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

PETITIONER'S REPLY

DONALD YARBROUGH
P.O. Box 11842
Fort Lauderdale, FL 33339
(954) 537-2000

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Counsel for Petitioner

June 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

INTRODUCTION

Respondent Arrow Financial Services concedes that there is a square circuit conflict over the question presented—whether the Telephone Consumer Protection Act (TCPA) precludes federal question jurisdiction over claims that indisputably arise under federal law. Arrow attempts to minimize the conflict, however, and suggests that it might best be resolved later, after the Third Circuit completes en banc rehearing in yet another case raising the issue.

Arrow's effort to downplay the scope of a longstanding conflict rests on a mischaracterization of the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (2005). As the Seventh Circuit recently confirmed, *Brill* directly *holds* that federal courts have *federal question* jurisdiction as well as diversity jurisdiction over TCPA claims. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, __ F.3d __, 2011 WL 2039663, at *1 (May 26, 2011).

And contrary to Arrow's suggestion, the Third Circuit's grant of rehearing en banc in *Landsman & Funk PC v. Skinder-Strauss Associates,* 2011 WL 1879624 (3d Cir. May 17, 2011)—which came after a panel split *three ways* on the question of federal jurisdiction over TCPA claims, *see* __ F.3d __, 2011 WL 1226371 (3d Cir. Apr. 4, 2011)—only underscores the lower courts' confusion and the need for guidance from this Court to resolve the conflict, which will persist no matter the ultimate result in *Landsman*.

Arrow's remaining arguments go principally to the merits rather than the need for review. Even as merits arguments they fail to establish that the TCPA overrides 28 U.S.C. § 1331's grant of federal jurisdiction over cases arising under federal law.

ARGUMENT

1. Arrow agrees that the decision below and other appellate decisions holding that the TCPA forecloses assertion of federal question jurisdiction under 28 U.S.C. § 1331 over claims arising under the Act directly conflict with the Sixth Circuit's decision in *Charvat v. Echostar Satellite LLC*, 630 F.3d 459 (2010). Arrow argues, however, that this conflict is so one-sided and of such recent vintage that the Court should allow the issue to "percolate" further through the lower courts before taking it up.

Arrow's argument rests on its claim that the Seventh Circuit's earlier decision in *Brill* does not really hold that federal courts can exercise jurisdiction over TCPA claims under § 1331, but only that federal courts may assert diversity jurisdiction over TCPA claims. That argument reflects a clear misreading of *Brill*. To be sure, the defendant in *Brill* cited diversity jurisdiction under the Class Action Fairness Act's amendments to 28 U.S.C. § 1332 as the basis for removal, but the Seventh Circuit's holding that federal jurisdiction was proper was based on the court's ruling that the TCPA does not provide for exclusive jurisdiction in state courts and thus does not displace either diversity jurisdiction *or* federal question jurisdiction. *See* 427 F.3d at 450-51.

Moreover, because the removal in *Brill* was proper if there was jurisdiction under either § 1331 or § 1332, *see id.* at 451, the court appropriately addressed both diversity and federal question jurisdiction: "[R]emoval is authorized not only by the Class Action Fairness Act but also by [28 U.S.C.] § 1441, because the claim arises under federal law." *Id*. The court's conclusion that there was federal question jurisdiction thus was

an alternative holding, not dicta. The Seventh Circuit, like most courts, treats its alternative holdings as binding precedents. *See Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1030 (2004) ("There is a big difference between dicta and alternative holdings."); *Whetsel v. Network Prop. Servs., LLC*, 246 F.3d 897, 903 (2001) (alternative holdings are "entitled to precedential weight").

