No. 10-1195

In the Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in upholding the dismissal of plaintiff's claims under the Telephone Consumer Protection Act, Pub. L. No. 102-243, § 3(a), 105 Stat. 2394, 2395 (1991), for lack of subject matter jurisdiction.

RULE 29.6 STATEMENT

Arrow Financial Services, LLC is wholly owned by AFS Holdings, LLC, which in turn is wholly owned by Sallie Mae, Inc., which in turn is wholly owned by SLM Corp., a publicly traded company.

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STATEMENT OF THE CASE

1. Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991 as part of an amendment to the Communications Act of 1934. Pub. L. No. 102-243, § 3(a), 105 Stat. 2394, 2395. The TCPA prohibits certain unsolicited marketing calls and facsimile advertisements and restricts the use of automatic dialers and prerecorded messages in non-emergency calls to cell phones. *See* 47 U.S.C. § 227(b)(1)-(2).

Although many states had already passed laws seeking to regulate or prohibit unsolicited telemarketing, those laws had "had limited effect ... because States do not have jurisdiction over interstate calls," S. Rep. No. 102-178, at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970, and "telemarketers [could] easily avoid the restrictions of State law, simply by locating their phone centers out of state," H.R. Rep. No. 102-317, at 9 (1991). "Many States ha[d] expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls." S. Rep. No. 102-178, at 3. "Congress intended the TCPA to provide 'interstitial law preventing evasion of state law by calling across state lines.'" *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir. 2006) (Sotomayor, J.) (quoting *Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995)). "Congress thus sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps." *Gottlieb*, 436 F.3d at 342.

The TCPA contains distinct provisions for private parties on the one hand, and state attorneys general on the other, to enforce its prohibitions. The TCPA's

private right of action allows a person, "if otherwise permitted by the laws or rules of court of a State, [to] bring in an appropriate court of that State" a private action for damages or injunctive relief, and entitles a successful plaintiff to recover actual damages or statutory damages of $500 per violation. 47 U.S.C. § 227(b)(3). A separate provision authorizes state attorneys general to bring civil actions for damages and injunctive relief, over which the federal courts "shall have exclusive jurisdiction." *Id.* § 227(g)(1), (2). The TCPA does not prevent state officials from bringing similar actions in state court or otherwise exercising their powers under state law. *See id.* § 227(g)(5), (6).

In explaining the law's "private right-of-action provision," the sponsor of the law explained that "[t]he provision would allow consumers to bring an action in State court against any entity that violates the bill." 137 Cong. Rec. 30,821 (1991) (statement of Senator Hollings). Senator Hollings further stated that "it is my hope that States will make it as easy as possible for consumers to bring such actions [in state court], preferably in small claims court." *Id.* He also admonished that he "expect[ed] that the States will act reasonably in permitting their citizens to go to court to enforce this bill," but added that "the bill [also] permits the State attorneys general to enforce the provisions of the bill in Federal court." *Id.* at 30,822.

In 1998, construing the text in context and in light of Congress's stated purpose, the Eleventh Circuit held that there is no federal-question jurisdiction under 28 U.S.C. § 1331 over private actions under the TCPA. *See Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir.), *modified*, 140 F.3d 898 (11th Cir.

1998). Until December 2010, that was the uniform view of the courts of appeals. *See Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435-37 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *International Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000).

2. In August 2009, Petitioner filed a complaint in the United States District Court for the Southern District of Florida, alleging that respondent, Arrow Financial Services, LLC (Arrow), had placed telephone calls to his cell phone without his prior consent using an auto-dialer system, in an effort to collect a debt from Petitioner. The complaint alleged violations of the TCPA, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. § 559.55 *et seq.*[1]

After the parties stipulated to dismissal of Petitioner's FDCPA and FCCPA claims, Arrow moved to dismiss Petitioner's TCPA claim for lack of subject matter jurisdiction, citing the Eleventh Circuit's prior decision in *Nicholson* holding that the federal courts lacked federal-question jurisdiction over such claims. The district court granted Arrow's motion and

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[1] At the time petitioner filed his complaint, it was the settled law of the Eleventh Circuit that federal courts lack federal-question jurisdiction over private TCPA suits. *See, e.g., Nicholson*, 136 F.3d at 1289. Petitioner does not claim that the courts of the state of Florida were an inadequate forum. *Cf.* Pet. 11-12 n.5.

dismissed. Petitioner appealed, arguing that the Court of Appeals should reconsider *Nicholson* in light of this Court's decisions in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), and *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003).

