No.

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

PETITION FOR A WRIT OF CERTIORARI

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

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

Counsel for Petitioner

March 2011

QUESTION PRESENTED

Did Congress divest the federal district courts of subject-matter jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act?

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INTRODUCTION

Every law student learns in first-year civil procedure class that 28 U.S.C. § 1331 gives the federal district courts jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." Despite the simplicity of those words, a single, precise definition has proved notoriously elusive. The one that Justice Holmes proposed nearly a century ago remains the most familiar: "A suit arises under the law that creates the cause of action."

The circuits, however, are intractably divided over whether federal-question jurisdiction exists over a cause of action created by a particular federal law: the Telephone Consumer Protection Act of 1991 (TCPA), the key federal statute aimed at interstate telemarketing abuse. The TCPA provides that a victim of telemarketing abuse "may" bring a civil action to enforce the Act in state court. 42 U.S.C. § 227(b)(3). Based on that language, and the Act's sparse legislative history, six circuits have concluded that Congress intended to give state courts exclusive jurisdiction.

But recent decisions of the Seventh Circuit (by Judge Easterbrook, joined by Judges Posner and Rovner) and the Sixth Circuit (by Judge Sutton) have thoughtfully considered the same jurisdictional question and rejected the majority approach—as did then-Judge Alito when he was sitting on the Third Circuit. These opinions all recognize that Congress's permissive grant of jurisdiction to the state courts cannot divest the courts of the subject matter jurisdiction that they otherwise possess under 28 U.S.C. § 1331, and that the six circuits' contrary view is at odds with several of this Court's precedents.

The entrenched 6-to-2 split among the circuits on this important question of federal jurisdiction is intolerable. The conflict has sown confusion over fundamental jurisdictional principles, generated needless satellite litigation, and frustrated Congress's goal of providing a nationally uniform solution to the problem of abusive telemarketing. This case presents an ideal vehicle to explore the conflict, which will not resolve itself absent this Court's intervention. Petitioner Marcus D. Mims therefore respectfully petitions for a writ of certiorari.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the appendix at 1a. The decision of the United States District Court for the Southern District of Florida is unreported and is reproduced in the appendix at 4a.

JURISDICTION

The court of appeals entered its judgment on November 30, 2010. On February 22, 2011, Justice Thomas granted a timely request for an extension of time, to and including March 31, 2011, to file a petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 1331 provides

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

47 U.S.C. 227(b)(3) provides, in relevant part:

> Private right of action

> A person or entity may, if otherwise permitted by the laws of a court of a State, bring in an appropriate court of that State—
>
> (a) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation
>
> (b) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
>
> (c) both such actions.

47 U.S.C. 227(f)(2) provides, in relevant part:

> Exclusive jurisdiction of Federal Courts
>
> The district courts of the United States … shall have exclusive jurisdiction over all civil actions brought [by state attorneys general or designated state officials or agencies].

STATEMENT

1. In 1991, Congress responded to consumers' "outrage over the proliferation of intrusive, nuisance calls to their homes from telemarketers." 47 U.S.C. 227 note. Although over half the states had laws addressing the problem, telemarketers could "evade their prohibitions through interstate operation." *Id.* Congress therefore concluded that a "Federal law is needed to control residential telemarketing practices." *Id.*; *see also* S. Rep. No. 102-178, at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970.

The result was the Telephone Consumer Protection Act of 1991 (TCPA), enacted as an amendment to the Communications Act of 1934. Pub. L. No. 102-243, § 3(a), 105 Stat. 2395 (codified at 47 U.S.C. § 227). Among other

things, the TCPA prohibits certain unsolicited marketing calls, restricts the use of automatic dialers or prerecorded messages, and delegates rulemaking authority to the Federal Communications Commission (FCC). 47 U.S.C. §§ 227(b)(1)(A), (b)(2). The Act may be enforced through civil suits brought by state attorneys general or private citizens. 47 U.S.C. §§ 227(b)(3), 227(f)(1). In either type of suit, the plaintiff may obtain injunctive relief, actual damages, or statutory damages of $500 per violation.

