No. 10-1195

In The Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF DBA INTERNATIONAL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*

DBA International ("DBA") is a non-profit corporation based in Sacramento, California, founded in 1997 as a trade group for debt buyers – financial institutions that purchase uncollected accounts from originating lenders – and was formerly known as Debt Buyers Association.[1] Currently, DBA has over 500 professional debt buyer members, as well as 120 vendor and affiliate members. Formed to provide a forum for ethical and knowledgeable debt buyers, DBA maintains a strict Code of Ethics that requires compliance with a variety of federal and state laws, including the Telephone Consumer Protection Act ("TCPA" or "the Act"), 47 U.S.C. § 227.

DBA provides its members with networking and educational opportunities, as well as a forum to advance the interests of debt buyers before state and federal legislatures and agencies. DBA provides information to its members on legal matters, including the TCPA, through an annual convention, an executive conference, newsletters, educational webinars, teleconferences, and other media.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief was filed on September 9, 2011.

Debt buying began more than forty-five years ago, but has become more widely practiced in the last decade as consumer credit originators sell increasing amounts of charged-off receivables. Upon purchasing a portfolio of charged-off receivables, a debt buyer, as assignee, takes subject to all of the rights, title and interest of the assignor to the indebtedness, as well as to any applicable defenses the debtor may have. Debt sales of accounts other than those originated by banks also have become as commonplace. Examples of charged-off receivables sold to debt buyers include accounts originated by credit card issuers, telecommunications providers, utility providers and retail merchants.

Hundreds, if not thousands, of entities purchase charged-off debt, including five publicly-traded companies, three of whom purchased a combined total of more than $77,000,000,000.00 of charged-off debt between the end of 1996 and the end of 2006. These publicly-traded debt buyers, as well as several large privately-owned companies, purchase many of the larger portfolios directly from the originators. There are also many smaller debt buyers that are active in the debt buying marketplace, who purchase a wide variety of portfolios and are active in trade organizations such as DBA. By purchasing uncollected accounts for less than the face value of the debt, debt buyers are able to settle these debts at a discount, thereby enabling consumers to improve their credit records, increase their access to credit and reduce the overall cost of credit for the benefit of all consumers.

Debt purchasing and collecting is a heavily-regulated industry, subject to a number of federal laws, including the TCPA.[2] DBA and its members have a vested and viable interest in the outcome of this matter as debt buyers hold title to millions of charged-off accounts that they attempt to collect through various means, including through the use of the telephone, which exposes them to potential TCPA liability. Determining the proper forum for TCPA actions directly and economically impacts the millions of accounts owned by debt buyers. The Court's decision will impact the future sale of accounts and efforts to collect those accounts, as the potential cost of defending against TCPA claims is taken into consideration as a factor in the price that can be paid. It is DBA's position that the proper forum for TCPA claims is in state court, with its attendant lower costs, "ease of use," and quicker path to resolution.

SUMMARY OF ARGUMENT

DBA writes separately to urge the Court to clarify an issue of vital importance to its members: namely, that private TCPA actions can be brought in state

[2] Other applicable laws include the (1) Fair Debt Collection Practices Act; (2) Fair Credit Reporting Act; (3) Fair and Accurate Credit Transaction Act of 2003; (4) Financial Privacy Rule and Gramm-Leach-Bliley Act; (5) Safeguard Rule; (6) Electronic Funds Transfer Act ("Reg. E."); and (7) Health Insurance Portability and Accountability Act.

court only. The TCPA was enacted to help fill the void created by the states' inability to regulate or prohibit unsolicited *interstate* telemarketing activities. The Act prohibits certain unsolicited telephone calls and facsimile transmissions, and restricts the use of automatic dialers and prerecorded messages to cellular telephones. In addition, Congress created a private right of action and provided for the recovery of "actual monetary loss" or a statutory penalty of $500, as well as injunctive relief.

Consistent with its goal of bridging the gap caused by the states' lack of jurisdiction to regulate interstate telecommunications activity, Congress vested jurisdiction over private TCPA actions in state courts to the extent "permitted by the laws or rules of court of a State." *See* 47 U.S.C. § 227(b)(3). This served Congress's desire to "make it as easy as possible for consumers to bring such actions [in state court], preferably in small claims courts."[3] Allowing such actions to proceed in federal court would completely undermine that objective and disserve consumers.