The Eleventh Circuit summarily affirmed in an unpublished per curiam opinion. Pet. App. 1a-2a. The court cited its prior decision in *Nicholson* holding "that federal courts lack subject matter jurisdiction over private actions under the Act," 136 F.3d at 1289, and explained that neither *Grable* nor *Breuer* considered the TCPA or "explicitly or implicitly" abrogated *Nicholson*. Pet. App. 2a. Petitioner did not seek rehearing *en banc*.

REASONS FOR DENYING THE WRIT

I. THE ASSERTED SPLIT IN AUTHORITY IS LOPSIDED, VERY RECENT, AND WARRANTS FURTHER PERCOLATION

In the first two decades after the TCPA was enacted, the six courts of appeals that had squarely addressed the issue had uniformly concluded that there is no federal-question jurisdiction over private TCPA suits. *See Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435-37 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *International Sci. & Tech. Inst. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir.), *modified*, 140 F.3d 898 (11th Cir. 1998). There is no indication that the Act did not function as desired

during that period due to this jurisdictional rule and, indeed, as explained below, Congress has amended the statute in other respects but has not touched the jurisdictional provision at issue here.

Departing from that uniform line of precedent, the Sixth Circuit held in December 2010 that there is federal-question jurisdiction under the TCPA over private actions filed under the Act. *See Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 463-64 (6th Cir. 2010). The asserted "split" on the question presented is therefore both lopsided (1-6) and nascent, having emerged less than six months ago and decades after the enactment of the TCPA.

Petitioner argues that the decision below also conflicts with the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005). But while dictum in *Brill* supports Petitioner's position, *see id.* at 450-52, the holding of *Brill* is addressed to a different question, eliminating any actual conflict between this case and *Brill*. In *Brill*, the Seventh Circuit *held* only that a private TCPA action originally filed in a state court may be removed to a federal court pursuant to the Class Action Fairness Act of 2005, § 1 *et seq.*, where the requirements for diversity jurisdiction under 28 U.S.C. § 1332 are met. *See* 427 F.3d at 447-50. This case does not involve any question of removal, under the Class Action Fairness Act or any other provision. Moreover, Petitioner's claimed basis for federal jurisdiction is 28 U.S.C. § 1331 (federal question), not § 1332 (diversity).

Both the Second and Third Circuits have addressed the distinct question whether *diversity* jurisdiction is available in private TCPA actions that satisfy the requirements of the federal-diversity statute (§ 1332).

As those courts have recognized, that question is distinct from whether *federal-question* jurisdiction exists over such actions and turns on different considerations. *See Landsman & Funk PC v. Skinder-Strauss Assocs.*, --- F.3d ---, Nos. 09-3532, 09-3793, 09-3105, 2011 WL 1226371, at *7 (3d Cir. Apr. 4, 2011) (explaining "the meaningful difference between federal question jurisdiction, a constrained basis for jurisdiction that applies in a 'narrow class' of federally-oriented cases, and diversity jurisdiction, which has traditionally been open to claims based on any cause of action out of concern for avoiding bias against out-of-state parties") (citation omitted), *reh'g en banc granted*, --- F.3d ---, 2011 WL 1879624 (3d Cir. May 17, 2011); *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 338-43 (2d Cir. 2006) (Sotomayor, J.) (holding that although Congress did not authorize federal-question jurisdiction over private TCPA claims, diversity jurisdiction under § 1332 remains available); *accord US Fax Law Ctr., Inc. v. iHire, Inc.*, 476 F.3d 1112, 1116 (10th Cir. 2007), *cert. denied*, 552 U.S. 1139 (2008). Every circuit that has addressed *that* distinct jurisdictional question agrees that diversity jurisdiction is available for TCPA claims. And that question is not presented here. As Petitioner concedes, "[i]t is undisputed that" there is no potential "basis for [federal] jurisdiction [in this case] other than federal-question jurisdiction." Pet. 12.

