

No. 10-1195

In the
Supreme Court of the United States

MARCUS D. MIMS,

Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 3(b), 105 Stat. 2394, 2396, provides that a private plaintiff “may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State, an action” for damages in the amount of \$500 per violation or injunctive relief. The question presented is whether a plaintiff seeking relief under this unique private right of action may bypass state court and bring an action in federal district court under 28 U.S.C. § 1331.

RULE 29.6 STATEMENT

Arrow Financial Services, LLC is wholly owned by AFS Holdings, LLC, which in turn is wholly owned by Sallie Mae, Inc., which in turn is wholly owned by SLM Corp., a publicly traded company.

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INTRODUCTION

Hardly anyone likes receiving unsolicited automated telephone calls and facsimiles. And this fact of life has not escaped the notice of the States. By 1991, more than 40 States had enacted legislation to combat this problem in one way or another, as the number of telemarketing calls reached more than 18 million per day. The States found, however, that their *intrastate* restrictions on abusive telemarketing practices could be evaded by telemarketers' *interstate* operations. See 47 U.S.C. § 227 note (Congressional Findings) (reproduced at Pet. Br. 23a-24a). So Congress acted to fill this interstitial void. This case concerns the contours of the private right of action that Congress created in the Telephone Consumer Protection Act (TCPA) to address this perceived enforcement gap and, in particular, whether Congress intended the TCPA private right of action to be enforceable in federal court under 28 U.S.C. § 1331.

The private right of action at issue states that persons “may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court *of that State*” an action based on violation of the TCPA. 47 U.S.C. § 227(b)(3) (emphasis added). The TCPA’s private right of action appears to be *sui generis*—and uniquely state-law centered—in terms of how it is framed. But there is no requirement that Congress must adopt the same approach to every problem. Nor must Congress turn to federal courts—instead of state courts—to enforce rights enabled by federal law. The provision at issue takes an innovative approach by creating a federal claim that operates like state law and provides an example of true cooperative federalism—of Congress helping the States to help themselves.

As with any statute, this Court must give effect to Congress's intent in establishing the TCPA's private right of action. The text, structure, legislative history, and purpose of the TCPA, as well as other indicia of congressional intent, confirm that Congress intended private TCPA actions to be brought in state court where "permitted by" state law—just as Congress said in § 227(b)(3). In creating this private right of action and giving States control over the scope and availability of such claims, Congress did not intend to allow plaintiffs simply to bypass state court by invoking § 1331. Nor is there any evidence that Congress sought to open the federal courts to a potential influx of private TCPA claims stemming from *millions* of telemarketing calls each day. To the contrary, the available evidence suggests that Congress believed that private TCPA actions—with damages set at \$500 per violation—would be most appropriate for state small claims court. *Infra* at 5.

It is true, as petitioner observes (at 11), that the unique private right of action that Congress created is "dependent on the grace of the state courts." But Congress explicitly contemplated that result by directing that claims could be brought in state court "if permitted by" state law. There is no reason to presume that States, or state courts, are not capable of responsibly overseeing private TCPA claims. And petitioner has provided no basis for this Court to dismantle the innovative approach that Congress took in the TCPA—and greatly expand the scope of the limited private action it created—by holding that private TCPA claims may be brought in federal court *regardless* of whether or to what extent they are "permitted by" state laws or rules of court.

STATEMENT OF THE CASE

1. For better or worse, American businesses and entrepreneurs have never been shy about marketing their goods and services. In the telecommunications age, there are enormous opportunities for marketing, but also opportunities for abuse. In the past few decades, the use of telemarketing has become pervasive. Thousands of solicitors call tens of millions of American households each day. *See* 47 U.S.C. § 227 note. Indeed, it has been estimated that there are some 6.57 billion telemarketing transmissions each year. *International Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1157 (4th Cir. 1997) (emphasis added). Many of those transmissions are not welcome by the individuals or homes that receive them.

The States, no doubt spurred by annoyed residents, were the first to take action to address this phenomenon. By 1991, when the TCPA was enacted, more than 40 States had already legislated limits on the use of automatic-dialer recorded-message players or otherwise restricted telemarketing practices. S. Rep. No. 102-178, at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. Those state laws had “had limited effect” (*id.*), however, because it was believed that “telemarketers [could] easily avoid the restrictions of State law, simply by locating their phone centers out of state,” H.R. Rep. No. 102-317, at 9 (1991). As a result, “[m]any States ha[d] expressed a desire for Federal legislation ... to supplement their restrictions on intrastate calls.” S. Rep. No. 102-178, at 2.

Congress responded in the TCPA, which was enacted in 1991 as part of an amendment to the Communications Act of 1934. Pub. L. No. 102-243, § 3(a), 105 Stat. 2394, 2395. The TCPA prohibits

certain unsolicited telemarketing calls and facsimile advertisements and restricts the use of automatic dialers and prerecorded messages in non-emergency calls to cell phones. *See* 47 U.S.C. § 227(b)(1)-(2). In passing the law, Congress specifically found that “Federal law is needed” because “telemarketers can evade [state] prohibitions through interstate operations.” 47 U.S.C. § 227 note. Thus, “Congress intended the TCPA to provide ‘interstitial law preventing evasion of state law by calling across state lines.’” *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 342 (2d Cir. 2006) (citation omitted). And to do that, Congress “sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps.” *Id.*

The TCPA contains distinct remedial provisions for private parties and government entities. Congress created a private right of action stating that plaintiffs “may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of *that State*” an action for actual damages or statutory damages of \$500 per violation, and injunctive relief. 47 U.S.C. § 227(b)(3) (emphasis added). Congress authorized state attorneys general to bring civil actions for damages and injunctive relief whenever a State “has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of” the TCPA, *id.* § 227(f)(1), and specified that the federal courts would have “exclusive jurisdiction” over those actions, *id.* § 227(f)(2). And Congress authorized the Federal Communications Commission (FCC) to intervene as of right in actions initiated by state attorneys general. *Id.* § 227(f)(3).

Senator Hollings, who sponsored the law, explained that the private-right-of-action provision “would allow consumers to bring an action *in State court* against any entity that violates the bill.” 137 Cong. Rec. 30,821 (1991) (emphasis added). He further expressed his “hope that States will make it as easy as possible for consumers to bring such actions, preferably in [state] small claims court,” *id.*, observing that

[s]mall claims court, or a similar court, would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys’ costs to consumers bringing an action were greater than the potential damages.

Id. at 30,821-22. He added that the bill “permits the State attorneys general to enforce the provisions of the bill *in Federal court.*” *Id.* at 30,822 (emphasis added).