The TCPA confers on the federal district courts "exclusive jurisdiction over all civil actions" brought by state attorneys general. 47 U.S.C. § 227(f)(2). There is no parallel exclusive-jurisdiction provision for private suits. Instead, the TCPA provides that private citizens "may, if otherwise permitted by the laws or rules of court of a State, bring [an action] in an appropriate court of that State." 47 U.S.C. § 227(b)(5).

2. Respondent Arrow Financial Services is a subsidiary of Sallie Mae, an originator, servicer, and collector of private student loans. Petitioner Marcus Mims alleges that Arrow harassed him by repeatedly making collection calls to his cellular phone using an automatic dialing system and leaving prerecorded voicemail messages on that phone, in violation of the TCPA, 47 U.S.C. 227(b)(1)(A)(iii).[1]

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[1] The FCC has made clear in a declaratory ruling that calls to consumers' wireless phones for collection purposes violate the TCPA unless the phone number "was provided by the consumer to the creditor." *In the Matter of Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991, Request of ACA In'l for Clarification and Declaratory Ruling*, 23 FCC Rcd. 559, 564-65 (2008). The FCC emphasized that prerecorded calls could be

(*Footnote continued*)

Mims sued Arrow in federal district court. After the parties settled Mims' non-TCPA claims, the district court granted Arrow's motion to dismiss. Relying on *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), the district court ruled that "federal question jurisdiction under § 1331 is unavailable because Congress vested jurisdiction over the TCPA exclusively in state court." Pet. App. 5a.

The Eleventh Circuit affirmed. Finding itself "bound" by *Nicholson*'s 1998 holding that federal courts lack subject matter jurisdiction over private TCPA actions, the court declined to consider later cases from other circuits or this Court. *Id.* 2a. The court remarked that Judge Easterbrook's contrary opinion in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), "does not overturn our precedent" and that this Court's decisions interpreting 28 U.S.C. § 1331 in *Grable & Sons Metal Prods., Inc. v. Darue Eng'g*, 545 U.S. 308 (2005), and *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), are not "clearly on point."

Shortly after the Eleventh Circuit's decision, the Sixth Circuit joined the Seventh Circuit in reaching the contrary conclusion—that district courts do have federal-question jurisdiction over private TCPA actions. *See Charvat v. Echostar Satellite*, 630 F.3d 459 (6th Cir. 2010).

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particularly costly to cellular subscribers who pay for incoming calls. *Id.* at 562, 565.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Intractably Divided Over Whether Congress Divested the District Courts of Federal-Question Jurisdiction.

Six courts of appeals—the Second, Third, Fourth, Fifth, Ninth, and Eleventh—have held that federal courts lack federal-question jurisdiction over private TCPA actions. *See Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns*, Inc., 106 F.3d 1146, 1156 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir. 1998); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000). These six circuits have concluded that the TCPA's grant of jurisdiction to the state courts—which provides that a person "may" bring an action in state court if otherwise permitted by state law, 47 U.S.C. § 227(b)(3)—creates exclusive state-court jurisdiction and effectively divests the federal courts of federal-question jurisdiction under 28 U.S.C. § 1331.

By contrast, the two circuits that have most recently confronted the question on a blank slate—the Sixth and Seventh—have conclusively rejected the majority view. *See Charvat v. Echostar Satellite*, 630 F.3d 459, (6th Cir. 2010) (Sutton, J.); *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 450-51 (7th Cir. 2005) (Easterbrook, J., joined by Posner and Rovner, J.J.). In addition, then-Judge Alito, dissenting from the Third Circuit's decision

in *Erienet*, concluded that "it is clear that the language of the TCPA is insufficient to divest district courts of their federal question jurisdiction." 156 F.3d at 521.

In the three regional circuits that have yet to squarely decide the question presented—the First, Eighth, and Tenth—the district courts have recognized the circuit split and developed intra-circuit splits of their own.[2] Even the scholarly commentary is split, with one law review article representing each side of the question.[3]

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[2] *See, e.g., Holster v. BNA Subsidiaries, LLC*, 2010 WL 902699 (D.N.H. 2010) ("There is a split of authority among the courts of appeals that have considered whether there is federal question jurisdiction over private TCPA claims. … [T]he Seventh Circuit's view is the most persuasive.").*Compare Carnes v. IndyMac Mortg. Servs.*, 2010 WL 5276987 (D. Minn. Dec. 17, 2010) (observing that the "Circuits are split on whether federal-question jurisdiction exists over TCPA claims by individuals, and the Eighth Circuit has not yet addressed the issue," and following Seventh Circuit's approach) *with Percic Enterprises, Inc. v. European Autoworks, Inc.*, 2010 WL 2133563 (D. Minn. May 6, 2010) (observing that "there does not appear to be an Eighth Circuit decision on point" and concluding that "while the TCPA is a federal law, the specific jurisdictional provision in § 227(b)(3) calls for private actions to be brought in state courts").

