt collection practices, including harassment or abuse of the consumer (such as the use of obscene language and repeated telephone calls), 15 U.S.C. 1692d; false or misleading representations (including false assertions concerning the character, amount, or legal status of a debt or the consequences of failing to pay a debt), 15 U.S.C. 1692e; and unfair practices (such as collecting fees in excess of those permitted by law), 15 U.S.C. 1692f. Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. 45(a).

b. The parties filed cross-motions for summary judgment. Petitioners and Hutchins did not dispute that they had engaged in the collection practices alleged by the FTC. They asserted, *inter alia*, that the FDCPA did not apply to them because they were “creditors” collecting obligations owed to themselves rather than “debt collectors” collecting obligations owed to a third party. Petitioners and Hutchins also contended that the individuals who had written the NSF checks were criminals or tortfeasors and therefore were not “consumers” entitled to the protections of the FDCPA. Pet. App. 9.

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<sup>2</sup> The full definition of “debt” for purposes of the FDCPA is “any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been

*time the check was drawn."* *Id.* at 20 (quoting *Bass*, 111 F.3d at 1329). Because a bank can refuse payment on a

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<sup>3</sup> The FDCPA defines the term "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). The statutory definition contains several exclusions. The exclusion identified by the court of appeals applies to "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity \* \* \* concerns a debt which was not in default at the time it was obtained by such person." 15 U.S.C. 1692a(6)(F)(iii).

cluded that, through the definition of “debt collector,” “Congress ha[d] unambiguously directed [the court’s] focus to the time the debt was acquired in determining whether one is acting as a creditor or debt collector under the FDCPA.” *Id.* at 30. The court also relied on legislative history confirming that Congress’s focus in the FDCPA was on “third-party collectors of past due debts” who, unlike creditors, would not be constrained in their collection tactics by the desire to maintain good will with the consumer. *Id.* at 30-31. Applying those principles to the facts of this case, the court held that petitioners were “debt collectors” subject to the FDCPA because they “acquired the defaulted checks only for collection purposes.” *Id.* at 31. The court also observed that petitioners’ “course of conduct exemplifies why Congress enacted the FDCPA and the wisdom of doing so.” *Id.* at 33.

The court of appeals held that petitioners’ conduct was prohibited by the FTC Act as well. Pet. App. 33-34. The court explained that the FTC Act prohibits deceptive acts or practices employed in the collection of debts, *id.* at 33 (citing *Trans World Accounts, Inc*

erred by finding that they are “debt collectors” subject to the FDCPA. Petitioners also raise challenges to the FTC’s authority to seek injunctive and equitable relief

Petitioners respond (Pet. 16-19) that they qualify for the "creditor" exception to the definition of "debt collector." See 15 U.S.C. 1692a(6)(A) (excluding from term "debt collector" any officer or employee of a "creditor" while collecting debts for the creditor in the name of the creditor). The FDCPA defines the term "creditor" to include "any person \* \* \* to whom a debt is owed," but *excludes* from that category any person who "receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another." 15 U.S.C. 1692a(4); see p. 7, *supra*. Petitioners "accept[ ] for purposes of argument" (Pet. 16-17) that they received an "assignment" of the NSF checks after the checks were in default. Petitioners contend (Pet. 17) that they are "creditors" nonetheless because their "purpose" was to collect the debts

nitional universe, and there is therefore no need to exclude them." *Ibid.*

To resolve the ambiguities presented by the "for another" phrase in the "assignment" exception, the court of appeals correctly considered the broader statutory context and the legislative history of the FDCPA. See, e.g., *Dolan v. USPS*, 546 U.S. 481, 486 (2006) (interpretation of a word or phrase in a statute "depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis"). The court recognized that petitioners' interpretation of the phrase "for another" would "weave a technical loophole into the fabric of the FDCPA big enough to devour all of the protections Congress intended in enacting that legislation." Pet. App. 28.