Not long after the statute became law, the FCC issued a Consumer Alert “to answer questions consumers may have about [the new law and related regulations].” Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, 8 FCC Rcd. 480, 480 (Jan. 11, 1993). The Commission explained that a citizen who receives a live telephone solicitation, automated or prerecorded voice call, or unsolicited fax advertisement in apparent violation of the TCPA or the FCC’s rules “may take the following actions”: (1) “contact the solicitor or business directly” and ask them to stop the calls; (2) “*file suit in state court (if your state permits such actions)* to stop such calls and/or file suit for actual monetary loss”; or (3)

“request FCC enforcement action on suspected violations of FCC rules.” *Id.* at 481 (emphasis added). In addition, the notice explained, “states can initiate a civil action in federal district court against any person or entity that engages in a pattern or practice of violations of the TCPA or the FCC rules.” *Id.*

2. In August 2009, petitioner filed a complaint in the United States District Court for the Southern District of Florida, alleging that respondent, Arrow Financial Services, LLC (Arrow), had placed telephone calls to his cell phone without his prior consent using an auto-dialer system, in an effort to collect a delinquent debt from petitioner. The complaint alleged violations of the TCPA, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. § 1692 *et seq.*, and the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. § 559.55 *et seq.* JA 8-20. It asserted subject-matter jurisdiction under 28 U.S.C. § 1331 and other provisions not relevant here. JA 8; Pet. 12.¹

The parties stipulated to dismissal of petitioner’s FDCPA and FCCPA claims. Arrow then moved to dismiss petitioner’s TCPA claim for lack of subject matter jurisdiction under § 1331. Relying on the settled law of the Eleventh Circuit and five other circuits, the district court dismissed the case for want of subject matter jurisdiction. Pet. App. 7a. The Eleventh Circuit summarily affirmed on the basis of existing circuit precedent. *Id.* at 2a.

¹ Petitioner has never argued that he could not have maintained this suit in a Florida state court. *Cf.* Pet. 11-12 n.5; Opp. 3 n.1.

SUMMARY OF ARGUMENT

The court of appeals properly held that the federal courts lack federal-question jurisdiction under 28 U.S.C. § 1331 over private TCPA claims.

The uniquely state-centered private right of action that Congress created in the TCPA explicitly authorizes bringing private claims only in state court. Unlike the statute in *Tafflin v. Levitt*, 493 U.S. 455 (1990), Congress did not generally provide that TCPA claims “may be brought” in state court. It carefully qualified, and limited, the private right by specifying that such claims may be brought in state court—“if otherwise permitted by the laws or rules of court of a State.” The distinctive, state-law—and state-court—language that Congress used underscores that Congress had a particular remedial scheme in mind.

Petitioner’s interpretation renders that language superfluous, because it is black-letter law that the state courts would have concurrent jurisdiction over private TCPA claims if Congress had said *nothing* about bringing such claims in state court. The only way to give meaningful effect to the unique language that Congress used is to hold that private TCPA claims are tantamount to state claims that must be filed in state court—as “permitted by” state laws or rules of court.

The unusual limitation that Congress imposed in the TCPA (making a private right of action contingent on the laws or rules of court of the States) is inconsistent with the notion that Congress intended for federal-question jurisdiction to extend to *all* private TCPA claims, because the existence of the TCPA’s private right to sue itself is explicitly tied to state law. But the limitation is perfectly consistent with the express purpose of the TCPA—to ensure that the

States could address the problem of *interstate* calls that violated the Act, where the States themselves chose to address this problem but were frustrated by their inability to enforce their laws for interstate calls.

Other considerations reinforce the conclusion that Congress did not intend for private TCPA claims to be subject to general federal-question jurisdiction. The broader context of the statute underscores that Congress intentionally drew jurisdictional lines between federal and state court depending on the party bringing suit. Likewise, the legislative history shows that Congress did not just have in mind *state court* litigation for private TCPA claims, but preferred channeling such claims to state *small claims court* to ensure that the costs of litigating TCPA claims would not swallow the relatively small damages at stake. Petitioner's position not only would allow plaintiffs to bypass state court, but would also allow defendants to *force* consumers into likely more costly federal court litigation by removing actions filed in state court.

Confining private TCPA claims to state court—and giving States control over the scope and availability of such claims—is consistent with the enormous potential volume of such claims. As Congress found when it passed the TCPA, Americans receive *millions* of telemarketing calls and faxes each day. There is no reason to believe that, in establishing a carefully limited and state court-focused private right, Congress intended to subject the *federal* courts to a potential influx of private, \$500-per-violation claims. The contemporaneous views of the agency charged with administering the TCPA further reinforce the conclusion that Congress intended private TCPA claims to be brought only in state court.

The mechanism that Congress expresses to enforce a private right is an integral component of the private right it has created. Petitioner’s interpretation would transform, and expand, the private right that Congress created in two fundamental respects. Even though Congress explicitly authorized bringing private TCPA claims only in state court, petitioner’s position would allow any plaintiff to bring any private TCPA claim in federal court under § 1331. And even though Congress explicitly limited the right by authorizing States to define the contours and availability of TCPA claims, petitioner’s position would make the federal courts open for private TCPA claims *regardless* of whether they would be allowed by the courts of a State. Adopting petitioner’s interpretation would therefore require a departure from this Court’s precedents emphasizing that Courts should take great care in construing private rights of action. Indeed, petitioner is effectively asking this Court to infer a new private right of action authorizing plaintiffs to bring TCPA claims in *federal* court—*without regard* to state law.

Petitioner says he does not wish “to denigrate the important objective served by Congress’s authorization for state courts to entertain TCPA claims.” Pet. Br. 35. But his position does something worse. It takes a statute that tries out an innovative, cooperative federalism approach to allowing the States to help themselves in addressing a particular problem and transforms it into just another federal cause of action. The court of appeals properly rejected that position.

ARGUMENT

FEDERAL COURTS LACK FEDERAL-
QUESTION JURISDICTION UNDER 28
U.S.C. § 1331 OVER PRIVATE TCPA CLAIMS

Federal courts are courts of limited jurisdiction—jurisdiction exists only insofar as it is conveyed by Congress. *See Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850). Petitioner’s brief is devoted largely to a proposition that is not contested—that 28 U.S.C. § 1331 confers a broad grant of general federal-question jurisdiction on the federal courts. *See* Pet. Br. 1, 10, 12-26. To that end, petitioner delves into the history of the federal-question jurisdiction statute and discusses at length the *general* availability of federal-question jurisdiction with respect to claims “arising under” federal law. But ultimately, even petitioner recognizes (as he must) that “Congress can and does make exceptions to statutes conferring jurisdiction on the federal district courts, including § 1331’s grant of federal-question jurisdiction.” Pet. Br. 24-25. And in that regard, the question before the Court is not whether Congress *could* allow for federal-question jurisdiction over private actions under the TCPA, but rather whether it has. *Cf. Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 506 (1900) (“The question ... is not one of the power of Congress, but of its intent.”).