Equally important, allowing TCPA actions to be filed in federal court would be contrary to the interests of DBA and its members (and others) who must defend against private TCPA actions. Like consumers, defendants facing TCPA claims, where the likelihood of actual damages is low, have an interest in having a forum in which they can resolve such claims as

[3] 137 Cong. Rec. 30,821 (1991).

quickly, efficiently and inexpensively as possible. State courts – especially small claims courts – provide that forum, and they are more widely accessible to consumers and defendants alike than federal courts. Allowing plaintiffs to file TCPA claims – involving what Congress found were "nuisance calls"[4] – in federal courts would convert the United States District Courts into small claims courts. This result would needlessly increase the costs for all involved (including the courts), which is completely at odds with the purpose of section 227(b)(3) of the TCPA.[5] Accordingly, DBA joins Respondent in urging the Court to affirm the decision of the Eleventh Circuit.

[4] 47 U.S.C. § 227 note (Congressional findings) Sec. 2(6); *see also id.* at Sec. 2(10) (stating that evidence compiled by Congress "indicates that residential telephone subscribers consider automated or prerecorded telephone calls . . . to be a nuisance. . . ."); *id.* at Sec. 2(13) (stating that "the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance"); *id.* at Sec. 2(14) (noting that businesses "have complained . . . that automated or prerecorded telephone calls are a nuisance").

[5] Despite the fact that six out of seven circuits to have addressed the question have held that private TCPA claims may be brought only in state court, such lawsuits are often filed in federal court. When these cases are improperly filed in federal courts, defendants are needlessly forced to move to dismiss them, or the courts are required to do so *sua sponte*, wasting valuable and finite resources.

ARGUMENT

Congress Enacted The TCPA To Assist The States By Closing A Jurisdictional Loophole And Creating A Federal Right That Could Be Enforced In State Courts As The States Saw Fit

Finding that Americans were receiving more than 18 million unsolicited telemarketing calls every day, Congress passed the TCPA in 1991 to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile ([f]ax) machines and automatic dialers." S. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968; *see* 47 U.S.C. § 227(b)(1)(A-D) (setting forth prohibitions); 47 U.S.C. § 227 note (Congressional findings) Sec. 2(3). Although many states already had "statutes restricting various uses of the telephone for marketing," Congress was concerned that telemarketers could sidestep those restrictions "through interstate operations," *i.e.*, by calling consumers inside a state from outside the state's borders. 47 U.S.C. § 227 note (Congressional findings) Sec. 2(7). Congress therefore found that "[f]ederal law is needed to control residential telemarketing practices." *Id.*; *see also ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 518 (3d Cir. 1998) ("Federal legislation was deemed necessary because telemarketers could avoid state legislation by engaging in interstate operations, *not because Congress recognized significant federal interest deserving of protection in federal courts*."

(italics added)); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 513 (5th Cir. 1997) ("Congressional action was needed as states had no independent regulatory power over interstate telemarketing activities."); *International Science & Tech. Inst., Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1154 (4th Cir. 1996) ("[T]he dominant reason that Congress created a private TCPA action at all was out of solicitude for states which were thwarted in their attempts to stop unwanted telemarketing."). The Act provides various enforcement mechanisms, including allowing a private cause of action or a civil action brought on behalf of a state's residents by the state attorney general. *See* 47 U.S.C. § 227(b)(3) (private right of action); *id.* § 227(f)(1) (state attorney general actions).

Significantly, however, Congress carefully limited the fora in which the two types of actions could be brought: private actions may be brought only in state court if permitted by state law, while state attorneys general may proceed only in federal court. Thus the statute provides, "[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" an action for injunctive relief, "to recover for actual monetary loss" from the alleged violation or "$500 in damages," or both. *Id.* § 227(b)(3)(A-C).[6]

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[6] The court also has the discretion to "increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph." 47 U.S.C. § 227(b)(3).

A state attorney general, meanwhile, may file suit seeking similar relief when "any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of [a] State in violation of this section or the regulations prescribed under this section." *Id.* § 227(f)(1). In contrast to private actions, however, such actions may be brought only in federal court: "The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under [§ 227(f)]." *Id.* § 227(f)(2). All circuits to have addressed the issue, save one, have held that a private TCPA cause of action may be brought *only* in state court.[7]

State Courts Are More Widely Available Than Federal Courts And Provide A Quicker, Less Expensive Forum For Resolution Of TCPA Claims, As Congress Intended

That Congress stepped in to protect consumers by creating a federal law to prevent certain interstate

