No. 11-1411

IN THE

Supreme Court of the United States

EARLE GIOVANNIELLO,
Petitioner,

v.

ALM MEDIA, LLC,
Respondent.

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

BRIEF IN OPPOSITION

ELIZABETH C. KOCH
Counsel of Record
CHAD R. BOWMAN
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, N.W.
Suite 200
Washington, DC 20036
(202) 508-1100
bkoch@lskslaw.com

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether the Second Circuit erred in affirming dismissal of a 2009 claim for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, as time-barred where the claim arose from a January 2004 facsimile transmission, and Connecticut specifically provides for a two-year statute of limitations for such claims.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) and Rule 29.6 of the Rules of the Supreme Court of the United States, the following are parties to the proceeding below:

ALM Media, LLC, appellee below and respondent here, is a privately held corporation whose parent company is another private company, ALM Media Holdings, Inc. No publicly held corporation owns more than 10 percent of ALM Media, LLC stock.

Earle Giovanniello, appellant below and petitioner here, is an individual.

Public Citizen, Inc. has filed a Brief of Amicus Curiae in Support of petitioner.

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The Petition should be denied because the Second Circuit's decision neither creates a clear Circuit split nor directly conflicts with a ruling of this Court.

STATEMENT OF THE CASE

Petitioner Earle Giovanniello ("Giovanniello") seeks review of the Second Circuit's decision affirming the dismissal of his claim under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), as time-barred. In seeking such review, Petitioner relies entirely on this Court's recent decision of a different legal issue in a different TCPA case. As outlined below, review is unwarranted.

The operative allegation by Giovanniello, a Connecticut attorney, is that *The Connecticut Law Tribune*, a legal newspaper owned by Respondent ALM Media, LLC ("ALM"), sent him a single facsimile ("fax") marketing transmission on January 28, 2004. Giovanniello claims that this transmission violated the TCPA, and has sought to assert claims on behalf of a class of more than 10,000 alleged recipients. Including the present action, Giovanniello has filed four separate lawsuits based on that fax transmission, each of which has been dismissed. *See* Pet. App'x ("A.") 5a-6a. The issue in this fourth action is whether the statute of limitations now bars his claim.

This case was filed in the United States District Court for the District of Connecticut on September 8, 2009—*i.e.*, five years, seven months, and twelve days after Giovanniello received the allegedly actionable one-page fax transmission. *Id.* A. 6a.

The District Court dismissed this latest claim as time-barred even under the longest potentially applicable limitations period—the four-year "catchall" federal statute of limitations urged by Giovanniello—and even assuming that the limitations period was tolled during the pendency of all prior class claims (but, pursuant to well-established tolling doctrine, not during a post-dismissal motion for reconsideration or appeal, as Giovanniello had urged). *Id.* 3a-4a, 7a-8a; *see also id.* 52a-53a.

The Second Circuit affirmed on an alternate basis, without reaching the federal tolling issue decided by the District Court.[1] Unlike most states, Connecticut has a specific statute of limitations for claims arising from allegedly unauthorized facsimile transmissions. The Second Circuit concluded that this two-year limitations period applied to the single intrastate facsimile marketing transmission at issue. *Id.* at 2a-3a ("In the circumstances of this case, where the relevant state law, Conn. Gen. Stat. § 52-570c, specifically recognizes a cause of action for statutory damages for the transmission of unsolicited commercial facsimile ('fax') communications, but

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[1] In his concurring opinion, Senior Circuit Judge J. Clifford Wallace, sitting by designation from the Ninth Circuit, indicated that he would have affirmed on the District Court's rationale. A. 21a. While not relying on its rationale, the majority opinion similarly recognized that the District Court's decision was in line with "every circuit to have addressed the scope of this [tolling] doctrine." *Id.* at 4a n.1.

permits such an action to be filed only within two years of the complained-of transmission, *see id.* § 52-570c(d), we conclude that a TCPA action may be maintained only as permitted by that state statute of limitations.").

In urging review, Petitioner relies upon *Mims v. Arrow Financial Services, LLC*, 132 S. Ct. 740 (2012). In that case, arising from allegedly improper debt-collection telephone calls to a cellular telephone number, the Court resolved a well-developed Circuit split and found concurrent state and federal jurisdiction over private TCPA claims. *Id.* at 745.

Petitioner alleges that the rationale of *Mims*, including its references to the TCPA as federal law, undermines the Second Circuit's application of the Connecticut limitations period. Pet. 2-3. However, the Court in *Mims* decided only a narrow jurisdictional question—whether the TCPA's language was specific enough to rebut a presumption of federal question jurisdiction over claims arising under federal statutes. 132 S. Ct. at 744. The opinion says nothing directly about the proper statute of limitations for a TCPA claim, and should not be read implicitly to decide issues that were neither considered by, nor properly before, the Court.