In addressing that question, petitioner proceeds from page one of its brief as if the TCPA private right of action at issue in this case were “precisely” like any other “cause of action of created by federal law.” But it is not—not even close. As the lower courts have acknowledged, the TCPA private right of action possesses an “unusual constellation of statutory features.” *Chair King, Inc. v. Houston Cellular Corp.*,

131 F.3d 507, 512-13 (5th Cir. 1997). Those features include (1) an express creation of a private right of action only as “otherwise permitted by the laws or rules of court of a State”; (2) an express direction that such actions may be brought “in an appropriate court of that State” as authorized by state law; and (3) a jurisdictional grant to federal courts to entertain actions brought by *state attorneys general* (with no reference to federal court jurisdiction for private claims). And the combination of these features makes the TCPA private right of action truly “*sui generis*.” *Gottlieb*, 436 F.3d at 342 n.8.

The upshot is that Congress created a private right of action that “behaves like state law,” *Bonime v. Avaya, Inc.*, 547 F.3d 497, 501 (2d Cir. 2008), and is thus subject to state law and rules of court. That unique approach was no doubt based in part on the extraordinary volume of telecommunications presenting potential claims (millions a day), and Congress’s desire to ensure that States had the authority to regulate such claims. Holding that federal-question jurisdiction exists to entertain private TCPA claims would allow plaintiffs to evade the limits established by Congress and bypass state court—and ignore state law—altogether. There is no evidence that Congress intended that result. Instead, the signs point to the conclusion that Congress intended to do just what it said: create a limited private right of action that was enforceable in state court—to the extent “permitted by [state] laws or rules of court.”

**A. The Text Of The TCPA Private Right Of
Action Explicitly Contemplates Bringing
Such Actions Only In State Court**

For jurisdictional issues, just as for other matters involving the search for Congress’s intent, “[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Engine Mfrs. Ass’n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Section 227(b)(3) of the TCPA—the key statutory provision at issue—provides in relevant part:

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State— ... an action [for damages and injunctive relief].

47 U.S.C. § 227(b)(3); Pet. Br. 10a.

1. Petitioner grounds his reading of § 227(b)(3) on Congress’s use of “may” and emphasizes the permissive nature of *that* word. Pet. Br. 1. But in doing so he loses sight of one of the most fundamental maxims of statutory interpretation: “Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used ...” *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.). Here, Congress qualified—and limited—its use of “may” in critical respects in the next clause. As Judge Calabresi has observed, “[u]nder well-established rules of interpretation, the language of the ‘if otherwise permitted’ clause modifies *and limits* the word ‘may.’” *Bonime*, 547 F.3d at 503 (concurring) (emphasis added).

“May” is not the same as “May, *if*.” The language that Congress used here is the same as saying “may, provided that,” or “may, to the extent that”

The way that Congress qualified “may” makes the private right of action uniquely state law—and, indeed, state *court*—focused. In creating the TCPA private right of action, Congress explicitly authorized only actions brought “in an appropriate court of th[e] State,” and only “if otherwise permitted by the laws or rules of court of a State.” The fact that 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” underscores that Congress intended state courts to play an indispensable role in shaping the right. It also is an express sign that Congress did not envision federal courts entertaining such claims under § 1331.

Federal courts lack lawmaking authority and thus could not substantively alter the contours of TCPA claims. And except as called for in *diversity* cases for *procedural* rules (see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)), federal courts generally are not accustomed to applying state “rules of court.” Indeed, even in diversity cases, this Court has struggled in determining when state rules governing litigation may trump federal rules. See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444-47 (2010). At a minimum, even if federal courts were generally required to follow state “rules of court” in adjudicating private TCPA claims under § 1331, petitioner’s position would almost certainly create problems in deciding *which* rules of court to follow. Cf. *Holster v. Gatco, Inc.*, 131 S. Ct. 1575, 1576 (2010) (Scalia, J., concurring). And adopting petitioner’s position (see Pet. Br. 44-48) that substantive state

limits on TCPA claims—whether from state laws or rules of court—are not binding on federal courts adjudicating such claims under § 1331 would eliminate an express limit on the private right of action.

2. “[O]ne of the most basic interpretive canons” is “that ‘[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...’” *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)); see *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a ‘cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). The only way to give meaningful effect to the limitations expressed in § 227(b)(3) is to read the statute as authorizing private TCPA actions only in state court, as “permitted by” state law. It is “black letter law” that state courts generally have concurrent jurisdiction over federal causes of action. *Tafflin v. Levitt*, 493 U.S. 455, 461 (1990) (citation omitted). Congress was surely aware of that background principle when it enacted the TCPA. So there would have been no reason for Congress to go out of its way to frame the TCPA private right of action in terms of state law—and state courts—unless Congress meant the references to state law and state courts to limit the private right of action.

Petitioner hypothesizes two reasons why Congress would have included this language, even though it purportedly did not intend to limit private TCPA claims to state court. Both are far-fetched. First, petitioner suggests that Congress wanted to “put[] to

rest any suggestion that *federal* jurisdiction [over such claims] might be exclusive.” Pet. Br. 37. But there is no indication whatsoever that Congress was worried about this. Nor was there any reason to worry given the black-letter rule that state courts have concurrent jurisdiction over federal claims. Second, petitioner suggests that Congress may have wanted to address the “nondiscrimination principle of *Testa v. Katt* [330 U.S. 386 (1947),]” though he refuses to say how, or even if, Congress actually altered *Testa’s* rule by using this language. See Pet. Br. 38. Again, there is no evidence that Congress had this particular concern in mind.

In fact, Congress’s focus on state law and state courts in § 227(b)(3) is perfectly consistent with its undeniable objective in enacting the TCPA. Because of the perceived enforcement loophole with respect to *interstate* transmissions, “Congress ... sought to put the TCPA on the same footing as state law, essentially supplementing state law where there were perceived jurisdictional gaps.” *Gottlieb*, 436 F.3d at 342; *Bonime*, 547 F.3d at 500 (recognizing “Congress’s innovation in creating a federal claim which behaved like state law”). As the Texas Supreme Court has observed, “the reason Congress created the TCPA private right of action at all was ‘out of solicitude for states which were thwarted in their attempts to stop unwanted [interstate] telemarketing.’” *The Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.3d 707, 716 (Tex. 2006) (quoting *International Sci. & Tech. Inst.*, 106 F.3d at 1154). Confining private TCPA actions to state court—as permitted by state law and rules of court—fits hand in glove with that objective.

