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

PETITIONER'S REPLY BRIEF

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I. The TCPA's Permissive Grant of State-Court Jurisdiction Does Not Oust Federal Jurisdiction.

A. Respondent Arrow Financial Services does not contest that 28 U.S.C. § 1331 grants federal courts jurisdiction over cases arising under federal law unless Congress has curtailed that jurisdiction. Arrow quibbles over whether this principle is a "clear-statement rule" (Resp. Br. 30), but that is largely beside the point. This Court's precedents may not require Congress to speak with unmistakable clarity to divest federal courts of jurisdiction, but they do require it to *speak*, and they hold that jurisdiction "should not be disturbed by a mere implication flowing from subsequent legislation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976) (quoting *Rosecrans v. United States*, 165 U.S. 257, 262 (1897)). The Court does not read "silence or ambiguous language as modifying or limiting our pre-existing jurisdiction." *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1187 (2010).

Arrow acknowledges that *Tafflin v. Levitt*, 493 U.S. 455 (1990), and *Yellow Freight Systems, Inc. v. Donnelly*, 494 U.S. 820 (1990), hold that permissive language saying an action "may" be brought in a particular court does not oust other courts of jurisdiction they otherwise presumptively possess, even when, as in *Tafflin*, the reference to the court in which an action "may" be brought appears in the very definition of the right of action. But Arrow argues that their holdings are inapplicable because the judicially created presumption that state courts possess jurisdiction over federal claims is stronger than the presumption

that federal courts possess the jurisdiction granted them in § 1331. Resp. Br. 17. Federal courts are, to be sure, courts of limited jurisdiction. But when an action falls squarely within statutory jurisdictional limits—here, because it arises under federal law—this Court has required the same affirmative action of Congress to displace federal jurisdiction that it has required to oust state-court jurisdiction. *See* Pet. Br. 18-26.

Arrow invokes *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), to argue that in the TCPA, unlike in RICO, the word "may" means "may only." But *Langdeau* concerned a *venue* statute specifying the location in which actions permitted to be filed in state courts might be brought, and concluded that the provision would have meaning only if it limited venue to the locations mentioned. *Langdeau* holds that where a statute not only says actions may be brought in a particular court system but also specifies the venue, the venue provision may be mandatory if it would otherwise be meaningless. By contrast, *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193 (2000), indicates that absent such circumstances, venue provisions saying an action "may" be filed in a particular venue need *not* be read to displace the more expansive general venue provisions of 28 U.S.C. § 1391. Neither decision suggests, contrary to *Tafflin*, that a statute saying actions may be brought in one court system implicitly excludes *jurisdiction* in another court system not mentioned in the statute.

B. Arrow also argues that the TCPA is different from the statutes in *Tafflin* and *Donnelly* because it does not just say an action "may" be brought in state court, but provides that it "may" be filed in state

court "if" certain conditions are met. "'May,'" says Arrow, "is not the same as 'May, *if*.'" Resp. Br. 13.

Arrow's statement is true as far as it goes, but it does not go very far. The "if" clause certainly limits the permission to file a TCPA action in state court to the condition specified—"if otherwise permitted by the laws or rules of court of a State." But state-court jurisdiction remains permissive: A plaintiff *may* file the action in state court if state laws and rules allow such a claim in that court (and not otherwise). But nothing in the statute says filing a TCPA claim in state court is *mandatory* if state law permits the filing, or otherwise states that a plaintiff may *not* file in federal court. The statute conditionally permits filing in state court, but does not exclude federal jurisdiction—whether or not the condition that permits state-court filing is satisfied.

Indeed, "section 227(b)(3) says *nothing* about the jurisdiction of the federal district courts." *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 521 (3d Cir. 1998) (Alito, J., dissenting) (emphasis added). It does not make a plaintiff's ability to bring an action *in federal court* dependent on state laws or rules.[1] Indeed, as Judge Posner has pointed out, conditioning the ability to file a TCPA claim in state court on state law and rules of court implies that access to federal court is *not* similarly conditioned. "[O]therwise where

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[1] A contrary reading would raise a host of additional problems. For example, if a plaintiff in state A brought a federal TCPA action (diversity or federal-question) in state B against a corporation headquartered or incorporated in state B based on unlawful calls originating in state C, which state's laws and rules should be consulted to determine whether the action should proceed?

would victims go if a state elected not to entertain these suits?" *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 451 (7th Cir. 2005).

