No. 11-1411

IN THE

Supreme Court of the United States

EARLE GIOVANNIELLO,

Petitioner,

v.

ALM MEDIA, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its approximately 250,000 members and supporters before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents the interests of its members in litigation and regularly files amicus curiae briefs in cases in this Court and the federal appellate courts.

Public Citizen has a particular interest in preserving access to the courts, including the federal courts, for consumers and other plaintiffs pursuing remedies available under federal laws creating private rights of action, such as the Telephone Consumer Protection Act (TCPA), which is at issue in this case. Consistency and uniformity of applicable federal substantive and procedural law in such cases enhances the efficacy of such remedies and promotes the fair administration of justice.

Public Citizen Litigation Group represented the prevailing parties in two cases in this Court that are of relevance here, *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012), and *Shady Grove Orthopedic Associates v. Allstate Ins. Co.*, 130 S. Ct. 1431

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[1] Counsel of record for the parties received timely notice of amicus curiae's intent to file this brief as required by this Court's Rule 37.2(a). Written consents to the filing of the brief from all parties have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

(2010), and Public Citizen remains interested in the proper application of the principles established in those cases. Public Citizen submits this brief because it believes that supplementing the arguments made in the Petition for Certiorari in this case may help the Court determine the proper resolution of this case.

REASONS FOR GRANTING THE WRIT

In addition to the reasons provided in the Petition for Certiorari, this case warrants this Court's attention because there is significant disagreement among the lower courts, including a conflict among the circuits, over the question presented—that is, whether TCPA claims brought in federal courts are governed by federal or state statutes of limitations. This Court's recent decision in *Mims* weighs decisively against the side of the disagreement taken by the court below because *Mims* rejects core premises on which the Second Circuit's decision rests. Although the disagreement among the circuits and the untenability of the Second Circuit's reasoning after *Mims* would otherwise justify plenary review by this Court, the fact that *Mims* postdates the Second Circuit's decision in this case indicates that it would be most appropriate for the Court to grant the petition for certiorari, vacate the judgment below, and remand (GVR) for further consideration in light of *Mims*.

I. There Is a Conflict Among the Circuits On the Question Presented.

As this Court is aware, the Second Circuit was one of those courts that, before *Mims*, had erroneously ruled that TCPA claims could not be brought in federal court under the federal-question jurisdictional statute, 28 U.S.C. § 1331. The Second Circuit had

based its view on language in 47 U.S.C. § 227(b)(3) providing that TCPA claims "may" be brought in state court if state law otherwise permits. *See Mims*, 132 S. Ct. at 747 (citing *Foxhall Realty Law Offices, Inc. v. Telecommun. Premium Servs., Ltd.,* 156 F.3d 432 (2d Cir. 1998)). The Seventh Circuit, by contrast, correctly anticipated *Mims* by holding that claims under the TCPA arise under federal law for purposes of § 1331. *See Mims*, 132 S. Ct. at 747, 750 & n.10, 751 (citing *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005)).

The divergent views of the Second and Seventh Circuits not only contributed to the conflict over § 1331 jurisdiction that this Court resolved in *Mims*, but also spawned a conflict over whether TCPA claims are governed by state statutes of limitations or by 28 U.S.C. § 1658's catch-all, four-year statute of limitations for civil actions arising under federal law. Based on its view that the TCPA makes the availability of a right of action in both state and federal court contingent on whether state law permits the claim to be brought, and that the TCPA thus must be "applied as if it were a state law," *Bonime v. Avaya Inc.*, 547 F.3d 497, 501 (2d Cir. 2008), the Second Circuit held below that state statutes of limitations apply to TCPA claims because the TCPA is "the 'functional equivalent of a state law,' applicable only as otherwise permitted by state law and court rules." *Giovanniello v. ALM Media, LLC*, 660 F.3d 587, 592 (2d Cir. 2011).

By contrast, the Seventh Circuit, again anticipating *Mims*, has interpreted the TCPA's "if otherwise permitted by the laws or rules of court of a State" language to govern only the circumstances under which a TCPA action may be brought in a *state* court,

and *not* to control whether or when it may be brought in *federal* court. *See Brill*, 427 F.3d at 451. Thus, the Seventh Circuit has flatly held that TCPA claims brought in the federal courts are subject to the federal statute of limitations: "The statute of limitations is four years. 28 U.S.C. § 1658." *Sawyer v. Atlas Heating & Sheet Metal Works*, 642 F.3d 560, 561 (7th Cir. 2011).