The Court has two options before it. The first—interpreting § 227(b)(3) as authorizing private TCPA

actions only in state court—gives effect to the distinctive state-law and state-court focused language that Congress used and fits naturally with its express objective of closing a perceived interstitial gap at the state level (while leaving States free to decide what TCPA claims to allow). The second—interpreting § 227(b)(3) as permitting private TCPA actions in federal court under § 1331 *or* state court—renders the unique state-focused language that Congress used for all practical purposes gratuitous and is based on the hypothesis that Congress was trying to achieve objectives that were either entirely unnecessary (because of the black-letter rule that state courts have concurrent jurisdiction over federal claims) or unstated and implausible. This Court should adopt the interpretation that gives effect to the entire text of the law that Congress enacted and assumes that Congress acted to address the genuine problem it identified in its own findings (*see* Pet. Br. 23a-24a).

3. *Tafflin*, the case on which petitioner principally relies (*see* Pet. Br. 10-11, 27-30, 42, 45), does not compel a different conclusion. It is distinguishable in at least two fundamental respects. First, the text of the RICO statute at issue in *Tafflin* differs in critical respects from the text of § 227(b)(3) of the TCPA. The RICO statute provides that “[a]ny person injured in his business or property by reason of a violation of [RICO] *may sue therefor* in any appropriate United States district court ...” 18 U.S.C. § 1964(c) (emphasis added). In other words, *Tafflin* involved the effect of Congress’s essentially unadorned use of “may”—and not the “may, *if*” formulation that Congress used in the TCPA provision at issue here, by which Congress unmistakably took pains to tie the private right to state

law and state courts. Petitioner argues (at 29) that the TCPA has “exactly the same features” as the statute in *Tafflin*, but it has *none* of the express limits found in the TCPA’s extraordinary “may, if” clause.

Second, the jurisdictional circumstances of *Tafflin* are the “reverse” of those here. *International Sci. & Tech. Inst.*, 106 F.3d at 1152. The question in *Tafflin* was whether Congress’s reference to claims in federal court was intended to preclude claims in *state* court, whereas the question here is whether Congress’s reference to claims in state court was intended to preclude claims in *federal* court. The Court’s decision in *Tafflin* is grounded on the “deeply rooted presumption in favor of concurrent state court jurisdiction” over federal claims. 493 U.S. at 459; *see id.* at 470 (Scalia, J., joined by Kennedy, J., concurring) (“It ... takes an affirmative act of power under the Supremacy Clause to oust the States of jurisdiction” over federal claims); *see Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981). That constitutional principle was a focus of the briefing and argument in *Tafflin*. But it does not apply when the question is whether Congress intended to allow claims in *federal* court by establishing a carefully-circumscribed private right of action in *state* court. Indeed, the background presumption of constitutional law is *reversed*, because federal courts are courts of *limited* jurisdiction. *See Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).²

² In *Tafflin*, the Court also observed that its “review of the legislative history ... reveal[ed] no evidence that Congress even considered the question of concurrent state court jurisdiction over RICO claims, much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts.” *Tafflin*, 493 U.S. at 461. Here, as

Petitioner’s reliance (at 29) on *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), is similarly misplaced. In *Donnelly* the Court held, for “the reasons set forth in” *Tafflin*, that federal courts do not have exclusive jurisdiction over civil actions brought under Title VII of the Civil Rights Act of 1964. *Id.* at 821. *Donnelly* is distinguishable from this case on the same basic grounds as *Tafflin*. And the same goes for the other cases on which petitioner relies, where Congress’s use of “may” or similar language in jurisdictional provisions was not limited in the unique and unmistakable way that it is in the TCPA. *See, e.g., Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005); *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691 (2003); *Verizon Maryland, Inc. v. Public Serv. Comm’n*, 535 U.S. 635 (2002).³

discussed below, the legislative history strongly supports the conclusion that Congress intended private TCPA claims to be brought only in state court—and, indeed, had a preference for States to funnel these suits to small claims court. That history is inconsistent with the notion that Congress intended to open the federal courts under § 1331 to private claims under the TCPA.

³ *Grable & Sons* considered whether a state-law quiet title action against a federal tax sale purchaser gave rise to federal-question jurisdiction under § 1331. The Court held that a state law claim may, in some circumstances, be sufficient to trigger federal-question jurisdiction when it implicates a federal issue, but “only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts.” 545 U.S. at 313-14. *Grable & Sons* did not involve the interpretation of *any* federal cause of action, much less one that affirmatively assigns jurisdiction to state courts. *Verizon Maryland* concerned a provision of the Telecommunications Act providing that “any party aggrieved by” certain state agency decisions “may bring an action in an appropriate *Federal district court.*” 47 U.S.C. § 252(e)(6) (emphasis added). Because

This Court has previously read the use of “may,” in context, to have an exclusionary, or mandatory, connotation (*e.g.*, “may only” or “may, if”). *See, e.g., Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555, 560 (1963) (rejecting argument that use of “may” was merely permissive with respect to provision of the National Banking Act of 1864, providing that “suits ... may be had [against national banks] ... in any state, county, or municipal court in the country or city in which said association is located, having jurisdiction in similar cases”) (citation omitted); *see also Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (“[T]he mere use of ‘may’ is not necessarily conclusive of congressional intent to provide for a permissive or discretionary authority.”); *United States v. Rodgers*, 461 U.S. 677, 706 (1983) (“The word ‘may,’ when used in a statute usually

§ 252(e)(6) explicitly provided for a cause of action “in an appropriate Federal district court,” there was no question that federal courts had jurisdiction if there was a right to relief at all. The Court concluded that nothing in § 252(e)(6) could be read to prescribe (as the TCPA does) a “distinctive review mechanism” that displaces the general federal-question statute. 535 U.S. at 644. Finally, *Breuer* involved the Fair Labor Standards Act of 1938, which provides that a private suit “may be maintained ... in any Federal or State court of competent jurisdiction.” 538 U.S. at 693 (quoting 52 Stat. 1069, as amended, 29 U.S.C. § 216(b)). The issue was whether Congress prohibited *removal* to federal court under 28 U.S.C. § 1441(a), by specifying that suits “may be maintained.” Because federal-question jurisdiction indisputably covers such claims, and because the Court had long interpreted § 1441(a) to authorize removal in any case that could have been brought in federal court under § 1331, this Court reasoned that Congress’s use of the word “maintain,” without more, did not evince congressional intent to prohibit removal. *See id.* at 694-700.

implies some degree of discretion,” but “[t]his common-sense principle of statutory construction ... can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute”). Here, the distinctive language that Congress used in § 227(b)(3) to qualify and limit its use of “may” likewise counsels strongly in favor of reading the private right of action as requiring any claims to be brought in state courts—and “in those courts alone.” *Langdeau*, 371 U.S. at 560.