C. Arrow fundamentally misreads the statute to condition the existence and even "contours" of the private right of action on state procedural and substantive law. *See, e.g.*, Resp. Br. 32, n. 7. According to Arrow, "Congress expressly conditioned the private right of action not only on the 'laws' of a State but on the 'rules of court of a State'" and thus "intended state courts to play an indispensable role in shaping the right." *Id*. at 13. But Congress did no such thing. The only thing the statute conditions on state law or rules is the *availability of the action in state court*. The statute "says merely that an action under that provision 'may' be brought in an appropriate state court 'if otherwise permitted by the laws or rules of court of' that state." *ErieNet*, 156 F.3d at 521 (Alito, J., dissenting).

Thus, recognizing federal jurisdiction over TCPA claims will not assign federal courts the unaccustomed role of "applying state 'rules of court.'" Resp. Br. 13. Nor will it require federal courts to apply "substantive state limits on TCPA claims," *id*. at 13-14, or place them in the position of "substantively alter[ing] the contours of TCPA claims." *Id*. at 13. Rather, a federal court entertaining a TCPA claim under a preexisting grant of subject-matter jurisdiction (whether federal-question or diversity) will "apply federal substantive and procedural law." *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 n.8 (2d Cir. 2006).

Arrow's contrary view—that the language permitting actions in state court if allowed by state law makes state procedural law applicable *in federal*

courts—reflects a "highly implausible reading of the Act." *Holster v. Gatco, Inc.*, 130 S. Ct. 1575, 1576 (2010) (Scalia, J., concurring). Arrow's argument that the TCPA makes state *substantive* law controlling is more implausible still because it disregards the law's plain language, which makes liability dependent on whether the defendant has committed "a violation of this subsection or the regulations prescribed under this subsection." 47 U.S.C. § 227(b)(3)(A). The statute explicitly designates *federal* law as the substantive rule of decision in TCPA cases wherever they are filed. *See, e.g., First Nat'l Collection Bur. v. Walker*, 348 S.W.3d 329 (Tex. App. 2011) (holding that the TCPA preempts conflicting state standards).

The TCPA is therefore far from "analogous to the statutory right at issue in *Shoshone Mining* [*Co. v. Rutter*, 177 U.S. 505 (1900)]." Resp. Br. 32, n.7. In *Shoshone Mining*, the statute designated state and local laws as the rules of decision in many cases, and the Court held that cases not actually governed by federal law did not arise under federal law for jurisdictional purposes. *See id.* But *every* case under the TCPA raises a federal-law issue because liability depends on a violation of exclusively federal-law requirements.

The statutory language is thus wholly inadequate to the task Arrow assigns it: creating a unique federal right of action that "behaves like state law." Arrow Br. 11 (quoting *Bonime v. Avaya, Inc.*, 547 F.3d 497, 501 (2d Cir. 2008)). Nothing in the statute's permissive authorization of state-court litigation provides the affirmative indication of legislative intent necessary to divest federal courts of their presumptive jurisdiction over any action otherwise within the scope

of their general jurisdictional grants. *See Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 62 (2002); *see also Colorado River,* 424 U.S. at 808-809 & n.15 (statute granting state courts jurisdiction over federal water-rights cases does not preclude federal-question jurisdiction under 28 U.S.C. §§ 1346 & 1331). Still less does the statutory language support the elaborate edifice Arrow constructs, under which state law defines the "contours" of a federal right of action and strips it of its federal-law character.