The Third Circuit recently granted rehearing *en banc* in *Landsman*. *See* 2011 WL 1879624 (3d Cir. May 17, 2011) (order granting reh'g en banc), *available at* http://www.ca3.uscourts.gov/opinarch/093105poen.pdf. Unlike this case, *Landsman* presents both the diversity and federal-question aspects of the jurisdictional issue. If this Court believes that

certiorari may be warranted to consider the jurisdiction conferred by the TCPA, the more prudent and efficient course would be to wait for a vehicle like *Landsman*, which would allow the Court to address both diversity and federal-question jurisdiction at once. Waiting at least for *Landsman* also would ensure that the Court would have the benefit of the *en banc* Third Circuit's considered views on both aspects of the federal-jurisdiction issue.[2]

II. THE DECISION BELOW IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND WITH THE INTENT OF CONGRESS

The longstanding and, until recently, uniform view of the courts of appeals that the federal courts lack federal-question jurisdiction over private TCPA claims is consistent with this Court's precedents as well as with the intent of Congress.

A. The Asserted Conflict With This Court's Decisions Is Unavailing

Contrary to Petitioner's assertion (Pet. 15), there is no conflict between the decision below and this Court's decision in *Tafflin v. Levitt*, 493 U.S. 455 (1990). In *Tafflin*, this Court held that the federal RICO statute's permissive grant of federal jurisdiction does not *divest state courts* of concurrent jurisdiction over private RICO actions. *Id.* at 460-61. The question in this case, however, concerns the effect of the TCPA's *assignment* of jurisdiction to the state courts over

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[2] As Petitioner notes (at 6), then-Judge Alito dissented from the Third Circuit's decision in *ErieNet* holding that federal courts lack federal-question jurisdiction over private TCPA actions. 156 F.3d at 519. The prominence of a dissenter, however, is not sufficient to create a circuit conflict.

private claims brought under the Act. As several courts of appeals have explained, an affirmative assignment of jurisdiction to state courts has a different effect than the permissive grant of jurisdiction to federal courts at issue in *Tafflin*. "The difference derives from the fact that state courts are courts of general jurisdiction and are accordingly presumed to have jurisdiction over federally-created causes of action unless Congress indicates otherwise, whereas federal courts are courts of limited jurisdiction ...." *Foxhall*, 156 F.3d at 435 (citing *Tafflin*, 493 U.S. at 460-61, and *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850)); *accord ErieNet*, 156 F.3d at 516-17 & n.2; *Chair King*, 131 F.3d at 512; *International Sci.*, 106 F.3d at 1151-52. *Tafflin* spoke only to whether state court jurisdiction, which exists apart from any Act of Congress, had been ousted. *See* 493 U.S. at 459 ("[N]othing in the concept of our federal system prevents state courts from enforcing rights created by federal law."). *Tafflin* is thus readily distinguishable, and in no way conflicts with the circuit courts' longstanding view that federal-question jurisdiction, which is a creature of statute, is not available here.

Petitioners also argue that this Court's decisions in *Grable* and *Breuer* are "in tension with" the decisions of the six circuits holding that federal-question jurisdiction is not available for TCPA claims—stopping short of arguing that the decision below actually conflicts with *Grable* and *Breuer*. *See* Pet. 15-16. But as the Eleventh Circuit here explained, *Grable* and *Breuer* involved different questions and are therefore inapposite.

Grable examined the narrow circumstances in which a *state law* claim gives rise to federal-question

jurisdiction. It held only that a substantial federal issue present in a state-law claim may, in some circumstances, be sufficient to trigger federal-question jurisdiction under § 1331. The Court explained that even where there is a substantial federal issue, a case "will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts ...." *Grable*, 545 U.S. at 313-14. In the TCPA, however, Congress's expressed its judgment that private TCPA claims should be heard in state court. The statute "refers potential plaintiffs to the state courts[,] ... does not appear to reflect any significant federal interest, ... [and] does not reflect an attempt by Congress to occupy this field ... or to promote national uniformity of regulation." *ErieNet*, 156 F.3d at 515. Rather, Congress recognized that "[f]ederal legislation was necessary in order to prevent telemarketers from evading state restrictions." *Id.*

Breuer similarly is off the mark. *Breuer* involved the Fair Labor Standards Act, which provides that a private suit "'may be maintained ... in any Federal or State court of competent jurisdiction.'" 538 U.S. at 693 (quoting 52 Stat. 1069, as amended, 29 U.S.C. § 216(b)). Because Congress explicitly created a private right of action that could be brought "in any Federal or State court," there was no dispute in *Breuer* about whether the federal courts would have original jurisdiction under § 1331. *See id.* at 694 ("There is no question that Breuer could have begun his action in the District Court."). The issue in that case was whether the FLSA provision nevertheless prohibited *removal* to federal court under § 1441(a), by specifying that suits "may be maintained." This Court held that it did not,

reasoning that because there was, indisputably, federal-question jurisdiction over such claims, removal under §1441(a) was permitted unless Congress expressly prohibited it. *See id.* at 695-700. This case, as explained, does not involve any question respecting removal.