**B. Other Tools Of Statutory Interpretation
Bolster The Conclusion That Congress
Intended Private TCPA Claims To Be
Brought Only In State Court**

The text of the TCPA private right of action itself compels the conclusion that Congress did not intend to allow for general federal-question jurisdiction over TCPA claims. But several other tools of statutory construction bolster that conclusion.

1. The “broader context of the statute as a whole,” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997), confirms that Congress did not intend to confer federal jurisdiction over private actions under the TCPA. Congress drew clear jurisdictional lines in the TCPA depending on the party bringing suit. In contrast to the private right of action, Congress gave the federal courts exclusive jurisdiction when the action was brought by a state attorney general. 47 U.S.C. § 227(f)(1), (2). The juxtaposition between these parallel remedial and enforcement schemes—one that refers only to actions in state court (§ 227(b)(3)), and another that refers only to actions in federal court (§ 227(f)(1), (2))—makes clear that Congress had different jurisdictional regimes in mind.

That conclusion is reinforced by the fact that elsewhere in the Communications Act where Congress intended to authorize concurrent federal and state jurisdiction, it did so explicitly. Indeed, in every other private right of action in Title 47, Congress used language that obviously encompasses both federal and state courts. *See* 47 U.S.C. § 214(c) (“any court of competent jurisdiction”); *id.* § 223(b)(5)(B)(i) (“a court”); *id.* § 415(f) (“in the district court or the State court”); *id.* § 503(a) (“trial court”); *id.* § 504(c) (“a court of competent jurisdiction”); *id.* § 553(c)(1) (“in a United States district court or in any other court of competent jurisdiction”); *id.* § 555(a) (“district court of the United States” or any “State court of general jurisdiction having jurisdiction over the parties”); *id.* § 605(e)(3)(A) (“United States district court or in any other court of competent jurisdiction”); *id.* § 1007(a) (“[a] court”). Especially against this backdrop, the state court-focused language that Congress used in § 227(b) is a powerful indication that Congress had a different—and more limited—jurisdictional scheme in mind.

Moreover, elsewhere in the TCPA itself, where Congress expressly provided for federal court jurisdiction, Congress saw fit to address venue, service of process, and possible conflicts with FCC enforcement efforts. *See id.* § 227(f)(2) (authorizing state attorneys general to bring an action in federal court); *id.* § 227(f)(4), (7) (venue, service of process, conflicts). Section 227(b), by contrast, says nothing about those issues and instead refers only to the “rules of court of a State.” In context, then, Congress’s silence as to the rules governing the exercise of any federal court jurisdiction for § 227(b) speaks volumes. *Cf. Northwest Airlines, Inc. v. Transport Workers*

Union of Am., 451 U.S. 77, 97 (1981) (“The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.”).

2. The legislative history likewise strongly confirms that Congress’s explicit focus on state courts was intentional. As discussed above, the law’s sponsor explained that the law contains a “private right-of-action provision” that “would allow consumers to bring an action in State court against any entity that violates the bill.” 137 Cong. Rec. at 30,821 (statement of Sen. Hollings). Senator Hollings went on to explain that “[s]mall claims court or a similar court would allow the consumer to appear before the court without an attorney,” and that “it would defeat the purposes of the bill if the attorneys’ costs to consumers of bringing an action were greater than the potential damages.” *Id.* at 30,821-22.

Petitioner argues (at 41) that Senator Hollings’s statement “in no way suggests that federal-court actions are precluded.” But the reference to small claims court—which is consistent with the relatively small amounts of damages available in TCPA actions (\$500 per violation)—underscores that Congress believed that private actions were best suited for state rather than federal court. The ordinary cost of federal court litigation almost certainly exceeds that of state small claims court—not to mention the cost of securing an attorney (which presumably would not be necessary for small claims court). *See* 137 Cong. Rec. at 30,821.

Moreover, if plaintiffs are free to bring TCPA claims in federal court under § 1331, then defendants sued in state court would be equally free to remove

those cases to federal court under 28 U.S.C. § 1441. *See Breuer*, 538 U.S. at 693-94. It is exceedingly unlikely that a Congress that expressed a preference for making it as easy—and affordable—as possible for individual consumers to file private TCPA claims in state small claims court would have intended for defendants to be able to remove such cases and force consumers into a potentially inconvenient and, in all likelihood, more expensive federal forum. Indeed, given the small stakes in most cases, removal could be used as a mechanism simply to defeat such claims, given that consumers might conclude that fighting it out in federal court is not worth the candle.

In addition, the law’s sponsor contrasted the provision of the TCPA “permit[ting] the State attorneys general to enforce the provisions of the bill *in Federal court*,” emphasizing the different jurisdictional schemes Congress intended depending on which party brought the action. 137 Cong. Rec. at 30,822 (emphasis added). The different approach for enforcement actions brought by state attorneys general is consistent with the fact that bearing the cost of such litigation presumably would not be as significant a factor for States as it would be for private individuals suing on \$500-per-violation claims.

The statutory findings accompanying the TCPA also make clear that Congress understood the potential influx of private claims it might unleash. Congress found that “[m]ore than 300,000 solicitors call more than 18,000,000 Americans every day.” Pet. Br. 23a (reproducing 47 U.S.C. § 227 note, § 2(3)). “Congress understandably avoided opening federal courts to the millions of potential private TCPA claims by authorizing private actions only in state courts,

presumably in small claims courts.” *International Sci. & Tech. Inst.*, 106 F.3d at 1157; see *The Chair King, Inc.*, 184 S.W. 3d at 715 (“Understandably, Congress opted to close federal courts to the millions of potential private TCPA claims since the overwhelming locus of regulation was centered in the states.”). At the same time, Congress made certain that the States would be able to regulate the flow of such claims in their own courts pursuant to “the laws or rules of court of [the] State[s].” 47 U.S.C. § 227(b)(3). Given that Congress was unquestionably aware of the staggering number of communications potentially implicated by the TCPA, it would defy common sense to conclude that Congress intended to open the federal courts to “the millions of private actions that could be filed if only a small portion of each year’s 6.57 billion telemarketing transmissions were illegal under the TCPA,” *International Sci. & Tech. Inst.*, 106 F.3d at 1157—and yet said nothing about the filing of such claims in federal court.⁴