II. The TCPA's Language Is Not Superfluous.

Arrow contends that unless the statutory language is given the unusual construction it advocates, the language is meaningless because, under *Tafflin*, TCPA claims could be brought in state courts even without it. Arrow brushes aside Judge Posner's explanation that the language has the benefit of making clear that federal jurisdiction is not exclusive. Despite the venerable rule of *Claflin v. Houseman,* 93 U.S. 130 (1876), that issue has generated lengthy disagreements among the lower courts over other statutes—such as the one that required this Court to decide *Tafflin* a year before the TCPA was enacted. *See Brill*, 427 F.3d at 451. To avoid such misunderstanding, Congress often enacts statutory language that may not be strictly necessary in order to "make assurance doubly sure." *Crandon v. United States*, 494 U.S. 152, 174 (1990) (Scalia, J., concurring); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc*, 545 U.S. 546, 565 (2005); *Am. Trucking Ass'ns v. Atchison, Topeka, & Santa Fe Ry.*, 387 U.S. 397, 412 (1967); *United States v. Alpers*, 338 U.S. 680, 684 (1950).

Arrow objects that there is no evidence Congress was "worried" about the possibility of exclusive feder-

al jurisdiction over private TCPA actions. Resp. Br. 15. But evidence that Congress "worried" about something is not necessary to demonstrate that statutory language clarifying the point is meaningful. And as Arrow itself observes, the legislative history *does* indicate that Congress wanted to emphasize that the private right of action, unlike state attorney-general actions, *could* be brought in state court. *See* Resp. Br. 22-23. *Tafflin*, of which Congress was presumptively aware, *see* Resp. Br. 14, left open the possibility that an "unmistakable inference from legislative history" or "a clear incompatibility between state-court jurisdiction and federal interests" could exclude state-court jurisdiction even absent statutory language dictating that result. *See* 493 U.S. at 461. What better way to avoid any such misreading of congressional intent than to provide explicitly that an action may be brought in state court?

Arrow similarly disparages the second function of the "may, *if*" language: defining when state courts must entertain the TCPA right of action, and substituting a statutory standard ("if otherwise permitted by the laws or rules of court of a State") for the judge-made standard of *Testa v. Katt*, 330 U.S. 386 (1947). Arrow's only responses are that "petitioner … refuses to say how, or even if, Congress actually altered *Testa*'s rule," and that "there is no evidence that Congress had this particular concern in mind." Resp. Br. 15.

This case, where the issue is not presented, is not the occasion for deciding to what degree the statutory standard produces different results than would *Testa*—an issue that has divided state supreme courts. *See* Pet. Br. 46 & n.9. But if Arrow means to suggest

that the statute leaves *Testa* unaltered, it contradicts itself later when it says that the TCPA "explicitly gives the States the authority to determine whether to permit private TCPA claims according to their own 'laws or rules of court,'" Resp. Br. 35—a reading that upends *Testa*'s nondiscrimination standard.

Here, the critical point is not exactly *what* the statutory "if otherwise permitted" standard means, but that it quite evidently means *something*. Even Arrow acknowledges that the standard defines when plaintiffs are entitled to bring TCPA claims in state courts. Thus, in cases testing whether a TCPA claim may be brought in state court, the decisive issue is what the statutory language means, not what *Testa* means. In substituting a statutory standard for *Testa*'s judge-made rule, the language is not "superfluous" regardless of whether the results it yields are no different from, little different from, or diametrically opposite to the results *Testa* would yield absent the "*if*" clause.[2]

As for "evidence that Congress had this particular concern in mind," no more evidence is necessary than the language of the statute. On its face, it addresses and provides a standard for resolving the *Testa* question. No legislative history documenting Congress's "concerns" is needed to prove that a statute does what its language says.

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[2] For examples of the possible different consequences of the TCPA language, *see* Pet. Br. 38 & n.8.

III. Context, Legislative History, Administrative Construction, and Congressional Ratification Do Not Support Arrow.

A. Turning from the unsupportive text of § 227(b)(3), Arrow argues that statutory "context" indicates that state-court jurisdiction under § 227(b)(3) is exclusive because the TCPA provides exclusive *federal* jurisdiction over state attorney general actions in § 227(f), and this "juxtaposition … makes clear that Congress had different jurisdictional regimes in mind." Resp. Br. 20. Congress certainly had "different jurisdictional regimes" in mind. The question is *what the difference is*, and the answer does not help Arrow: Section 227(f) provides for jurisdictional exclusivity, and § 227(b)(3) does not.