[3] *Compare* Gonell, *Statutory Interpretation of Federal Jurisdictional Statutes*, 66 Fordham L. Rev. 1895, 1898 (1998) (arguing that "jurisdictional language merely permitting state court jurisdiction, such as that in the TCPA, should not divest federal courts of § 1331 jurisdiction absent clearly expressed congressional intent to repeal") *with* Kevin N. Tharp, *Federal Court Jurisdiction Over Private TCPA Claims: Why the Federal Courts of Appeals Got It Right*, 52 Fed. Comm. L. J. 189, 192 (1999) (arguing that the TCPA "requires that state courts exercise exclusive jurisdiction" over private actions).

The conflict over the question presented has also generated confusion over whether the TCPA divests the district courts of diversity jurisdiction under 28 U.S.C. § 1332. The Second, Seventh, and Tenth Circuits have each "rejected extension of the reasoning from the TCPA federal question cases to TCPA diversity cases." *US Fax Law Ctr. Inc. v. Ihire*, 476 F.3d 1112, 1116 (10th Cir. 2007). These courts hold that, "absent an explicit indication that Congress intended to create an exception to diversity jurisdiction, one may not be created by implication." *Id.; see Gottlieb v. Carnival Corp.*, 436 F.3d 335, 338 (2d Cir. 2006) (Sotomayor, J.); *Brill*, 427 F.3d at 450. "But," as the Sixth and Seventh Circuits have pointed out, "if state jurisdiction really is 'exclusive,' then it knocks out § 1332 as well as § 1332." *Id.*; *see also Charvat*, 630 F.3d at 464; *Bonime v. Avaya, Inc.*, 547 F.3d 497, 502 (Calabresi, J. concurring) (suggesting that the two lines of cases are not easily reconciled). As then-Judge Sotomayor observed, "Congress's explicit investiture of 'exclusive jurisdiction' in the federal courts in § 227(f)(2) indicates that in § 227(b)(3), which does not include such language, Congress did not similarly vest categorical, 'exclusive' jurisdiction in state courts for private TCPA claims, and therefore did not divest federal courts of both federal question and diversity jurisdiction." *Gottlieb*, 436 F.3d at 338.

Finally, the circuit split on the question presented turns on the courts' "dizzying uncertainty" over an even more fundamental question about the law of federal jurisdiction: "where Congress explicitly grants state courts jurisdiction, are federal courts also presumed to possess jurisdiction?" LITTLE, FEDERAL COURTS 224-25 (2006). The circuit split reveals that "the lower courts are in disagreement" over that question, which this Court has never squarely addressed. *Id.* (discussing TCPA

cases); *compare Int'l Science*, 106 F.3d at 1151-52; *with ErieNet*, 156 F.3d at 521 (Alito, J., dissenting).

Certiorari is warranted because the division among the circuits over federal-question jurisdiction for private TCPA claims is considered and entrenched. The Sixth and Seventh Circuits have specifically considered and rejected the views of the Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits. Moreover, there is no reason to believe that these six circuits will reconsider their position, to which they have adhered to more than a decade. As a result, it is unlikely that the conflict will be resolved absent this Court's intervention.

II. The Question Presented Is a Recurring Issue of National Importance, and This Case Is An Ideal Vehicle for Resolving It.