Thus, district courts within the Seventh Circuit are bound to exercise federal question jurisdiction over TCPA claims and regularly do so. *See, e.g., Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, __ F.R.D. __, 2011 WL 884092 at *2, n.1 (S.D. Ill. Mar. 11, 2011); *Wilder Chiropractic, Inc. v. Pizza Hut of S. Wis., Inc.*, 754 F. Supp. 2d 1009, 1020 (W.D. Wis. 2010); *Benedia v. Super Fair Cellular, Inc.*, 2007 WL 2903175 at *1 (N.D. Ill. Sept. 26, 2007). As the court stated in *Benedia*, "there is no basis to limit *Brill* to its facts … and deny jurisdiction over a claim brought in federal court initially, pursuant to 28 U.S.C. § 1331." 2007 WL 2903175, at *1. Similarly, the court in *Vigus* recognized that *Brill* "held" that TCPA claims are subject to federal question jurisdiction and that district courts within the Seventh Circuit are "bound by that precedent." 2011 WL 884092, at *2, n.1.

The Seventh Circuit's recent decision in *Sawyer* confirms this reading of *Brill*. There, in deciding the merits of a certified interlocutory appeal involving statute of limitations issues in a TCPA case, the court stated that the case was "[p]roperly in federal court" under "federal-question jurisdiction" because, although counsel for some of the parties "may have believed that state courts have exclusive jurisdiction of suits under § 227, … *we held otherwise in Brill* …."

2011 WL 2039663, at *1 (emphasis added). The court's express characterization of *Brill*'s ruling on federal question jurisdiction as a holding, and its reliance on that holding to deem "proper" the exercise of jurisdiction over a TCPA claim under § 1331, belies Arrow's suggestion that the question presented remains open in the Seventh Circuit.

When its mischaracterization of *Brill* is set aside, Arrow's attempt to paint the conflict as entirely one-sided and of too recent vintage to merit resolution by this Court quickly fails. The conflict has persisted for nearly six years; eight courts of appeals (not to mention district courts in the three remaining regional circuits) have weighed in on it; and although the earlier appellate decisions rejected federal question jurisdiction over TCPA claims, the two more recent published precedents on the subject, *Charvat* and *Brill*, written by Judges Sutton and Easterbrook, take the opposite view. The issues have been well fleshed out in the many opinions on the subject; the disagreement among the courts is entrenched, and the time to resolve it is at hand.

2. The Third Circuit proceedings in *Landsman* only underscore the confusion in the lower courts and the need for guidance from this Court. In the now-vacated panel decision, three judges split three ways on the issue of the TCPA's impact on federal question jurisdiction. The author of the lead opinion, Judge Rendell, adhered to the court's earlier holding in *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998), that the TCPA forecloses federal question jurisdiction. She took the view, however, that diversity jurisdiction over TCPA claims was nonetheless permissible. 2011 WL 1226371, at *1-*13. Chief Judge

McKee, concurring in the judgment, would have adopted then-Judge Alito's view from his *ErieNet* dissent that the TCPA does not oust federal question jurisdiction any more than it does diversity jurisdiction. *Id*. at *17-*22. And Judge Garth, dissenting, would have held that the TCPA forecloses both federal question and diversity jurisdiction. *Id*. at *22-*28.

Thus, two judges agreed that there was federal jurisdiction over the claims at issue. But at the same time, a different two-judge combination agreed with Judge Easterbrook's fundamental point in *Brill* that "if state jurisdiction [over TCPA claims] really is 'exclusive,' then it knocks out § 1332 as well as § 1331," 427 F.3d at 450; they disagreed, however, over whether state jurisdiction is indeed exclusive. And yet another duo agreed that the TCPA forecloses federal question jurisdiction, though their reasons for reaching that conclusion were inconsistent, with one viewing state-court TCPA jurisdiction as truly exclusive and the other disagreeing. The Third Circuit's fractured panel decision in *Landsman* thus replicates the circuit-split that already existed and reinforces the need for an authoritative resolution.

Contrary to Arrow's suggestion, there is no reason to wait for the Third Circuit's en banc decision, meanwhile leaving the lower courts in a state of confusion, before this Court takes up the issue. Although the en banc proceedings create the possibility that the Third Circuit will switch sides, the conflict over whether the TCPA forecloses federal question jurisdiction over claims that arise under it will persist no matter what the en banc court decides. Forcing the full Third Circuit to choose sides on a question that this Court will ultimately have to resolve anyway is a

waste of judicial resources, especially because the competing arguments have been fully developed not only in the appellate decisions that already existed on the issue, but also in the three opinions by the *Landsman* panel.