Arrow argues that Congress's failure to enact special venue and service-of-process rules for private TCPA actions in federal court, as it did for state attorney-general actions, implies Congress intended to prohibit TCPA claims in federal court. Resp. Br. 21. But the absence of special provisions only means "there was no need for Congress to reiterate" the standard venue and service-of-process rules applicable to individual actions brought under the jurisdictional grants of 28 U.S.C. §§ 1331 and 1332. *See ErieNet*, 156 F.3d at 523 (Alito, J., dissenting). Moreover, *Taffin* concluded that RICO's special venue and service provisions, applicable only in federal court, did not indicate intent to foreclose state-court jurisdiction, *see* 493 U.S. at 466; conversely, the *absence* of such features does not reveal intent to make state-court jurisdiction exclusive. Similarly, no provisions regarding conflicts between enforcement proceedings brought by different governmental entities are needed for pri-

vate actions, whether in federal or state court, so the absence of such provisions does not, as Arrow contends, suggest anything about jurisdiction. *See id.*

In another appeal to "context," Arrow says Congress must have meant to exclude federal jurisdiction over TCPA claims because, in other provisions in Title 47 of the United States Code, Congress explicitly authorized concurrent state and federal jurisdiction. But "because these provisions of the Communications Act were not passed contemporaneously with the TCPA, they shed little light on the intent of Congress at the time of the TCPA's passage." *ErieNet*, 156 F.3d at 523 (Alito, J., dissenting).

Moreover, the provisions Arrow cites apparently provide for both state and federal jurisdiction to distinguish them from other Communications Act provisions providing *exclusive federal-court* jurisdiction, *e.g.*, 47 U.S.C. §§ 252(e)(4) & (6); *id.* § 402, not to differentiate them from provisions allowing exclusive state-court jurisdiction (of which Arrow cites none). And there are many *other* Communications Act provisions that say only that actions may be brought in federal court but do not, under *Tafflin*, preclude concurrent state-court jurisdiction. *See, e.g.*, 47 U.S.C. §§ 207, 274(e), 338(i)(7), 401(b), 532(d), 551(f)(1). Accordingly, this Court has already concluded that the Communications Act's approach to jurisdiction is the opposite of the one Arrow posits: "where otherwise applicable jurisdiction was meant to be excluded, *it was excluded expressly*." *Verizon Md.*, 535 U.S. at 644 (emphasis added). The "context" Arrow invokes refutes its argument.

B. Because statutory language and structure do not support it, Arrow turns to legislative history. The

history on which it places primary reliance, a floor statement in which one Senator repeats what the statute says—that private claims may be brought in state court while state attorney-general actions must be brought in federal court—sheds no light on the question here. Resp. Br. 22-23. If the statutory language does not divest the federal courts of jurisdiction, a floor statement paraphrasing it surely does not.

Arrow also concocts an argument that the legislative history indicates Congress must have been concerned about an overwhelming influx of small-dollar claims if it allowed federal jurisdiction over the TCPA right of action, and therefore must have intended to bar such jurisdiction. Arrow's sole support is that the legislative history indicates Congress's awareness that there are billions of telemarketing calls each year, from which Arrow concludes that "millions" of TCPA claims could result. Resp. Br. 23-24.

The idea that billions of *calls* translate into millions of *violations* and, in turn, millions of *lawsuits* is farfetched (assuming, among other things, a shocking degree of noncompliance). There is no evidence that TCPA claims number in the millions. The *total* number of civil suits filed in state courts annually is about 20 million; the majority are contract actions (mostly collection cases), with small-claims, probate, real property, mental health, and tort cases making up most of the rest.[3] There is no reason to think TCPA cases make up more than an infinitesimal percentage

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[3] National Center for State Courts, Court Statistics Project, Civil Caseloads (2008), http://www.ncsconline.org/d_research/csp/2008_files/Civil.pdf.

or that they would swamp federal courts if allowed to be filed there. The federal courts receive about 300,000 new civil cases each year.[4] According to one source, from January 1 through September 15 of this year, fewer than 300 TCPA cases were filed in district courts nationwide, fewer than any other category of consumer cases reported.[5] And no one has presented evidence that courts in the Seventh Circuit, where federal TCPA filings have been permitted for six years, have been snowed under by TCPA claims.