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[7] *See Murphey v. Lanier*, 204 F.3d 911, 914-15 (9th Cir. 2000); *Foxhall Realty Law Offices, Inc. v. Telecommunications Premium Servs., Ltd.*, 156 F.3d 432, 434-35 (2d Cir. 1998); *ErieNet, Inc.*, 156 F.3d at 516-18; *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998); *Chair King, Inc.*, 131 F.3d at 510; *International Science & Tech. Inst., Inc.*, 106 F.3d at 1152-53; *but see Charvat v. Echostar Satellite, LLC*, 630 F.3d 459, 464 (6th Cir. 2010) (rejecting argument that private claims may proceed in state court only).

telemarketing activities does not mean that Congress wanted to burden the federal courts with the resulting litigation, or that Congress believed consumers would be best served by litigating TCPA claims in federal court. On the contrary, Congress "intended that private actions under 47 U.S.C. § 227(b)(3) be treated as small claims *best* resolved in state courts designed to handle them. . . ." *International Science & Tech. Institute, Inc.*, 106 F.3d at 1152. The circuit courts holding that jurisdiction over private TCPA claims lies only in state court have painstakingly examined the text of the statute, and considered the legislative history and purpose of the statute, in reaching this conclusion.

By directing private TCPA actions to state court, Congress sought to clear an easy and affordable path to recovery for those harmed by violations of the Act. For example, in California, there are fifty-eight superior (trial) courts, and the state court system has facilities in over 450 locations.[8] In contrast, the entire state of California has just four United States District Courts, with only fourteen locations spread across an enormous geographic region.[9]

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[8] *See* http://www.courts.ca.gov/2113.htm (accessed Oct. 15, 2011).

[9] *See* http://www.uscourts.gov/court_locator/CourtLocatorSearch.aspx (accessed Oct. 15, 2011) ("Location" selected = "California," and "Court Type" selected = "District Court").

In addition to providing many more locations for consumers to initiate an action, the cost of doing so is much lower in California state court. The filing fee for a small claims case seeking to recover for a single violation of the TCPA is only $30.00. *See* Cal. Code Civ. P. § 116.230(b)(1) (setting fee where amount demanded is $1,500.00 or less). To file an identical claim in the United States District Court for the Northern District of California costs over ten times as much – $350.00. *See* http://www.cand.uscourts.gov/courtfees (accessed Oct. 15, 2011).

Congress also hoped to ensure that plaintiffs could make their case themselves, without having to go to the trouble and expense of hiring an attorney, especially given that attorneys' fees could easily dwarf any recovery. The bill's sponsor, Senator Hollings, explained that the

> bill contains a private right-of-action provision that will *make it easier for consumers to recover damages* from receiving these computerized calls. That provision would allow consumers to bring an action in State court against any entity that violates the bill. 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*. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, *it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages*. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) (italics added).

Support for the conclusion that Congress wanted private TCPA actions heard in state court is found in Congress's findings regarding the sheer magnitude of the problem. It is unfathomable that Congress would open the doors to the federal courts to deal with upwards of eighteen million "nuisance" calls a day, particularly when the sponsor of the Act explicitly expressed his preference that disputes be resolved in small claims court. As the Fourth Circuit observed:

> [I]t is readily apparent that . . . Congress considered the effect that a newly created private right of action would have on judicial administration. Specifically finding that 18 million telemarketing calls are made daily . . . , Congress understandably avoided opening federal courts to the millions of potential private TCPA claims by authorizing private actions only in state courts, presumably in the small claims courts. Similarly concerned

> over the potential impact of private actions on the administration of state courts, Congress included a provision to allow the states to prohibit private TCPA actions in their courts. We have no doubt that Congress has a legitimate interest in not overburdening state and federal courts. Nor can it be doubted that Congress has a legitimate interest in respecting the states' judgments about when their courts are overburdened. With those interests in mind and recognizing that other enforcement mechanisms are available in the TCPA, we believe Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing transmissions were illegal under the TCPA.

International Science & Tech. Institute, Inc., 106 F.3d at 1157.