1. When it enacted the TCPA in 1991, Congress found that "[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day." 47 U.S.C. § 227 note. By 2003, the number of daily calls had "increased five fold (to an estimated 104 million), due in part to the use of new technologies, such as predictive dialers." *Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991*, 68 Fed. Reg. 44144-01, 44152 (2003). That high volume of calls translates into a high volume of litigation over telemarketing abuses. Indeed, the question presented here arises frequently in cases across the country.[4]

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[4] *See Vigus v. S. Ill. Riverboat/Casino Cruises, Inc.*, 2011 WL 884092 (S.D. Ill. March 11, 2011); *Harmon v. Gulf Coast Collection Bureau, Inc.*, 2011 WL 777960 (S.D. Fla. March 1, 2011); *Hawk Valley, Inc. v. Taylor*, 2011 WL 710466 (E.D. Pa. Feb. 28, 2011); *Spillman v. Dominos Pizza, LLC*, 2011 WL 721498 (M.D. La. Feb. 22, 2011); *A & L Industries, Inc. v. CDM Tech. Training Inst., Inc.*, (*Footnote continued*)

"The volume of these lawsuits heightens the risk that individuals and companies will be subject to decisions pointing in opposite directions." *Charvat*, 630 F.3d at 466. In the six circuits that have rejected federal-question jurisdiction, interpretation of the TCPA's private civil remedies—even in large class-actions or injunctive-relief suits with potentially sweeping consequences—will be left entirely to the state courts. This conflict will inevitably "increase disunity in standards and decisions in implementing a nationwide law." Eddings, Eddings, *Seventh Circuit Splits from Sister Circuits Over Telephone Consumer Protection Act*, 18 Loy. Consumer L. Rev. 257, 266 (2005).

The "possibility of conflicting decisions in different state and federal jurisdictions" is particularly onerous

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2011 WL 900132 (D.N.J. Feb. 3, 2011); *Burdge v. Ass'n Health Care Mgmt., Inc.*, 2011 WL 379159 (S.D. Ohio Feb. 2, 2011); *Nack v. Walburg*, 2011 WL 310249 (E.D. Mo. Jan. 28, 2011); *Ortega v. Collectors Training Institute of Illinois*, Inc., 2011 WL 241948 (S.D. Fla. Jan. 24, 2011); *Hall v. W.S. Badcock Corp.*, 2010 WL 5137832 (M.D. Fla. Dec. 10, 2010); *Watts v. Enhanced Recovery Corp.*, 2010 WL 3448508 (N.D. Cal. Sept. 1, 2010); *Am. Copper & Brass, Inc. v. Lake City Indus. Products, Inc.*, 2010 WL 2998472 (W.D. Mich. July 28, 2010); *Imhoff Inv., L.L.C. v. Alfoccino of Auburn Hills*, 2010 WL 2772495 (E.D. Mich. July 13, 2010); *Percic Enters., Inc. v. European Autoworks, Inc.*, 2010 WL 2133563 (D. Minn. May 6, 2010), *report and recommendation adopted*, 2010 WL 2133236 (D. Minn. May 27, 2010); *Radha Geismann, M.D., P.C. v. Byram Healthcare Centers, Inc.*, 2010 WL 1930060 (E.D. Mo. May 10, 2010); *Bridging Communities, Inc. v. Top Flite Fin., Inc.*, 2010 WL 1790357 (E.D. Mich., May 3, 2010); *Charvat v. NMP, LLC*, 703 F. Supp. 2d 735, 2010 WL 1257590, at *2 (S.D. Ohio Mar. 31, 2010); *Machesney v. Lar-Bev of Howell*, 2010 WL 821932, at *3 (E.D. Mich. Mar.4, 2010); *Raitport v. Harbour Capital Corp.*, 2010 WL 830071 (D.N.H. Mar. 4, 2010); *APB Assocs., Inc. v. Bronco's Saloon, Inc.*, 2010 WL 822195, at *3 (E.D.Mich. Mar. 4, 2010).

for telemarketers, who "generally peddle their services nationally." *Charvat*, 630 F.3d at 466. At the same time, "[h]ow this split plays out in the federal courts is important for consumers bringing TCPA claims." Eddings, 18 Loy. Consumer L. Rev. at 266. Absent intervention by this Court, access to a federal forum will turn on accidents of geography. Consumers and businesses in Ohio can go to federal court, while their counterparts across the border in Pennsylvania must go to state court. And in Missouri or Massachusetts, where the federal circuits have not yet decided the question presented, the conflict will produce needless satellite litigation. "Jurisdictional rules"—to prevent such uncertainty and waste—"should be clear." *Grable*, 545 U.S. at 321 (Thomas, J., concurring).