Moreover, Arrow cites no evidence in the legislative history that Congress was concerned about overwhelming federal TCPA caseloads. A legislative history argument without legislative history to support it is the weakest of reeds. To paraphrase Judge Leventhal, it is like looking over a crowd and picking out *imaginary* friends. *Cf.* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term,* 68 Iowa L.Rev. 195, 214 (1983).

There is nothing unusual about Congress providing federal-court actions for small recoveries in consumer protection statutes: The Consumer Credit Protection Act, for example, allows small-dollar individual claims for a variety of common violations. *See, e.g.*, 15 U.S.C. § 1640(a). What is *unusual* is for Congress to exclude small-dollar federal claims from federal court. Here, Congress quite notably did *not* do what it

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[4] http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C00Mar10.pdf.

[5] WebRecon LLC, FDCPA and Other Consumer Lawsuit Statistics, September 1-15, 2011, https://www.webrecon.com/b/fdcpa-case-statistics/fdcpa-and-other-consumer-lawsuit-statistics-september-1-15-2011/.

has done in a handful of other instances: limit federal jurisdiction to cases exceeding a statutorily specified damages threshold. Congress has provided that Carmack Amendment claims (involving loss or damage to property shipped in interstate commerce) may be brought in federal court only if the amount in controversy exceeds $10,000, 28 U.S.C. § 1337(a); that Consumer Product Safety Act claims are only cognizable if damages exceed $10,000, 15 U.S.C. § 2072(a); and that Magnuson-Moss Warranty Act claims may not be brought in federal court if the aggregate amount in controversy is less than $50,000 (or the value of any individual claim is less than $25), 15 U.S.C. § 2310(d)(3). That Congress elsewhere *explicitly* foreclosed small-dollar claims to avoid burdening the federal courts makes it highly unlikely that it would have here taken the very unusual step of *implicitly* foreclosing federal jurisdiction over a federal claim altogether (regardless of amount in controversy) based on *unstated* concerns about the burden of small claims.

C. Arrow also points to legislative history to argue that the TCPA was intended to provide only "interstitial" federal regulation of telemarketing. Arrow relies on one of the legislative findings supporting the TCPA—that federal legislation was needed in part because "telemarketers can evade [state] prohibitions through interstate operations." Resp. Br. 4 (quoting TCPA § 2(7), 47 U.S.C. § 227 note). Arrow leaps to the conclusion that the TCPA reflects a dominant state interest in regulating telemarketing, which in its view supports limiting the TCPA's private right of action to state courts.

In fact, although one reason for Congress's action was the perceived inefficacy of state regulation, Con-

gress also asserted its own interest in protecting both consumers and legitimate telemarketers. *See* Pet. Br. 4-5. As the House Report on the legislation stated, "[t]he preponderance of the evidence documents the existence of a national problem and argues persuasively in favor of federal intervention balancing the privacy rights of the individual and the commercial speech rights of the telemarketer." H.R. Rep. No. 102-317, at 10 (1991).

Congress's solution to this national problem was national in character and scope. Congress found that "*Federal* law is needed." TCPA § 2(7) (emphasis added). It enacted detailed substantive standards binding on telemarketers nationwide. It delegated substantial regulatory authority to a federal agency to flesh out those standards. Congress permitted state enforcement actions, but only in federal courts, and it subordinated those actions to federally initiated ones. In short, Congress established a comprehensive federal regulatory scheme in which state authorities and laws play a distinctly secondary role. Far from merely supplementing state efforts, Congress aimed "both [to] *relieve states of a portion of their regulatory burden* and [to] protect legitimate telemarketers from having to meet multiple legal standards." H.R. Rep. No. 102-317, at 10 (emphasis added). The TCPA's creation of a preponderantly federal regulatory and enforcement scheme refutes the suggestion that the private right of action must be limited to state courts, and subordinated to state law, to reflect the statute's interstitial character.