First, petitioners' interpretation would create conflicts with other provisions of the statutory scheme that address third parties who collect debts that originally were due to another—such as the definition of "debt collector"—in which Congress "unambiguously directed





were in default, the court correctly held that petitioners were “debt collectors” for purposes of the FDCPA.

2. Petitioners contend (Pet. 19-24) that the FTC acted outside its authority by pursuing relief for violations of the FDCPA in the district court without also initiating an administrative proceeding. Petitioners failed to raise that argument in the lower courts. Accordingly, the argument is not properly before the Court and should be rejected on that basis alone. *Travelers Cas. & Sur. Co. v. Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007) (Court ordinarily does not consider claims that were neither raised nor addressed below).

Petitioners’ argument also lacks merit. The FDCPA provides that the FTC may use “[a]ll of the functions and powers” available to it under the FTC Act to enforce the FDCPA. 15 U.S.C. 1692l(a). It is well settled that, pursuant to 15 U.S.C. 53(b), the FTC may initiate an action in federal district court seeking a permanent injunction and other equitable relief, including disgorgement, to enforce the FTC Act. *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994), cert. denied, 514 U.S. 1083 (1995); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-1315 (8th Cir. 1991); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1011 (5th Cir. 1984).

injunction authority to counteract consumer fraud, and the Committee believes that the expansion of venue and service of process in the reported bill should assist the FTC in its overall efforts"). Because the FTC may use any authority available to it under the FTC Act to enforce the FDCPA, it acted within its authority under Section 13(b) by seeking injunctive and monetary relief against petitioners in district court.

Petitioners separately contend (Pet. 24-28) that the FTC acted outside its authority under 15 U.S.C. 45(n). The court of appeals did not address that claim, which petitioners first raised in their reply brief in that court. See *In re Surrick*, 338 F.3d 224, 237 (3d Cir. 2003) (failure to identify or argue issue in opening brief constitutes waiver of argument on appeal), cert. denied, 540 U.S. 1219 (2004). Accordingly, the claim is not properly before this Court.

Petitioners' claim also lacks merit because 15 U.S.C. 45(n) is not implicated in this case. Section 5(n) of the FTC Act sets forth the standard of proof the FTC must satisfy in order to declare a practice "unfair" under 15 U.S.C. 45(a). The FTC did not allege that any of petitioners' acts or practices was "unfair" under the FTC Act, but instead asserted that petitioners' conduct violated Section 5(a) because it was *deceptive*. The standard of proof at 15 U.S.C. 45(n) does not apply when the FTC challenges conduct as "deceptive" under the FTC Act. Petitioners' claim is thus without merit.

3. Petitioners contend (Pet. 28-30) that the one-year statute of limitations set forth at 15 U.S.C. 1692k(d) limits the restitution the district court was authorized to order to the amount that petitioners unlawfully collected during the year that preceded the FTC complaint. Because petitioners failed to raise that argument in the

lower courts, it is not properly before this Court. Although petitioners describe (Pet. 28-29) the limitations period as a restriction on the “jurisdiction” of the district court, they offer no basis for departing from the general rule that statutes of limitations are waivable and non-jurisdictional. See, e.g., *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750, 753 (2008) (“[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver.”).

In any event, petitioners’ argument lacks merit. The statute of limitations on which petitioners rely is a subsection of the FDCPA provision that establishes a *private* right of action by a person or a class of persons damaged by the unlawful practices of a debt collector. See 15 U.S.C. 1692k(a). There is no corresponding statute of limitations in the provision that authorizes the FTC to enforce the FDCPA, 15 U.S.C. 1692l. Reinforcing the conclusion that Section 1692k has no application here, the one-year limitation period on which petitioners rely applies to actions “to enforce any *liability*.” 15 U.S.C. 1692k(d) (emphasis added). Actions brought by the FTC (or by other agencies authorized to enforce the FDCPA, 15 U.S.C. 1692l(b)) seek to secure equitable and other relief against a law violator, not to “enforce”

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**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM BLUMENTHAL