Worse still, in the six circuits that reject federal jurisdiction, nothing prevents states from limiting or cutting off private enforcement altogether. These circuits acknowledge that "a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights," and thus the very "existence of a private right of action under the TCPA could vary from state to state." *Int'l Science*, 106 F.3d at 1154; *Murphey* 204 F.3d at 1156; *see also Brill*, 427 F.3d at 451 ("[W]here would victims go if a state elected not to entertain these suits?").[5]

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[5] This scenario is not entirely hypothetical: Some state courts initially rejected private TCPA actions on the ground that they were not expressly "authorized" by state law. *See Autoflex Leasing, Inc. v. Manufacturers Auto Leasing, Inc.*, 16 S.W.3d 815, 817 (Tex. App. 2000); *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 815 A.2d 816, 816 (Md. Ct. Spec. App. 2003).

2. This case cleanly presents the question whether Congress has divested the district courts of federal-question jurisdiction over private TCPA actions. The case is an ideal vehicle to resolve that question because it is both squarely raised by, and outcome determinative of, this case. There is no dispute that this case arises under the TCPA and that no basis for federal jurisdiction other than federal-question jurisdiction is available here. And the underlying facts of the case are not at issue. The district court and court of appeals decisions hinged solely on whether federal-question jurisdiction exists over private TCPA claims.

If the Court does not grant review in this case, it risks being unable to address the issue for lack of another good vehicle. The time for review of the Sixth Circuit's decision in *Charvat* has already passed, and eight of the regional circuits have already squarely decided the question and are unlikely to revisit it. This Court should grant certiorari in this case to establish a predictable jurisdictional regime for resolving the large number of private actions under the TCPA.

III. The Decision Below Is Wrong and Cannot Be Reconciled With This Court's Cases.

Certiorari is also warranted because the majority approach applied by the decision below is wrong on the merits and at odds with this Court's cases. Congress has not divested the district courts of federal-question jurisdiction over private TCPA actions.

First, the majority approach cannot be reconciled with the plain language of the federal-jurisdiction statute, 28 U.S.C. § 1331, which since 1875 has given federal district courts original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties

of the United States." Although this language "has resisted all attempts to frame a single, precise definition," the "most familiar definition of the statutory 'arising under' limitation is Justice Holmes's statement, 'A suit arises under the law that creates the cause of action.'" *Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust for S. Calif.*, 463 U.S. 1, 9 (1983) (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). As a principle of inclusion, this definition has not seriously been challenged once in the 95 years since it was announced. *See* Gonell, 66 Fordham L. Rev. at 1927; HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 782 (6th ed. 2009); CHEMERINSKY, FEDERAL JURISDICTION 288 (5th ed. 2007) ("There is little dispute that there is federal question jurisdiction if a plaintiff's complaint states a claim under a federal law that provides a legal entitlement to a remedy.").[6]

Thus, federal-question jurisdiction exists under 28 U.S.C. § 1331 unless Congress has specifically acted to divest the courts of that jurisdiction. *Cf.* 28 U.S.C. 1441 (allowing, "[e]xcept as otherwise expressly provided by

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[6] A century ago, in *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), this Court recognized one "problematic (and perhaps anomalous)" exception to the proposition that all federal causes of action arise under federal law. HART AND WECHSLER at 784. But that "extremely rare exception to the sufficiency of a federal right of action," *Grable*, 545 U.S. at 317, does not apply here. *Shoshone* relied on two provisions—one incorporating local law as the rule of decision, and another requiring an amount in controversy that would not be present in the majority of the small mining-rights cases at issue. Neither rationale applies here: Substantive rights under the TCPA are defined entirely by federal law and Congress removed § 1331's amount-in-controversy requirement in 1980. *See* Gonell, 66 Fordham L. Rev. at 1928.

Act of Congress," removal of claims "arising under" federal law). But the courts that have adopted the majority rule concede that the TCPA "is silent as to federal court jurisdiction" over private actions. *Nicholson*, 136 F.3d at 1288; *see also ErieNet*, 156 F.3d at 521 (["Section 227(b)(3) says nothing about the jurisdiction of the federal district courts.") (Alito, J., dissenting). Given the existence of 28 U.S.C. § 1331, that silence should be the end of the matter.