In other words, as is typical in Commerce Clause legislation, while the *problem* Congress addressed was, in part, evasion of state regulatory efforts, the

solution it adopted was a uniform, national statutory and regulatory scheme. The FCC, though silent on the jurisdictional issue, has emphasized the primacy of federal law under the TCPA: "[F]ederal statutes like the TCPA are generally intended to have uniform nationwide application and there is a danger that the federal program would be impaired if state law were to control interpretation of a federal law." Brief for the FCC and U.S. as Amici Curiae at 13-14, *Charvat v. Echostar Satellite, LLC*, No. 09-4525 (filed Nov. 15, 2010) (internal quotation marks omitted).

D. Arrow suggests that this Court defer to a purported FCC construction of the TCPA rejecting federal jurisdiction over private actions. Arrow cites no authority holding that courts must or may defer to a federal agency's construction of statutory provisions defining jurisdiction over a private right of action. Deference to an agency's construction of statutory provisions *it administers* rests on explicit or implicit congressional delegation of authority to "speak with the force of law" to resolve ambiguities in the statutory framework. *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). The TCPA nowhere delegates authority to the FCC, or any agency, concerning jurisdiction over private claims. *Courts* are "the adjudicator[s] of private rights of action arising under the statute." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). The "precondition to deference under *Chevron*"—that is, "a congressional delegation of administrative authority"—is absent. *Id.*

In any event, there is nothing to defer to. Arrow points to no agency actions or statements that take a position on whether a plaintiff may bring a TCPA action in federal court under § 1331. Arrow cites only

informational materials that say what the statute says—an action may be brought in a state court. *See* Resp. Br. 25-26. The agency has not, however, taken a position—let alone spoken with the force of law—on whether the statute precludes an action in federal court. As Arrow observes, even in this Court the FCC has said nothing. The Court cannot defer to Delphic silence.

E. Arrow argues that Congress "ratified the prevailing … view of the courts of appeals" when it "enacted numerous amendments to the TCPA from 1992-2010" without altering the private right of action. Resp. Br. 26. This Court, however, has emphasized that "ratification" by acquiescence should be found only where there is "*overwhelming evidence*" that later Congresses focused on the "*precise* issue," *Rapanos v. United States*, 547 U.S. 715, 750 (2006) (plurality opinion), or where Congress "*reenacts* statutory language that has been given a consistent judicial construction." *See, e.g., Central Bank of Denver, NA v. First Interstate Bank of Denver, NA*, 511 U.S. 164, 185 (1994) (emphasis added). Otherwise, it is "impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the courts' statutory interpretation." *Id*. at 186 (citations, internal quotation marks, and brackets omitted); *see also Tafflin*, 493 U.S. at 462-63 (declining to infer preclusion of jurisdiction from legislative inaction).

Arrow cites legislation from 1992 and 1994 that made one change to the FCC's regulatory authority to exempt certain calls from TCPA prohibition and corrected two typographical errors. Pub. L. No. 102-556 (1992); Pub. L. No. 103-414 (1994). Both *predate* the

earliest appellate decisions concerning federal jurisdiction under the TCPA and could not have "ratified" them absent congressional clairvoyance. Arrow also invokes Public Law No. 108-187 (2003), which amended one sentence in the TCPA to encompass calls originating outside the United States, and Public Law No. 109-21 (2005), which provided an "established business relationship" exception to the junk-fax prohibition. Neither law amended or reenacted the private right of action or involved any focus on the jurisdictional issue. The final statute, Public Law No. 111-331 (2010), was enacted long after the Seventh Circuit's *Brill* decision created a circuit-split over jurisdiction and could not have ratified any judicial consensus. Moreover, that law added new caller-ID regulations that are not subject to an express private right of action, and it thus reflects *no* intent concerning jurisdiction over such a right of action.