The decision below places the law of the Second Circuit on the limitations issue in direct conflict with that of the Seventh Circuit. Moreover, although the Second and Seventh Circuits appear to be the only courts of appeals that have spoken on the question, every federal district court that has addressed the issue since *Mims* has rejected the Second Circuit's view and held that the federal limitations period governs a TCPA claim brought in federal court. *See Weitzner v. Sanofi Pasteur, Inc.,* 2012 WL 1677340 (M.D. Pa. May 14, 2012); *Bailey v. Domino's Pizza, LLC*, __ F. Supp. 2d __, 2012 WL 1150882 (E.D. La. Apr. 5, 2012); *Hawk Valley, Inc. v. Taylor*, 2012 WL 1079965 (E.D. Pa. Mar. 30, 2012); *St. Louis Heart Center, Inc. v. Vein Centers for Excellence, Inc.*, __ F. Supp. 2d __, 2012 WL 872757 (E.D. Mo. March 14, 2012); *City Select Auto Sales, Inc. v. David Randall Assocs.,* 2012 WL 426267 (D.N.J. Feb. 7, 2012).

In addition, the one state court that has addressed the issue since *Mims* has held that the federal statute of limitations applies in state courts. *Anderson Office Supply, Inc. v. Advanced Med. Assocs., P.A.*, 273 P.3d 786 (Kan. Ct. App. 2012). The decision notes a divergence of views among state appellate courts on the question.

In short, leaving the Second Circuit's decision undisturbed will perpetuate a significant disparity between the law in that Circuit and the law elsewhere in the country.

II. The Second Circuit's Decision Rests on a View of the TCPA That This Court Rejected in *Mims*.

It is not surprising that post-*Mims* decisions on the limitations issue disagree with the holding of the court below, because *Mims* rejects the view of the TCPA that underlies the Second Circuit's holding.

Mims holds that TCPA claims "aris[e] under" federal law—the predicate not only for jurisdiction under § 1331, *see* 132 S. Ct. at 747-48, but also for application of the federal statute of limitations set forth in 28 U.S.C. § 1658, which applies to "a civil action arising under an Act of Congress." *Mims* thus confirms the facial applicability of § 1658 to TCPA claims.

To be sure, § 1658 states that the statute of limitations applies to claims arising under federal law "[e]xcept as otherwise provided by law," just as § 1331 creates federal-court jurisdiction over such claims except when Congress provides otherwise. *See Mims*, 132 S. Ct. at 748-49. *Mims* holds that the permissive TCPA language on which the Second Circuit relied below—the clause allowing plaintiffs to bring claims in state court "if otherwise permitted by the laws and rules of the State," 47 U.S.C. § 227(b)(3)—does not "purpor[t] to oust federal courts of their 28 U.S.C. § 1331 jurisdiction over federal claims." 132 S. Ct. at 749. For exactly the same reasons, § 227(b)(3) does not displace § 1658 by "otherwise provid[ing]" on the issue of limitations periods.

To begin with, just as "[n]othing in the text" of the TCPA purports to strip federal courts of jurisdiction, *Mims*, 132 S. Ct. at 753, so nothing in the statute's text purports to address limitations periods. Moreover, the "if otherwise permitted" clause affects neither federal courts' jurisdiction over TCPA claims, *see id*. at 750-51, nor the application of § 1658. As *Mims* explains, § 227(b)(3) means only that "private actions may be brought *in state court* 'if otherwise permitted by the laws or rules of court of [the] State.'" 132 S. Ct. at 751 (emphasis added). The clause says nothing about whether, or when, such actions may be brought in *federal* court. Indeed, as *Mims* points out, it would be anomalous to read the clause as making the availability of a federal remedy in federal court turn on whether state law permitted the remedy. *See id.* at 751 n.13. Yet the premise of the decision below is that the TCPA does just that.

More broadly, *Mims* disavows the reading of the TCPA on which the decision below rests: that the statute is the "functional equivalent of state law," that it is merely intended to fill "gaps" in state law, and that its contours are defined by state law. *Giovanniello*, 660 F.3d at 592-93. *Mims* expressly rejects the view that Congress "sought only to fill a gap in the States' enforcement capabilities." 132 S. Ct. at 751. As *Mims* states, "Congress did not enact such a law," and "Congress' design would be less well served if consumers had to rely on 'the laws or rules of court of a State,' § 227(b)(3), … to gain redress for TCPA violations." *Id.* And *Mims* repeatedly emphasizes that federal law supplies the "rules of decision" in TCPA cases. *Id.* at 748, 749, 753.