3. Reading the TCPA private right of action as limiting claims to state court—to the extent permitted

⁴ Respondent has been unable to secure statistics on the number of private TCPA claims filed each year. But petitioner himself has stated that the “high volume of calls translates into a high volume of litigation over telemarketing abuses,” and that the “question presented arises with *staggering* frequency in cases across the country.” Pet. 9 (emphasis added). Moreover, the key point is what Congress reasonably believed, or feared, when it enacted the TCPA. And in view of its findings concerning the sheer magnitude of telemarketing calls each day, it was reasonable for Congress to assume that authorizing private claims based on the proscribed calls and facsimiles would at least create the potential for a large if not huge number of claims. It dealt with that concern by limiting such claims to state courts, and giving the States control over the scope and availability of claims.

by state law—is also consistent with the contemporaneous understanding of the agency charged with administering the Communications Act and with rulemaking authority under the TCPA as well. *See* 47 U.S.C. § 227(b)(2). In a Consumer Alert published shortly after the TCPA became law, the FCC explained that consumers who receive telephone calls or facsimiles in apparent violation of the TCPA or FCC rules “may take the following actions”:

- * contact the solicitor or business directly ...
- * *file suit in state court (if your state permits such actions) ...*
- * request FCC enforcement action on suspected violations of FCC rules.

Telephone Solicitations, Autodialed and Artificial or Prerecorded Voice Message Telephone Calls, and the Use of Facsimile Machines, 8 FCC Rcd. at 481 (emphasis added). The Commission also noted that “*states can initiate a civil action in federal district court against any person or entity that engages in a pattern or practice of violations of the TCPA or the FCC rules.*” *Id.* (emphasis added).⁵

The contemporaneous views of the FCC on the TCPA’s remedial and enforcement scheme—from which the agency, which declined to participate as an amicus in this case, has never retreated—support the conclusion that Congress did not intend for consumers

⁵ The Federal Trade Commission (FTC) appears to share the FCC’s views. *See* Proposed Rules, 67 Fed. Reg. 4492, 4518 & n.255 (Jan. 30, 2002) (explaining that “[t]he TCPA permits a person ... to bring an action in an appropriate State court” and noting that “consumers find that using the TCPA’s private right of action is a very complex and time-consuming process”).

to be able to bring private TCPA claims in federal court under § 1331. *See, e.g., Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 466 (1986) (“The agencies’ contemporaneous reading of the statute lends strong support to our interpretation.”); *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 438-39 (1986) (considering agency’s “contemporaneous understanding” of statute it administered).

4. Congress’s subsequent actions also cut against petitioner’s reading of the TCPA. Congress left the TCPA private right of action intact during the two decades after its enactment as the first six courts of appeals that addressed the question presented all concluded that there is no federal-question jurisdiction over private TCPA claims. That congressional acquiescence is significant, because Congress—which is presumed to know the law in the area in which it legislates—enacted numerous amendments to the TCPA from 1992-2010, yet did not alter the language relevant here.⁶ Congress should be presumed to have ratified the prevailing and, until recently, uniform view of the courts of appeals. *See, e.g., General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 593-94 (2004); *Evans v. United States*, 504 U.S. 255, 268-69 (1992); *cf. Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1616 (2010) (Congress presumed to have adopted judicial interpretation of three courts of appeals that had interpreted the Truth in Lending

⁶ *See* Pub. L. No. 111-331, § 2, 124 Stat. 3572, 3572-75 (2010); Pub. L. No. 109-21, §§ 2, 3, 119 Stat. 359, 359-63 (2005); Pub. L. No. 108-187, § 12, 117 Stat. 2699, 2717 (2003); Pub. L. No. 103-414, § 303(a)(11)-(12), 108 Stat. 4279, 4294 (1994); Pub. L. No. 102-556, § 402, 106 Stat. 4181, 4194-95 (1992).

Act's "bona fide error" defense when it used identical language in a later-enacted statute).

C. Allowing Plaintiffs To Bypass State Court Would Transform The Private Right Of Action That Congress Created

As this Court has observed, "[i]t is also an 'elemental canon' of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 532 (1989). The "private remedy" that Congress thought appropriate for TCPA violations is embodied in the "private right of action" that Congress expressed. *Cf. Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1347 (2011) (availability of "any private right of action" turns on Congress's intent to provide a "private remedy" (citation omitted)). "[I]n the absence of strong indicia of contrary congressional intent," this Court will "conclude that Congress provided precisely the remedies it considered appropriate." *Karahalios*, 489 U.S. at 533 (alteration added). The private remedy that Congress deemed appropriate was authorizing private claims in state court, as permitted by state law.

Petitioner's reading would expand the private right of action well beyond the one that Congress expressed in the TCPA. As this Court has admonished, the "mechanism that Congress cho[oses] to provide for enforcing" a federal statute is an important component of the right it has created. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 289 (2002). The "mechanism" that Congress expressed for enforcing the TCPA private right of action is state court litigation, as "permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3).

As discussed, Congress’s decision to select that enforcement mechanism is perfectly consistent with its objectives in enacting the TCPA.

Adopting petitioner’s position would expand the private right of action that Congress created in at least two fundamental respects. First, it would allow plaintiffs to bypass state court altogether and file suit in federal court under § 1331—or, conversely, allow defendants to *remove* actions to federal court, even if the plaintiff preferred to litigate in state court. And second, at least as interpreted by petitioner (*see* Pet. Br. 44-48), it would divest States of the authority that Congress granted them to determine whether and to what extent private TCPA claims should be “permitted by the laws or rules of court of a State.”

Adopting that interpretation would be inconsistent with this Court’s precedents construing private rights of action narrowly. *See, e.g., Gonzaga Univ.*, 536 U.S. at 290-91; *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005) (“[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” (alteration added)) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001)); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008) (“[T]he jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation”) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 746-747 (1979) (Powell, J., dissenting)); *see also Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173-74 (1994).

Ordinarily, the existence (or not) of a private right to relief goes to the merits, and does not implicate the power of the federal court to entertain the suit. *See,*

e.g., *Verizon Maryland*, 535 U.S. at 643-44. The private right of action at issue in this case, however, establishes a distinctive enforcement mechanism that is uniquely tied to state law and state courts. Holding that plaintiffs may bypass state court and sue in federal court under § 1331 would transform the private right that Congress created and, in that sense, the merits and jurisdictional inquiries collapse. In any event, if this Court views the availability (or not) of a private right of action to enforce the TCPA in *federal* court as going to the merits, then it should affirm on the alternative ground that there is no basis for inferring a private right of action to enforce the TCPA in federal court, much less a private right (as petitioner conceives it, Pet. Br. 44-48) to secure damages under the TCPA in federal court *regardless* of whether such a claim is allowed under state law. *See United States v. Tinklenberg*, 131 S. Ct. 2007, 2017 (2011) (the Court may consider, and affirm on, alternative grounds).