Second, the majority approach is at odds with "the general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *United States v. Bank of New York & Trust*, 296 U.S. 463, 479 (1936). This Court adhered to that rule in *Tafflin v. Levitt*, 493 U.S. 455 (1990), which held that the federal RICO statute's grant of jurisdiction to federal district courts does not divest state courts of concurrent jurisdiction over private RICO actions. *See* 18 U.S.C. § 1964 (providing that a person "may sue … in any appropriate United States district court"). This provision, *Tafflin* reasoned, "is plainly permissive, not mandatory, for the statute does not even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be." 492 U.S. at 460-61. As Justice Alito and Judge Sutton have explained, *Tafflin*'s reasoning makes it "clear that the language of the TCPA is insufficient to divest district courts of their federal question jurisdiction, as the statute merely provides that suits 'may' be brought in state court." *ErieNet*, 156 F.3d at 521-23 (Alito, J., dissenting); *see Charvat*, 630 F.3d at 464. The Eleventh Circuit's decision cannot be reconciled with *Tafflin*.

Third, as the Sixth and Seventh Circuits have pointed out, the majority approach is in tension with this Court's decisions in *Grable*, 545 U.S. 308, and *Breuer*, 538 U.S. 691—both of which postdate the decisions of the six circuits that have rejected federal-question jurisdiction. *Grable* held that federal-question jurisdiction exists even over state-law claims, where those claims depend on a substantial and disputed federal issue and where exercising jurisdiction would not disturb the congressionally approved balance of federal and state court jurisdiction. Those same factors favor exercising jurisdiction here. *See Charvat*, 630 F.3d at 463. And *Breuer* held that the Fair Labor Standards Act's provision allowing a plaintiff to "maintain" an action in either state or federal court did not preclude removal because the removal statute, 28 U.S.C. 1441(a) allows removal of any claim under federal law "[e]xcept as otherwise expressly provided by Act of Congress." The right to "maintain" an action in state court, *Breuer* held, was not an "express" prohibition on federal jurisdiction. "One may say exactly the same thing about the right to sue in state court under § 227(b)(3)." *Brill*, 427 F.3d at 450.

Fourth, the majority approach draws the wrong inference from the differences in language between § 227(f)(2), which provides for "exclusive jurisdiction" in federal court for state-enforcement actions, and § 227(b)(3), which provides only that consumers "may" sue in state court. "The most natural interpretation of Congress' failure to use similar language in section 227(b)(3) is that Congress did not intend to grant exclusive jurisdiction in that section." *ErieNet*, 156 F.3d at 522 (Alito, J., dissenting); *see Brill*, 427 F.3d at 451 ("The contrast between 227(f)(2) and 227(b)93) is baffling unless one provides exclusivity and the other doesn't.").

Fifth, the majority approach incorrectly concludes that the TCPA's grant of jurisdiction to state courts is superfluous unless exclusive, because concurrent jurisdiction would be available anyway. *See Testa v. Katt*, 330 U.S. 386 (1947). But that conclusion ignores two other functions served by § 227(b)(3). Its proviso ("if otherwise permitted by the laws or rules of a court of a State") is intended to make clear that states may elect not to entertain TCPA actions. And the provision avoids arguments that *federal* jurisdiction is exclusive; "such contentions are frequent and may entail decades of litigation across the thirteen circuits." *Brill*, 427 F.3d at 451; *see, e.g., Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820 (1990) (holding, after 26 years of litigation, that claims under the Civil Rights Act of 1964 may be resolved in state as well as federal courts); *Tafflin*, 493 U.S. 455 (holding, after 20 years of litigation, that claims under RICO may be resolved in state as well as federal courts).

Sixth, the majority approach inappropriately relies on an isolated statement by Senator Ernest Hollings, the TCPA's sponsor, as evidence that Congress intended to foreclose federal jurisdiction. *See Int'l Science*, 106 F.3d at 1152. But "one speech given by one senator" is insufficient to demonstrate Congress's unmistakable intent. *See ErieNet*, 156 F.3d at 522 (Alito, J., dissenting). In any event, Senator Hollings's statement—that the bill was designed to "*allow* consumers to bring an action in State courts," 137 Cong. Rec. S16205 (daily ed. Nov. 7, 1991) (emphasis added)—fully supports the conclusion that the TCPA's grant of jurisdiction to state courts was intended to be permissive rather than mandatory.