Mims thus removes the foundation of the decision below. Indeed, in a previous opinion, Judge Calabresi acknowledged that if the Seventh Circuit's view of the TCPA were adopted (as this Court did in *Mims*), the Second Circuit's position that federal courts must apply state rules of substance and procedure that would bar TCPA claims would likely have to be reconsidered. *See Bonime*, 547 F.3d at 503-04.

III. An Order Granting Certiorari, Vacating, and Remanding Is Appropriate in This Case.

The conflict among the circuits and the irreconcilability of the decision below with *Mims* would ordinarily be enough to justify plenary review of this case. However, because the Second Circuit issued its opinion without the benefit of *Mims*, a GVR is the better course of action at this point and will likely obviate the need for full review by this Court. As this Court has recognized, "[w]here intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is ... potentially appropriate." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Mims is plainly an "intervening development" relative to the decision below. The Second Circuit decided this case on October 17, 2011, denied rehearing on January 3, 2012, and issued its mandate, terminating its jurisdiction over the case, on January 12, 2012. Because this Court issued *Mims* on January 17, 2012,

the Second Circuit obviously could not consider the decision while this case was pending before it.

Although the petitioner requested that the Second Circuit recall its mandate and reconsider the case once *Mims* was decided, the Second Circuit declined to do so. That decision reflects only that the court did not believe that the case presented the kind of "extraordinary circumstances" involving "grave, unforeseen contingencies" that are necessary to justify the unusual step of recalling the mandate. *Calderon v. Thompson*, 523 U.S. 538, 550 (1997). And without recalling the mandate, the court lacked power to give further consideration to the merits.

Indeed, the very fact that the petitioner had already indicated his intention to seek relief from this Court, and that this Court would be likely to GVR if it believed *Mims* to be relevant, may well have contributed to the Second Circuit's view that it was unnecessary to take the extraordinary step of recalling the mandate.[2] In any event, the court of appeals' one-line order refusing to recall the mandate gives no indication that the court gave *any* substantive consideration to the effect of *Mims*, let alone that it "fully consider[ed]" the question. *Lawrence*, 516 U.S. at 163.

This Court has held unequivocally that a decision brought to a court of appeals' attention only after it issues its mandate is an "intervening" development justifying a GVR order. *Lords Landing Village Condominium Council of Unit Owners v. Continental Ins.*

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[2] The Second Circuit's docket reflects that on January 12, 2012, the court received notice from this Court that petitioner had obtained an extension of time to file a petition for certiorari.

Co., 520 U.S. 893, 895-96 (1997).[3] Such a situation, in which there is no reason to believe the lower court fully considered the new development, "falls squarely within [this Court's] historical use of the GVR mechanism." *Thomas v. American Home Prods., Inc.,* 519 U.S. 913, 914 (1996) (Scalia, J., concurring). Moreover, declining to GVR in circumstances where, *absent* the unsuccessful request to recall the mandate, a GVR would be a matter of course, would effectively penalize the petitioner for going the extra mile to try to relieve this Court of the need to consider the case.

The possibility that the court of appeals might ultimately reach the same result on *another* ground even if it reversed its view on the applicability of the federal statute of limitations should not dissuade this Court from issuing a GVR. The majority opinion below rests *exclusively* on the view that the state statute of limitations applies, and hence does not reach the question whether the action would be time-barred even under the four-year federal statute (a question that turns on the amount of tolling available based on the pendency of an ultimately uncertified class action). *See* 660 F.3d at 589 n.1. Unless this Court GVRs, the decision will retain precedential effect within the Second Circuit on the applicability of state statutes of limitations to TCPA actions, thus perpetuating the existing circuit split, leading to further erroneous decisions among district courts within the Se-

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[3] In *Lord's Landing*, the "intervening" decision was issued before the court of appeals' decision, but the parties were not aware of it until after the mandate had issued. 520 U.S. at 895. Here, *Mims* is truly an intervening decision, issued after the case was no longer before the court of appeals but within the time for seeking relief from this Court.

cond Circuit, and ultimately necessitating either en banc reconsideration by the court of appeals in a future case or plenary review by this Court. Thus, notwithstanding the possibility that the petitioner might not prevail on the tolling issue, a GVR in these circumstances would have a much greater potential beneficial effect on the administration of federal law than most GVRs, which, as Justice Scalia has pointed out, almost always are "of no general importance beyond the interest of the parties." *Thomas*, 519 U.S. at 915 (Scalia, J., concurring) (citation omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment should be vacated, and the case remanded for reconsideration in light of *Mims v. Arrow Financial Services*; alternatively, the petition should be granted and the case set for briefing and oral argument.

Respectfully submitted,

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