D. Petitioner Has Provided No Reason To Disregard The Express Intent, Purpose, And Design Of The TCPA’s Distinctive Private Right Of Action

The other considerations raised by petitioner provide no reason for holding that private TCPA claims are subject to federal-question jurisdiction.

1. Petitioner argues that, because § 1331 represents a general grant of jurisdiction, Congress must satisfy a clear-statement rule to confine the adjudication of a federal claim to state court. *See* Pet. Br. 25-26; *see id.* at 39 (“clear indication of congressional intent” required). The text of the TCPA private right of action—as well as the purpose and design of that provision and other indicia of

congressional intent discussed above—are sufficient to establish that private TCPA claims are not subject to federal-question jurisdiction, even under a heightened burden. As this Court recently observed, “Congress, of course, need not use magic words in order to speak clearly on [jurisdictional issues].” *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). And Congress has spoken sufficiently clearly in the TCPA on the question presented. But petitioner’s insistence on a clear-statement rule—and attempt to raise the bar on what is required to show that Congress intended for private TCPA claims to be adjudicated only in state court—should be rejected.

Petitioner’s argument depends largely on his reading of *Tafflin* and *Donnelly*. See Pet. Br. 27-31. As discussed above, however, those cases are distinguishable in fundamental respects, including insofar as the background constitutional presumption of state-court jurisdiction is not implicated here, and the statutes at issue in those cases lacked anything resembling the kind of distinctive language that qualifies Congress’s use of “may” in the TCPA’s private-right-of-action provision. See *supra* at 12-20.

More fundamentally, this Court has not imposed the kind of clear-statement rule (or presumption in favor of federal-question jurisdiction) that petitioner asks the Court to apply in this case. In *Verizon Maryland*, for example, in determining whether a statutory provision “eliminate[d] jurisdiction under § 1331,” the Court did not frame the analysis around whether Congress had satisfied a clear-statement rule. 535 U.S. at 643-44. Rather, it engaged in a more conventional inquiry into congressional intent, considering such factors as whether the provision at issue “establish[ed] a

distinctive mechanism” for review or “distinctly limit[ed] the substantive relief available.” *Id.* at 644. The Court’s decision also suggests that it is appropriate to consider not simply the text of the provision at issue, but what it “fairly implies.” *Id.* While the Court concluded that the provision at issue in *Verizon Maryland* “leaves the jurisdictional grant of § 1331 untouched,” *id.*, the interpretive inquiry engaged in by the Court is incompatible with the clear-statement rule that petitioner advances here.

Petitioner’s reliance on the rule that “repeals by implication are not favored” is likewise misplaced. Pet. Br. 26. That maxim is generally invoked when the Court is asked to find that an *earlier* enacted “specific statute has been repealed by a [later enacted] more general one.” *United States v. Continental Tuna Corp.*, 425 U.S. 164, 169 (1976) (citing cases). This case involves the opposite situation where the question is whether the Court should give effect to a *later* enacted specific statute. In that situation (*i.e.*, the one here), the general rule is that the later-enacted, more specific statute trumps the earlier and more general statute. *See, e.g., EC Term of Years Trust v. United States*, 550 U.S. 429, 433 (2007) (“In a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies.’ ... Resisting the force of the better fitted statute requires a good countervailing reason” (quoting *Brown v. GSA*, 425 U.S. 820, 834 (1976)); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (“[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended.”) (quoting *United States v. Estate of Romani*, 523 U.S.

517, 530-31 (1998)); *Strawser v. Atkins*, 290 F.3d 720, 733 (4th Cir. 2002) (where a general statute is followed by enactment of a specific one, the specific statute usually operates as an exception to the general rule).⁷

2. Although the only question presented in this case is whether there is federal-question jurisdiction over private TCPA claims, *see* Pet. i, petitioner also argues that the fact that federal courts of appeals have held that there is *diversity* jurisdiction over private

⁷ Because the text of the TCPA and other considerations discussed above clearly evince Congress's intent that private TCPA claims must be brought only in state court—as permitted by state law—the Court may assume, *arguendo*, that private TCPA claims “arise under” federal law for purposes of § 1331. Nevertheless, the private right that Congress created is extraordinary insofar as Congress made the contours and, indeed, availability of the private right dependent on *state law*. *See, e.g., The Chair King, Inc.*, 184 S.W.3d at 717-18 (explaining that Congress chose to allow the States “to determine whether to entertain the private TCPA claims that Congress decided to make exclusively actionable in state court” and holding that Texas had not authorized private claims under the TCPA during the time period at issue); *Bonime*, 547 F.3d at 501 (“Congress has clearly indicated that the courts should treat [the TCPA] as though it were [state law].”). In this regard, the unique private right of action created by the TCPA is analogous to the statutory right at issue in *Shoshone Mining*, which this Court held did *not* arise under federal law (even though it was created by federal law). *See* Pet. Br. 20 (“[T]he statutory right of action at issue in *Shoshone Mining* was an odd one because it provided that state, territory, and local statutory and customary law would in many instances provide the rule of decision.”); *see also Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912) (collecting cases). If this Court concludes that private TCPA claims do not satisfy § 1331’s “arising under” requirement to begin with, then federal jurisdiction is unquestionably lacking. *See* Pet. 12 (there is “no basis for jurisdiction other than federal-question jurisdiction”).

TCPA claims under 28 U.S.C. § 1332 means that federal-question jurisdiction must exist too. Pet. Br. 34, 47. Not so. As petitioner himself recognizes (at 35), “Congress can and occasionally has prohibited the exercise of federal-question jurisdiction while allowing diversity jurisdiction.” And, as courts of appeals have held, recognizing diversity jurisdiction over private TCPA claims is not inherently incompatible with holding that federal-question jurisdiction does *not* exist. *See, e.g., Gottlieb*, 436 F.3d at 338-343.

Given that Congress “sought to put the TCPA on the same footing as state law” in enacting the unique private right of action at issue, it is more natural to assume that Congress intended private TCPA claims to be treated the same as other state law claims for purposes of diversity jurisdiction. *Id.* at 342 (“Insofar as Congress sought, via the TCPA, to enact the functional equivalent of a state law that was beyond the jurisdiction of a state to enact, it would be odd to conclude that Congress intended that statute to be treated differently, for purposes of diversity jurisdiction, from any other state statute.”).