Moreover, although *Landsman* also involves the question of diversity jurisdiction, that twist provides no reason to wait for the en banc decision before taking up the issue of federal question jurisdiction. To begin with, a holding by this Court that the TCPA does *not* foreclose federal question jurisdiction not only would likely apply as well to diversity jurisdiction, but also would render the diversity issue academic. Moreover, there is currently no conflict requiring resolution by this Court over whether diversity jurisdiction is available, so there is no reason to prefer a case that has the added feature of diversity among the parties. Indeed, granting review in such a case would create the possibility that the Court might reach only the question of diversity jurisdiction while failing to resolve the conflict over federal-question jurisdiction, which would eventually necessitate taking up yet another case to settle that question. This case, which concededly presents the federal question issue cleanly, is the ideal vehicle for resolving this longstanding, intractable, recurring, and important conflict.

3. Arrow's remaining arguments are no more persuasive. Citing obvious differences between the TCPA jurisdictional question and the specific issues decided by this Court in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), and *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), Arrow denies that those decisions are in tension with the decision below. Arrow's

emphasis on superficial differences between the cases fails to come to grips with the relevance of the fundamental principles on which they rest.

Breuer holds that a statute permitting a state court to decide a particular type of federal claim should not be read to implicitly divest federal courts of their statutory jurisdiction over the same type of claim. That *Breuer* happened to involve removal jurisdiction while this case involves original jurisdiction is a distinction without a difference. Similarly, *Grable* holds that § 1331 broadly confers federal jurisdiction not only over cases (like this one) in which federal law creates a right of action, but also over cases in which claims rest on substantial and contested questions of federal law, absent a clear indication that assertion of federal jurisdiction would "distur[b] any congressionally approved balance of federal and state judicial responsibilities." 545 U.S. at 314. That principle, too, is fully applicable here.

In addition, Arrow disputes the pertinence of *Tafflin v. Levitt*, 493 U.S. 455 (1990), where this Court applied the longstanding principle that a permissive grant of jurisdiction to one court (there, RICO's jurisdictional grant to federal courts) does not implicitly displace jurisdiction otherwise available to another court (there, a state court of general jurisdiction). Arrow's answer, that *Tafflin* is not applicable where a statute "assigns" exclusive jurisdiction to one court, assumes the conclusion that the TCPA's permissive grant of jurisdiction to state courts should be read as such an exclusive "assignment." Arrow's argument not only begs the question, but also is directly contrary to *Tafflin*'s holding that permissive language

should *not* be read as an assignment of exclusive jurisdiction.

Arrow's argument is equally impossible to square with the longstanding principle announced in *Rosencrans v. United States*, 165 U.S. 257, 262 (1897), that express jurisdictional grants (such as the one in § 1331) "should not be disturbed by a mere implication flowing from subsequent legislation." Arrow does not mention *Rosencrans*, let alone attempt to square its position with that decision.

Moreover, as Chief Judge McKee's concurring opinion in *Landsman* points out, the argument that the TCPA displaces § 1331's preexisting jurisdictional grant is also inconsistent with other opinions of this Court, including *Whitman v. Department of Transportation*, 547 U.S. 512 (2006), and *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), which hold that jurisdiction under § 1331 remains available for the assertion of federal claims unless specifically divested by statute.

4. Arrow's repetition of the merits arguments supporting its interpretation of the TCPA establishes, at most, that there are arguments on both sides of the issue—which is hardly surprising for a question that has produced a deep division among the circuits. That Arrow can muster arguments for its position only goes to show that it will have something to say in its merits brief, not that this Court should not resolve the issue that has so bedeviled the lower courts.