Public Citizen Inc., counsel for the petitioner in *Mims*, has filed a Brief of Amicus Curiae in support the Petition. In addition to urging that *Mims* should be extended to control this case, Public Citizen also points to an alleged conflict between the Circuits as warranting an order granting *certiorari*, vacating, and remanding this case (a "GVR" order). *See* Brief

of Amicus Curiae Public Citizen, Inc. ("Am. Br.") 2-5. As outlined below, the supposed conflict is at the very least immature, and does not represent a Circuit split that warrants either the Court's review or a GVR order.

REASONS FOR DENYING THE PETITION

I. No Clear Circuit Split is Presented by This Case

Recognizing the Court's role in resolving conflicts between appellate courts' interpretations of federal law "on the same important matter," *see* S. Ct. R. 10(a), Amicus Public Citizen seeks to identify such a "Circuit split" here, contending that there is a "direct conflict" between the Second Circuit's decision below and the Seventh Circuit's decision in *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560 (7th Cir. 2011). Am. Br. 4.[2]

In *Sawyer*, the Seventh Circuit considered a tolling question—specifically, whether the statute of limitations for class claims under the TCPA had been tolled during specific prior lawsuits. 642 F.3d at 561. The court noted in its introductory summary that "[t]he statute of limitations is four years," citing 28 U.S.C. § 1658. 642 F.3d at 561. However, the decision includes no discussion of the applicable limitations period, and there is no indication that the issue was disputed by the parties. *Id.* This "terse conclusion," as the Second Circuit characterized it,

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[2] Petitioner Giovanniello neither asserts nor relies on any such alleged Circuit Court division.

A. 17a n.7, is the sole basis for the claimed conflict between the Circuits urged by Public Citizen.

But this single reference in *Sawyer* does not represent the type of clear conflict that necessitates this Court's intervention. *See generally Concrete Works of Colo., Inc. v. City & County of Denver*, 124 S. Ct. 556, 560 (2003) (Scalia, J., dissenting) (arguing that case "is worthy of the Court's review because it presents a clear Circuit split" on a "significant and unsettled question"). At the very most, Public Citizen has pointed to an immature and as-yet undeveloped conflict.

Moreover, there is a significant factual difference between *Sawyer* and the decision below that undermines any claim of conflict: the facsimile transmissions at issue in *Sawyer* arose in Wisconsin, which unlike Connecticut does not have a specific statute of limitations for claims arising out of the unauthorized transmission of marketing faxes. 642 F.3d at 561; *see also* Wis. Stat. § 134.72. The Second Circuit made clear that Connecticut's unusual law was central to its reasoning—and indeed distinguished cases arising in other states that lack this specific time bar for such claims. A. 16a-18a & n.8 (distinguishing TCPA authority from states that "unlike Connecticut, had not adopted a specific shorter statute of limitations for unsolicited commercial fax claims").

Nor does the Second Circuit's application of Connecticut's specific statute of limitations for claims arising from facsimile transmissions constitute an issue of pressing urgency or of a recurring nature.

As Public Citizen concedes, the result reached by the Second Circuit, applying this unusual Connecticut law, has not been followed by courts in other jurisdictions. Am. Br. 4.[3]

Indeed, the Court recently denied a petition for *certiorari* in a case addressing a similar legal issue: a court's reliance on substantive New York law restricting aggregated claims for statutory damages to bar TCPA class actions in federal court. *Holster v. Gatco, Inc.*, 131 S. Ct. 2151 (2011) (denying petition for review of decision published at 618 F.3d 214 (2d Cir. 2010)). Unlike *Holster*, the case at bar has minimal, if any, implications for future litigation; it merely (1) imposes a shorter statute of limitations (as opposed to a total bar), (2) for one type of TCPA claim, *i.e.*, those arising from allegedly improper faxes, (3) within Connecticut, under the unusual law of that state.

II. There is No Direct Conflict With a Decision of This Court

It is axiomatic that the Court may exercise its discretion to review appellate decisions that appear

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[3] Two decades after the TCPA established restrictions on fax marketing, such messages are in any event rapidly becoming technologcally obsolete. A 2010 survey by a trade association for marketers, for example, showed that just 1 percent of marketers reported that they still use facsimile transmissions at all to contact businesses. *See 2010 Response Rate Report: Performance & Cost Metrics Across Direct Media*, Direct Marketing Association (June 2010), at 22.

directly to conflict with a ruling of this Court. S. Ct. R. 10(c). But, notwithstanding Petitioner's claim to the contrary, no such conflict exists between the Second Circuit's decision below and the Court's recent decision in *Mims*.