Beyond easing the way for consumers' claims and sheltering the federal courts from a deluge of TCPA lawsuits, defendants also benefit from avoiding the complexity and expense of federal court litigation. Like consumers, they do not need to hire an attorney in small claims court – and in some cases, cannot be represented by an attorney. *See*, *e.g.*, Cal. Code Civ. P. §§ 116.530 (prohibiting attorneys from partaking "in the conduct or defense of a small claims action"); 116.540 (permitting corporations and other entities to "appear and participate in a small claims action only

through a regular employee," or an officer or director who is not employed solely for the purpose of appearing in small claims court). Discovery often is not allowed in state court proceedings. *See id.* § 116.310(b). Cases brought in small claims court are brought to hearing much sooner than a typical federal-court lawsuit. *See id.* § 116.330 (requiring case to be scheduled for hearing within twenty to seventy days after filing of claim).[10] Cases are heard and decisions are rendered informally and promptly. *See id.* §§ 116.510 ("The hearing and disposition of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively."); 116.520 (permitting court to "consult witnesses informally and otherwise investigate the controversy with or without notice to the parties"). The right to appeal decisions rendered in small claims court is often limited. *See id.* § 116.710(a) ("The plaintiff in a small claims action shall have no right to appeal the judgment on the plaintiff's claim. . . ."). These procedures can be of substantial benefit to both plaintiffs and defendants.[11]

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[10] In contrast, during the year-long period ending March 31, 2010, the median time to resolve a civil case in all of the United States District Courts was 8.2 months. *See* http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf (accessed Oct. 17, 2011).

[11] Although Senator Hollings spoke of consumers' interests in avoiding having to pay an attorney, DBA's members also have an interest in being able to defend TCPA claims without an attorney. Not only does this keep the costs of defense down, it avoids placing defendants in the undesirable position of having to spend more to defend an action than the plaintiff might

(Continued on following page)

In addition to small claims court, states often have a multi-tiered trial court system, where jurisdiction is based on the amount at issue and procedures are streamlined accordingly. Again using California as an example, a case where the amount in controversy "does not exceed twenty five-thousand dollars ($25,000)" is "treated as a limited civil case." Cal. Code Civ. P. § 85; *see id.* § 86. In such cases, the types of pleadings are limited, as is motion practice and discovery. *See id.* § 92 (pleadings, motions), § 94 (discovery). Direct testimony may be offered by affidavit or declaration. *See id*. § 98. As with small claims court, the streamlined procedures available in limited civil cases benefit both plaintiffs and defendants.

The Court Should Hold That TCPA Claims Cannot Be Filed In, Or Removed To, Federal Courts Pursuant To 28 U.S.C. §§ 1332 Or 1441

In support of the argument that "[n]othing in the TCPA expressly divests federal courts of federal-question jurisdiction," Petitioner points to "the so-far unanimous agreement of the courts of appeals that the district courts may exercise *diversity* jurisdiction over TCPA claims under 28 U.S.C. § 1332." Pet. Br. at 34. DBA respectfully submits that because Congress clearly intended that private TCPA claims be brought in state court only, the Court should hold that all such claims can be heard only in state court, regardless

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ultimately recover, *i.e.*, from having to choose between defending a non-meritorious case or offering a "cost of defense" settlement.

whether diversity jurisdiction might otherwise exist or whether removal might be proper under 28 U.S.C. § 1441. To hold otherwise would be to permit an end-run around section 227(b)(3) of the TCPA, and would deprive state courts of the right to determine whether and to what extent to permit TCPA actions in their courts.

In *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72 (3d Cir.), *reh'g en banc granted*, 650 F.3d 311 (2011), Judge Garth dissented from the court's holding that section 227(b)(3) did not divest federal courts of diversity jurisdiction over private TCPA claims. *See* 640 F.3d at 101. Emphasizing his view that the court's earlier decision in *ErieNet* had resolved the issue and that the court was bound by that decision, *see id.* at 102-03, Judge Garth cogently and persuasively explained why federal courts lacked jurisdiction to hear any private TCPA claims, regardless of the statutory basis for jurisdiction, *see id.* at 103-08. DBA urges the Court to hold that section 227(b)(3) vested jurisdiction to hear *all* private TCPA claims in state court, for the reasons stated by Judge Garth.

In closing, allowing private TCPA actions to proceed in federal court will deprive the parties – plaintiffs *and* defendants – of the benefits that Congress sought to provide when it directed that these actions be filed in state court. Doing so would also have a significant financial impact on DBA's members, by

requiring them to incur attorneys' fees whenever they choose to defend a TCPA claim.[12] In order to avoid an onslaught of lawsuits that would effectively turn the federal courts into small claims courts, DBA respectfully urges the Court to clarify that a private action under the TCPA may be heard only in state court.

CONCLUSION

For all of the foregoing reasons, DBA respectfully submits that the decision of the Eleventh Circuit should be affirmed.

Dated: October 27, 2011

Respectfully submitted,

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[12] Consumers, also, "would likely retain counsel if the cause of action were to be pursued in Federal court." *Landsman & Funk PC*, 640 F.3d at 106 (Garth, J., dissenting).