That said, the particular arguments that Arrow highlights are singularly unpersuasive. Arrow (at 11) asserts that the Act "unambiguously vests jurisdiction in the state courts over" private TCPA claims while giving "the federal courts exclusive jurisdiction when

the action was brought by a state attorney general." Those facts, however, hardly establish that Congress "unambiguously" provided the state courts with *exclusive* jurisdiction over private claims, which is the proposition Arrow must establish to prevail. The juxtaposition of the two sections establishes only that state courts *may* exercise jurisdiction over private TCPA claims but *may not* entertain actions by state attorneys general; it says nothing about whether *federal* courts may entertain private actions. Indeed, Congress's failure to say expressly that state-court jurisdiction over private actions is exclusive—as it expressly said that federal court jurisdiction over state attorney-general actions is exclusive—implies just the opposite. *See Brill*, 427 F.3d at 451.

Arrow also argues that Congress's failure to enact special venue and service-of-process rules for private TCPA actions in federal court, as it did for state attorney-general actions, implies that Congress intended to repeal § 1331's jurisdictional grant. But the absence of special provisions only reflects that no such special provisions are needed for ordinary actions brought by injured persons under the standard jurisdictional grants of 28 U.S.C. §§ 1331 and 1332; the ordinary venue and service-of-process rules applicable to all such cases are equally applicable to TCPA cases filed under those jurisdictional grants. Similarly, no special provisions regarding conflicts between enforcement proceedings brought by different governmental entities are needed for private actions, whether brought in federal or state court. The absence of such provisions applicable to private actions is, therefore, wholly irrelevant.

Further, Arrow asserts (at 12) that if the TCPA's expressly permissive grant of jurisdiction to state courts is not interpreted to preclude federal jurisdiction, it is "completely superfluous" because state courts would have such jurisdiction anyway. Arrow does not even attempt to respond to Judge Easterbrook's refutation of that argument in *Brill*, which demonstrates that the TCPA provision concerning state-court jurisdiction serves two important functions, even though it does not confer exclusive jurisdiction: First, the provision conclusively rules out any argument that *federal-court* jurisdiction is exclusive. Second, it spells out the conditions under which a state court need *not* take jurisdiction over TCPA claims (namely, if bringing the action in that particular court is not "otherwise permitted by the laws or rules of court of a State," 47 U.S.C. § 227(b)(3)). *See Brill*, 427 F.3d at 451. Arrow's argument that allowing federal jurisdiction renders § 227(b)(3) "completely superfluous" is flatly wrong.

Arrow also points (at 13) to a snippet of legislative history—one Senator's floor statement—that does not even speak to the point at issue. The few sentences Arrow quotes, while accurately stating that the TCPA would permit actions to be brought in state courts, including small-claims courts, nowhere suggest that such actions could be brought *only* in state courts, and they contain no discussion of the availability of federal jurisdiction.

Arrow thus falls back on an appeal to congressional inaction and acquiescence, neglecting this Court's "oft-expressed skepticism toward reading the tea leaves of congressional inaction." *Rapanos v. United States*, 547 U.S. 715, 749 (2006) (plurality opinion);

see also, e.g., Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159, 169-70 (2001). Moreover, Arrow points to no legislative actions (such as re-enactment of the same or similar statutory language), or even any failed legislative proposals, that would suggest that any Congress subsequent to the one that enacted the TCPA ever gave any consideration to the "precise issue" presented by the cases. *Bob Jones Univ. v. United States,* 461 U.S. 574, 600 (1983). Moreover, given the conflicting appellate decisions on whether the TCPA ousts the courts of federal question jurisdiction since *Brill* was decided nearly six years ago, Congress's silence is even less useful than usual as an interpretative aid: Where Congress fails to act in the face of legal uncertainty, its "silence is at best ambiguous." *Heckler v. Turner*, 470 U.S. 184, 199 (1985). There is no more reason to think Congress endorsed one position than to think it endorsed the other when it did *nothing at all* to address the question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

DONALD YARBROUGH
P.O. Box 11842
Fort Lauderdale, FL 33339
(954) 537-2000

Counsel for Petitioner

June 2011