In addition, diversity’s \$75,000 amount-in-controversy requirement (which federal-question jurisdiction lacks) at least partially addresses the concern that federal courts could be inundated with suits for \$500 TCPA claims given the enormous volume of telecommunications presenting potential claims. The costs of federal court litigation (including the costs of securing counsel) are also more proportionate to a claim worth \$75,000 or more, so allowing for federal diversity jurisdiction over such claims would not necessarily raise the concerns that led the sponsor of the law to urge States to channel such claims to state

small claims court. *See id.* at 343; *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 74-90 (3d Cir.), *reh'g en banc granted*, 650 F.3d 311 (3d Cir. 2011).

There are countervailing considerations. For example, Judge Garth has argued that the very considerations that compel the conclusion that federal-question jurisdiction is lacking with respect to private TCPA claims compel the conclusion that diversity jurisdiction is lacking too. *See Landsman & Funk PC*, 640 F.3d at 103-07 (dissenting). That argument also has force. But at a minimum, the availability of diversity jurisdiction for TCPA claims is a closer call for the reasons explained by the majority in *Landsman* and the *Gottlieb* court. And the fact that federal courts have recognized diversity jurisdiction over private TCPA claims provides no basis for this Court to recognize federal-question jurisdiction over such claims—a step that would potentially sweep *all* private TCPA claims into federal court, absence of diversity and amount-in-controversy notwithstanding.

Petitioner complains that the availability of diversity jurisdiction would impermissibly “affect whether a plaintiff has a claim as a matter of substantive law.” Pet. Br. 47 (citing *Shady Grove*). That is incorrect. The *availability* of the TCPA private right of action to a prospective plaintiff would not turn on the “accident” of diversity jurisdiction. Assuming § 1332, and not § 1331, is available as a source of federal jurisdiction over private TCPA claims, a plaintiff in State X, which does not “otherwise permit[]” such claims, will not have a cause of action in state *or* federal court. *See* Pet. Br. 46; *see also Holster v. Gatco, Inc.*, 618 F.3d 214, 218 (2d Cir. 2010) (“Because [the TCPA] uses state law to define

the federal cause of action, when the state refuses to recognize that cause of action, ‘there remains [nothing] to which any grant of federal court jurisdiction could attach.’”) (quoting *Bonime*, 547 F.3d at 503 (Calabresi, J., concurring)). But a plaintiff in State Y, which permits such actions, would have the choice of filing in an appropriate state court or—assuming federal diversity jurisdiction is available and its requirements are met—federal court. That is, the cause of action would be “the functional equivalent of a state law.” *Gottlieb*, 436 F.3d at 342.

The situation here is distinct from that in *Shady Grove*. *Shady Grove* turned on the application of “*Erie* principles” to the conventional interplay between the federal rules and a State’s own rules in the diversity context. The TCPA is unique insofar as it is a federal statute that explicitly gives the States the authority to determine whether to permit private TCPA claims according to their own “laws or rules of court.” 47 U.S.C. § 277(b)(3). Giving effect to Congress’s express intent to allow private TCPA actions only to the extent “permitted by” state law does not create any “conundrum[.]” Pet. Br. 47. Rather, the “conundrum” arises if plaintiffs may circumvent that express limitation—and the laws or rules of court of a State—by simply bypassing state court via § 1331.

3. Finally, petitioner errs in suggesting that recognizing that Congress did not intend for federal-question jurisdiction over private TCPA claims “would impair the federal interests served by the TCPA.” Pet. Br. 44 (heading). To begin with, petitioner is wrong to the extent he implies (at 43-44) that respondent does not believe that Congress served an important federal interest by closing, through the TCPA, the interstate-

enforcement loophole that Congress had identified. That objective was unquestionably important—but so too is the *manner* in which Congress chose to address that problem. Instead of directing “The Feds” to take over, Congress elected to provide the States with the interstitial authority necessary to help themselves, as *they* saw fit. Congress authorized private TCPA claims concerning interstate telemarketing practices, but only to the extent that the States themselves wished to permit such claims in their own courts.

If Congress believed that States were not acting responsibly in determining when private TCPA claims should be allowed, it could expand the remedial scheme enacted by the TCPA or take a different approach. But, although the States have taken different approaches with respect to TCPA claims, there is no evidence that any State has acted irresponsibly in determining when and how TCPA claims should be permitted.⁸ Petitioner suggests (at 45) that the Court must find that Congress had an “interest in *disabling* federal courts from uniformly interpreting federal law.” But Congress could hardly have been more explicit that it wished the scope and availability of the TCPA private right of action to be decided *by the*

⁸ One area in which States have taken divergent approaches concerns whether or to what extent they have allowed class actions. See *Local Baking Prods., Inc. v. Kosher Bagel Munch, Inc.*, 23 A.3d 469, 474-76 (N.J. Super. Ct. App. Div. 2011) (collecting different approaches). This divergence is perfectly consistent with the unique private right of action Congress created—which allows, if not invites, States to experiment in this fashion. See also *Holster*, 618 F.3d at 218 (holding that “[t]he ability to define when a class cause of action lies and when it does not is part of th[e] control” that Congress gave to the States in “solving the problems that the TCPA addresses”).

States. It explicitly framed the private right in terms so that it was dependent upon state law, and thus “behaves like” state law. *Bonime*, 547 F.3d at 500.

“Considering the potential burden on state court resources a flood of private TCPA claims might present, it is logical that Congress would choose to allow the states themselves to have some voice in the matter.” *The Chair King, Inc.*, 184 S.W.3d at 715; *see id.* at 716 (“There is strong evidence that Congress wanted to assist state regulation in reaching interstate communications if a state so desired, not to create an independent regulatory framework for a potential flood of individual state-court lawsuits.”). It is also logical to assume that Congress did not wish to burden the *federal courts* with such claims—especially under the federal-question statute, which has no amount-in-controversy requirement, and thus would open the federal courts to \$500 damages claims that Congress believed were most appropriate for *small claims court*.

Petitioner maintains that its position does not “denigrate the important objective served by Congress’s authorization for state courts to entertain TCPA actions.” Pet. Br. 47. But under petitioner’s construction of the TCPA, Congress’s painstaking references to state law and state courts added nothing, because it is well-settled that the state courts would have had concurrent jurisdiction over TCPA claims if Congress had said nothing on that matter. So it is difficult to see what “important objective” Congress accomplished by using that language, if it is given the meaningless construction advanced by petitioner.

In the end, petitioner seeks a ruling from this Court that the federal courts are open to entertain private TCPA claims under § 1331—*regardless* of whether, or

in what circumstances, such claims are allowed by state law. *See* Pet. Br. 44-48. Such a regime could scarcely be more removed from the one that Congress expressly intended when it created a private right of action to allow plaintiffs to bring TCPA claims—“*if otherwise permitted by the laws or rules of court of a State*”—“in an appropriate court of *that State*.”

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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