Moreover, neither *Grable* nor *Breuer* involved a statute that possesses the "unusual constellation of statutory features" present in the TCPA: (1) the express creation of a private right of action, (2) an express assignment of jurisdiction to the state courts to consider such private actions, and (3) and an express jurisdictional grant to federal courts to entertain actions brought by state attorneys general. *Chair King*, 131 F.3d at 512-13; 47 U.S.C. § 227(b)(3), (g)(2). As then-Judge Sotomayor observed in *Gottlieb*, the TCPA private right of action is truly "*sui generis*." 436 F.3d at 342 n.8. At a minimum, the *sui generis* nature of the TCPA defeats Petitioner's claim that the decision below conflicts with this Court's decisions.

B. The Decision Below Is Correct And Consistent With The Intent Of Congress

As six courts of appeals have concluded, the text, structure, and legislative history of the statute all point to the conclusion that there is no federal-question jurisdiction over private TCPA claims.

Section 227(b)(3) provides, in relevant part:

> A person or entity may, *if* otherwise permitted by the laws or rules of court of a State, bring in an appropriate *court of that State* [a private claim under the TCPA].

47 U.S.C. § 227(b)(3) (emphases added). The plain and ordinary meaning of the qualifying phrase "may, *if* otherwise permitted by ... a State" is that the private right of action is contingent on such state permission. The next clause, which specifies that such actions are to be brought "in an appropriate court of *that State*," plainly evinces congressional intent that such suits are to be brought in state court—to the extent allowed by state law.

Petitioner argues that Congress's unambiguous assignment of jurisdiction to the state courts over private actions brought under the Act does not divest the federal courts of jurisdiction to entertain such actions. But several customary sign posts of Congress's intent point to the opposite conclusion and confirm that Congress did not confer federal jurisdiction over private actions under the TCPA.

First, the "broader context of the statute as a whole," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), confirms that Congress did not confer federal jurisdiction over private actions under the TCPA. Congress drew clear jurisdictional lines based on the party enforcing the Act. The private enforcement provision unambiguously vests jurisdiction in the state courts over such claims. *See* 47 U.S.C. § 227(b)(3). By contrast, Congress gave the federal courts exclusive jurisdiction when the action was brought by a state attorney general. *Id.* § 227(g)(1), (2). The juxtaposition between those two provisions makes clear that Congress had different jurisdictional schemes in mind.

Moreover, elsewhere in the Communications Act, where Congress intended to authorize concurrent federal and state jurisdiction, it did so explicitly. *See id.* §§ 214(c), 407, 415(f), 553(c)(1), 555(a), 605(e)(3)(A). And elsewhere in the TCPA, where Congress

expressly provided for federal-court jurisdiction, Congress saw fit to address venue, service of process, and possible conflicts with FCC enforcement efforts. *See id.* § 227(g)(2) (authorizing state attorneys general to bring an action in federal court); § 227(g)(4), (7) (venue, service of process, conflicts). Section 227(b), by contrast, says nothing about those issues. In context, then, Congress's silence as to federal jurisdiction for § 227(b) speaks volumes. *Cf. Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.").

Second, as several courts of appeals have explained, Petitioner's preferred reading of the provision at issue as merely "confirming" the availability of a state forum would render it superfluous, because state courts would have had jurisdiction over private TCPA actions even if the statute said *nothing* about state-court jurisdiction. *See, e.g.*, *ErieNet*, 156 F.3d at 516 (citing *Tafflin*, 493 U.S. at 458-59, and noting the well-settled presumption in favor of state-court jurisdiction over claims created by federal law). Indeed, it is "'black letter law'" that state courts generally have jurisdiction to entertain federal causes of action. *Tafflin*, 493 U.S. at 461 (citation omitted). Petitioner provides no convincing reason why Congress would go out of its way to say that state courts could entertain private actions under the TCPA—when that obviously would be the case. The fact that Petitioner's interpretation renders the provision completely superfluous is a powerful reason for rejecting that interpretation. This Court strains to avoid rendering

Congress's words a nullity. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (statutes should be read to avoid making language "'superfluous, void, or insignificant'" (citation omitted)). It should do no less here.