IV. Arrow's Reading of the Statute Is Incoherent.

Arrow cannot decide whether its argument is that the language providing that actions "may" be brought in state court really means they may "only" be brought in state court, which would exclude bringing them in diversity cases or under the supplemental jurisdiction provided by 28 U.S.C. § 1367, or whether it only excludes federal-question jurisdiction. *See* Resp. Br. 32-35. Arrow cannot decide because both choices are unpalatable. Excluding diversity and supplemental jurisdiction would contradict its theory that the TCPA right of action "behaves" like one under state law and would have other strange consequences, such as requiring plaintiffs with claims under other federal statutes to divide their causes of action or for-

go otherwise available federal jurisdiction. But allowing diversity and supplemental jurisdiction runs up against the problem that nothing in the statute's language creating permissive state-court jurisdiction supports any distinction between different types of *federal* jurisdiction that are or are not permitted—not surprisingly, because the language does not address federal jurisdiction at all. The dilemma illustrates the perils of displacing jurisdiction by implication, which permits no definitive answers as to how *much* jurisdiction is ousted.

Perhaps because its jurisdictional argument is unsatisfactory, Arrow falls back on what it calls an alternative argument that a limitation to state courts is inherent in the right of action itself. Resp. Br. 27-29. Arrow's argument, not presented below and therefore waived, confuses the concepts of jurisdiction and rights of action. A right of action specifies that A is liable to B in X amount in Y circumstances. *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994). Jurisdiction determines which court can hear such a claim: "Subject-matter jurisdiction properly comprehended … refers to a tribunal's 'power to hear a case ….'" *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 596 (2009) (citation omitted). A right of action exists, or not, and a court has jurisdiction over it, or not; but a limit on which court may hear the claim is a limit on jurisdiction, not a part of the right of action itself.

If Arrow were correct, this Court should have said in *Tafflin*—where the very phrase creating the right of action says that an action may be brought in federal court—that the right of action did not "exist" in

state court, regardless of jurisdiction. The Court did not do so because where an action may be brought is a question of jurisdiction, not of the scope of the right of action. If the permission to bring a TCPA action in state court does not oust federal jurisdiction, it does not otherwise bar the claim in federal court.

V. Federal Jurisdiction Does Not Undermine the Role of State Small-Claims Courts.

A. Federal jurisdiction over TCPA claims is entirely consistent with Congress's expectation that state small-claims courts would be available forums for many TCPA cases. That plaintiffs have the option of a federal forum does not mean they will forgo state small-claims procedures in cases, unlike this one, in which their TCPA claims fall within the jurisdictional limits of small-claims courts. Cases involving small numbers of unintentional violations (the cases most likely to fall within small-claims jurisdictional limits, which in 31 states are $6,000 or less[6]) are unlikely to be filed in federal court if for no other reason than that the filing fee prescribed by 28 U.S.C. § 1914(a) would be disproportionate to the possible recovery. Arrow's fear that "federal courts could be inundated with suits for *$500* TCPA claims," Resp. Br. 33, is unrealistic. To paraphrase Judge Posner, only a lunatic or a fanatic will risk a $350 federal filing fee for a chance to win $500. *Cf. Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

Filing fees aside, plaintiffs are unlikely to overlook the features of small-claims courts that make them

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[6] HALT, 2011 Small Claims Report Card, http://www.halt.org/reform_projects/small_claims/2011_small_claims_rc/.

attractive venues for the pursuit of recoveries that are not large enough to make suing in federal district courts or state trial courts of general jurisdiction worth the time and expense. And plaintiffs' attorneys are equally unlikely to bring individual TCPA claims for trivial amounts in courts where such claims cannot be litigated cost-effectively. Because the TCPA contains no fee-shifting provision, attorneys for TCPA plaintiffs will typically be compensated on a contingency basis and will avoid filing cases whose potential recoveries cannot compensate them for the time and resources that would be needed to litigate them in federal court. *See* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 Judicature 22 (1997).