In *Mims*, the Court resolved a classic Circuit split over whether, in light of the TCPA's reference to state courts in creating a private right of action, federal courts are limited to hearing cases brought under the statute pursuant to diversity jurisdiction—or whether they also have federal question jurisdiction. 132 S. Ct. at 747 ("We granted certiorari, to resolve a split among the Circuits as to whether Congress granted state courts exclusive jurisdiction over private actions brought under the TCPA.") (citation omitted); *compare Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000) (no federal question jurisdiction for TCPA claims); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 519 (3d Cir. 1998) (same); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998) (same); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir.), *as modified on reh'g*, 140 F.3d 898 (11th Cir. 1998) (same); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997) (same); and *Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1156 (4th Cir. 1997) (same), *with Charvat v. EchoStar Satellite*, LLC, 630 F.3d 459, 465 (6th Cir. 2010) (federal question jurisdiction exists over private TCPA claims); and *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005) (same). The resolution of this split was the sole legal

issue presented for review in *Mims*. 132 S. Ct. at 744 ("The question presented is whether Congress' provision for private actions to enforce the TCPA renders state courts the *exclusive* arbiters of such actions.") (emphasis in original). As such, the Court's analysis of the statute necessarily focused on this jurisdictional context.

The Court in *Mims* recognized that federally created causes of action presumptively provide federal question jurisdiction, and then determined that the TCPA's statutory language does not, "expressly or by fair implication," strip away such jurisdiction. *Id.* at 749. As a result, the Court held that private actions under the statute can be brought in both state and federal courts—*i.e.*, that there is federal question jurisdiction over TCPA claims. *Id.* at 745 ("We hold, therefore, that federal and state courts have concurrent jurisdiction over private suits arising under the TCPA.").

Petitioner argues that the Court's discussion of the TCPA as a statute created under federal law, in the context of deciding the jurisdictional question before it, implicitly "abrogated the Second Circuit's opinion" about a separate issue—the applicable statute of limitations for a TCPA claim. Pet. at 3; *see also* Am. Br. at 5-7.

Selected language quoted by Giovanniello and Public Citizen does appear to support their view. Certainly, in *Mims* the Court read the TCPA as creating a uniform federal regulatory regime, and interpreted the statutory language relied upon by the Second Circuit—that private actions may be

brought "'if otherwise permitted by the laws or rules of court of [the] State,'" 132 S. Ct. at 751 (quoting 47 U.S.C. § 227(b)(3))—as simply recognizing that states could limit TCPA actions, rather than limiting TCPA actions to state courts. *Id.* But the Court's discussion of the statute related to an analysis of the *jurisdictional* question before it. Because no substantive choice of law question was presented to or decided by the Court in *Mims*—including any issues concerning applicable statutes of limitations—the case should not be read as implicitly resolving such issues.

This Court does not decide issues that are not directly before it, and its decisions should not be read to do so. *Cf. Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935) ("'The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.'") (citation omitted).

ALM respectfully submits that because the jurisdictional issue decided by the Court was different than that posed in this case, the presence of selective language in *Mims* cited by Petitioner does not create a direct conflict with the decision of the Second Circuit here.

III. No Remand Order Is Warranted

For the same reasons that this Court's review is unwarranted, a GVR order is unnecessary. As

outlined in PART II, *supra*, this is not a case in which there is "reason to question the correctness of the Court of Appeals' decision," such as the Court's "explicit disapproval of the cases on which the Court of Appeals based its decision." *Lords Landing Village Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 896 (1997). Because intervening authority on a different issue under the TCPA in no way "makes clear" that the ruling below was incorrect, *Thomas v. American Home Products, Inc.*, 519 U.S. 913, 914 (1996) (Scalia, J., concurring), a GVR order here is unwarranted.

Moreover, the Second Circuit's reliance on Connecticut's two-year statute of limitations is not critical to "determine the ultimate outcome of the litigation" in any event. *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The Court has an alternate basis for affirmance—the District Court's finding that Giovanniello's claim would be time-barred even under the four-year federal limitations period. A. 52a-53a. Indeed, without deciding that issue, the Second Circuit "acknowledge[d]" that the District Court decision was in line with "every circuit to have addressed the scope of this [tolling] doctrine," A. 4a n.1, and Judge Wallace went so far as to write a concurrence stating that he would have affirmed on the District Court's rationale. A. 21a.

CONCLUSION

For the reasons discussed above, the Petition should be denied.

July 25, 2012

Respectfully submitted,

ELIZABETH C. KOCH
Counsel of Record
CHAD R. BOWMAN
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, N.W.
Suite 200
Washington, D.C. 20036
Telephone: (202) 508-1100
Facsimile: (202) 861-9888
bkoch@lskslaw.com

Counsel for Respondent