The decision below thus incorrectly decided the question whether Congress divested the federal district courts of subject matter jurisdiction over private TCPA actions. Because the circuits are hopelessly divided over that important question, this Court should grant certiorari to resolve the conflict and correct the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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

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

Counsel for Petitioner

March 2011

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-12077
Non-Argument Calendar

D.C. Docket No. 1:09-cv-22347-UU

MARCUS D. MIMS,

Plaintiff - Appellant,

versus

ARROW FINANCIAL SERVICES, LLC,

Defendant - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(November 30, 2010)

Before EDMONDSON, CARNES and MARTIN, Circuit Judges.

PER CURIAM:

Marcus Mims appeals the district court's dismissal of his complaint against Arrow Financial Services, LLC, for lack of subject matter jurisdiction. Mims' complaint alleged that Arrow acted in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227. Mims acknowledges that this Court has held that federal courts lack subject matter jurisdiction over private actions under the Act. Mims, however, contends that we should reconsider our binding precedent in light of two Supreme Court decisions and a Seventh Circuit decision. We held in *Nicholson v. Hooters of Augusta, Inc.* that "Congress granted state courts exclusive jurisdiction over private actions under the Act," and therefore "federal courts lack subject matter jurisdiction [over] private actions under the Act." 136 F.3d 1287, 1288–89 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir. 1998). We are bound by this precedent. *See Smith v. GTE Corp.*, 236 F.3d 1292, 1303 (11th Cir. 2001).

Mims, in asking this Court to reconsider its precedent, points to *Grable & Sons Metal Products, Inc. v. Darue Eng'g*, 545 U.S. 308, 125 S. Ct. 2363 (2005), and *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 123 S. Ct. 1882 (2003). Neither of those cases considered the Act, and neither of them explicitly or implicitly overrules our precedent. *See United States v. Kaley*, 579 F.3d 1246, 1255 ("To constitute an overruling . . . the Supreme Court decision must be clearly on point.") (citations and quotations omitted). Additionally, the Seventh Circuit's decision in *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005), does not overturn our precedent. *See Kaley*, 579 F.3d at 1255 ("We may disregard the holding of a prior

opinion only where that holding is overruled by the Court sitting en banc or by the Supreme Court.") (citations and quotations omitted). Accordingly, the district court properly dismissed Mims' complaint for lack of subject matter jurisdiction.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 09-CV-22347-Ungaro

MARCUS D. MIMS,

Plaintiff,

v.

ARROW FINANCIAL SERVICES, LLC,

Defendant.
_____/

ORDER ON MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

THIS CAUSE came before the Court upon Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed on February 17, 2010. (D.E. 14.) Plaintiff filed his Opposition to Defendant's Motion to Dismiss on March 18, 2010. (D.E. 23.) And Defendant filed a Reply on March 24, 2010. (D.E. 24.) The parties filed a Joint Stipulation for Partial Dismissal on March 25, 2010. (D.E. 26.)

THE COURT has considered the Motion and pertinent portions of the record and is otherwise fully advised in the premises.

I.

Plaintiff alleges Defendant engaged in illegal debt collection practices by leaving numerous voice mail messages on Plaintiff's cellular phone. Accordingly, Plaintiff filed this action on August 7, 2009 seeking damages and equitable relief under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* (Counts I through IV); the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.55 *et seq.* (Counts V and VI); and the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227 *et seq.* (Count VII). Additionally, Plaintiff sought a declaration that Defendant violated the FCCPA and TCPA and a permanent injunction from further violations (Count VIII). (D.E. 1.)

Defendant moves to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. Since the filing of the motion, both parties have stipulated to dismissal of the FDCPA and FCCPA claims. (D.E. 1 & 26.) Thus, the Court dismisses Plaintiff's FDCPA and FCCPA claims in Counts I through VI and VIII, leaving only the TCPA claims in Counts VII and VIII. The Court addresses the Motion to Dismiss with regard to these remaining claims.