B. Nor is it likely that defendants will routinely remove TCPA cases involving trifling claims to federal court and thus deprive TCPA plaintiffs of a small-claims forum in such cases. See Resp. Br. 23. True, if TCPA claims fall within the original jurisdiction provided by § 1331, they can also be removed. *See* 28 U.S.C. § 1441(b). But a defendant would have to be as much of a lunatic to retain counsel and pay the $350 filing fee to remove a $500 case from small-claims court as a plaintiff would have to be to bring the case in federal court in the first place. *See* 28 U.S.C. § 1914(a) (imposing filing fee on one who institutes an action in federal court "by … removal"). If it took an attorney only one hour to prepare and file removal papers, the filing and attorney fees together would exceed the amount of a minimal TCPA claim. *See* Nat'l Fed'n Indep. Bus. Br. 9 (positing "a modest hourly rate of $200 per hour to retain outside counsel").

Moreover, as all three of the amicus curiae briefs supporting Arrow explain at length, the benefits of streamlined and inexpensive procedures are highly prized by defendants as well as plaintiffs in cases involving only individual claims for the small amounts within the jurisdictional limits of small-claims courts. As one of those briefs explains:

> Like consumers, defendants facing TCPA claims … have an interest in having a forum in which they can resolve such claims as 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.

DBA Int'l Br. 4-5; *see also* Nat'l Fed'n Indep. Bus. Br. 5-9; ACA Int'l Br. 7-10.

C. The incentives of both plaintiffs and defendants thus suggest that TCPA claims genuinely appropriate for resolution by small-claims courts will be litigated there rather than being filed in or removed to the federal courts—regardless of whether jurisdiction under § 1331 is theoretically available. But not all TCPA claims meet that criterion. Many claims, such as Mr. Mims's, involving allegations of multiple intentional violations of the statute (at up to $1,500 per violation), far exceed the jurisdictional limits of small-claims courts, which in Florida are only $5,000. Fla. Sm. Cl. R. 7.010. The suggestion of one amicus curiae that Mr. Mims "should have filed his TCPA claims" in "Florida small-claims court," Nat'l Fed'n Indep. Bus. Br. 6, disregards that he *could not* have done so.

In addition, § 227(b)(3) expressly provides a right to *enjoin* TCPA violations. 47 U.S.C. § 227(b)(3)(A). Such injunctive relief is unavailable in the "vast ma-

jority" of state small claims courts.[7] Mr. Mims could not have brought his claim for injunctive relief (*see* JA 19) in a Florida small-claims proceeding even if his monetary claims were within the jurisdictional limits. *See Tax Certificate Redemption's, Inc. v. Meitz*, 705 So. 2d 64, 65 (Fla. Dist. Ct. App. 1997) (Florida small-claims procedures do not apply to equitable claims).

For TCPA claims that are outside small-claims jurisdiction because of the damages claimed, relief sought, or both, the question is whether the claims will be litigated exclusively in state trial courts of general jurisdiction or whether they may also be brought in federal court. The benefits of inapplicable small-claims procedures are irrelevant to that question. Such TCPA cases are comparable in terms of amount in controversy, relief requested, and nature of issues to many statutory claims that federal courts routinely hear under their federal-question jurisdiction. Either plaintiffs or defendants, or both, may have reasons to prefer a federal forum in particular TCPA cases—including case backlogs in underfunded and overburdened state courts, the greater familiarity of federal courts with federal statutory issues, the benefits of the Federal Rules of Civil Procedure, and the quality of the federal judiciary. The choice of a federal forum that is generally available in federal-question cases should not be denied the parties in *all* TCPA cases merely because state small-claims courts are the better forum for *some* TCPA cases.

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[7] HALT, Small Claims Court Best Practices 4, http://www.halt.org/reform_projects/small_claims/2011_small_claims_rc/pdf/Small_Claims_Best_Practices.pdf.

Limiting TCPA claims to state courts, and state small-claims courts at that, would likely significantly limit the efficacy of the right of action in enforcing the statute's prohibitions. Arrow's amicus curiae ACA International makes no bones about this objective: It asserts that its members regularly use automated dialers to call cell phones in violation of the statute, and complains that if federal jurisdiction is available (and with it, potentially, class actions under applicable federal rules) this unlawful practice may be inhibited. ACA Int'l Br. 3, 12-13. The jurisdictional preferences of serial TCPA violators are no reason for reading into the statute a limitation not found in its text.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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