Third, the legislative history confirms that this provision was *not* intended to be superfluous, but instead to confer exclusive jurisdiction on state courts to entertain a particular class of claims under the TCPA, *i.e.*, private actions. As discussed above, the law's sponsor explained that the law contains a private-right-of-action provision that "would allow consumers to bring an action in State court against any entity that violates the bill." 137 Cong. Rec. at 30,821 (statement of Sen. Hollings). Senator Hollings went on to explain:

> The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. .... Small claims court or a similar court would allow the consumer to appear before the court without an attorney.

Id. The reference to small claims court—which is consistent with the relatively small amounts of damages available in TCPA actions—underscores that Congress believed that private actions were best suited for state rather federal court. Moreover, in the same passage, the sponsor contrasted the provision of the TCPA "permit[ting] the State attorneys general to

enforce the provisions of the bill *in Federal court*," underscoring the different jurisdictional schemes Congress intended depending on which party brought the action. *Id.* at 30,822 (emphasis added).

Finally, the first six courts of appeals that addressed the question all concluded that there is no federal-question jurisdiction over of private TCPA claims, yet Congress did not act to revise the provision. That congressional acquiescence is significant, because Congress enacted various amendments to the TCPA from 1992-2010, but did not alter the language relevant here. *See* Pub. L. No. 111-331, § 2, 124 Stat. 3572, 3572-75 (2010); Pub. L. No. 109-21, §§ 2, 3, 119 Stat. 359, 359-63 (2005); Pub. L. No. 108-187, § 12, 117 Stat. 2699, 2717 (2003); Pub. L. No. 103-414, § 303(a)(11)-(12), 108 Stat. 4279, 4294 (1994); Pub. L. No. 102-556, § 402, 106 Stat. 4181, 4194-95 (1992). Congress should thus be presumed to have ratified the uniform view of the courts of appeals. *See, e.g., General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94 (2004); *Evans v. United States*, 504 U.S. 255, 268-69 (1992); *cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, --- U.S. ---, 130 S. Ct. 1605, 1616 (2010) (Congress presumed to have adopted judicial interpretation of three courts of appeals that had interpreted the Truth in Lending Act's "bona fide error" defense when it used identical language in a later-enacted statute).

The fact that Congress has not acted to address the line of circuit precedent that Petitioner attacks—even though Congress has amended the TCPA on several occasions—indicates that Congress has no objection to that precedent, and counsels against this Court's intervention at this preliminary stage of the alleged conflict.

III. IN ANY EVENT, THIS CASE IS AN INFERIOR VEHICLE FOR RESOLUTION OF THE QUESTION PRESENTED

Petitioner warns that if this Court "does not grant review in this case, it risks being unable to address the issue for lack of another good vehicle." Pet. 12. That statement not only is at odds with Petitioner's assertion that the question presented occurs with "staggering frequency" (Pet. 9), it is plainly unfounded.

Just last month, the Third Circuit issued a thorough published opinion reaffirming its holding in *ErieNet* that there is no federal-question jurisdiction over private TCPA claims, and agreeing with the Second Circuit's decision in *Gottlieb* holding that diversity jurisdiction under § 1332 remains available. *Landsman*, --- F.3d ---, 2011 WL 1226371, at *7-13. The Third Circuit recently granted rehearing *en banc* in *Landsman*. 2011 WL 1879624 (3d Cir. May 17, 2011). Unlike *Landsman*, this case presents only one dimension of the federal-jurisdiction issue, in a brief unpublished opinion. If this Court believes that certiorari may be warranted to consider the jurisdiction conferred by the TCPA, the more prudent and efficient course would be to wait for a vehicle like *Landsman*, which would allow the Court to address both diversity and federal-question jurisdiction at once, with the benefit of the *en banc* Third Circuit's considered views and any further developments in the case law.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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