II.

The Court lacks subject matter jurisdiction over the remaining claims. Plaintiff invoked the subject matter jurisdiction of this Court pursuant to 28 U.S.C. §§ 1331, 1337 and 15 U.S.C. § 1692k. (D.E. 1.) None of these provisions is available. First, federal question jurisdiction under § 1331 is unavailable because Congress vested jurisdiction over the TCPA exclu-

sively in state courts.[7] *See* 47 U.S.C. § 227(b)(3) (2005); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287 (11th Cir. 1998) (holding that Congress has granted state courts exclusive jurisdiction over private actions under the TCPA); *Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998); *Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131F.3d 507 (5th Cir. 1997). And the case law cited by Plaintiff in support of § 1331 jurisdiction is inapposite.[8] *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (where state class action removed under the Class Action Fairness Act was improperly remanded back to state court pursuant to TCPA); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003) (holding an action brought under the Fair Labor Standards Act beginning in state court was removable to federal court); *Grable & Sons Metal Prods., Inc., v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) (holding state law quiet title claim alleging failure by IRS to give adequate notice under federal tax law was removable

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[7] With respect to the declaratory judgment claim in Count VIII, for purposes of subject matter jurisdiction the Court analyzes the underlying claim for jurisdiction; that the claim is brought pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 – 2202, does not of itself create a federal question. *See, e.g.*, *Hudson Ins. Co. v. Am. Elec. Corp.*, 957 F.2d 826, 828 (11th Cir. 1992). And the only remaining underlying claim is brought pursuant to the TCPA.

[8] To be sure, "Plaintiff recognizes this Court is bound by Eleventh Circuit precedent, but Plaintiff seeks to preserve the issue for purposes of appeal." (D.E. 23.)

federal question considering the strong government interest, the effect on the federal-state division of labor, and the implication of a contested federal statute).

Second, jurisdiction under § 1337 is similarly unavailable. Section 1337(a) provides original subject matter jurisdiction for "any civil action or proceeding arising under any Act of Congress regulating commerce." "The same tests for determining whether an action 'arises under' federal law for purposes of § 1331 apply to determine whether an action 'arises under' an Act of Congress regulating commerce." *Erienet, Inc.*, 156 F.3d at 519 (citing *Franchise Tax Bd v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 n. 7 (1983)). Thus, jurisdiction over Plaintiff'sTCPA claims is unavailable under § 1337 for the same reason it is unavailable under § 1331. *See Nicholson*, 136 F.3d at 1289; *Erienet, Inc.*, 156 F.3d 513 at 520 (holding "Congress' intent to limit consumer suits under the TCPA to state courts supersedes the general grant of jurisdiction in § 1337.").

Third, § 1692k is inapplicable because the Court has dismissed all FDCPA claims. And finally, although Plaintiff does not invoke jurisdiction under § 1367, having dismissed all claims over which it had original jurisdiction, the Court would decline to exercise supplemental jurisdiction over the remaining claims pursuant to § 1367(c)(3) in any event. *See Mergens v. Dreyfoos*, 166 F.3d 1114, 1119 (11th Cir. 1999) (holding District Court had discretion to decline to exercise supplemental jurisdiction under § 1367 where the court had dismissed all claims over which it had original jurisdiction); G*raham v. State Farm Mutual*

Ins., Co., 193 F.3d 1274, 1282 (11th Cir. 1999) (same). Accordingly, the Court dismisses Plaintiff's remaining TCPA claims in Counts VII and VIII for lack of subject matter jurisdiction.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the FDCPA and FCCPA claims in Counts I through VI and VIII are DISMISSED WITH PREJUDICE pursuant to the parties' Joint Stipulation for Partial Dismissal (D.E. 26). The Court reserves jurisdiction regarding Plaintiff's reasonable attorneys' fees and costs as to these claims. It is further

ORDERED AND ADJUDGED that the Motion (D.E. 14) is GRANTED as follows: The remaining claims (*i.e.* the TCPA claims in Counts VII and VIII) are DISMISSED for lack of subject matter jurisdiction.

DONE AND ORDERED in Chambers at Miami, Florida, this 1st day of April, 2010.

/s/ Ursula Ungaro

_____

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc: counsel of record