

No. 10-1195

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IN THE  
**Supreme Court of the United States**

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MARCUS D. MIMS,  
*Petitioner,*

v.

ARROW FINANCIAL SERVICES,  
*Respondent.*

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**On Writ of Certiorari to the  
United States Court of Appeals  
for the Eleventh Circuit**

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**BRIEF FOR ACA INTERNATIONAL  
AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENT**

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DAVID M. SCHULTZ  
JOEL D. BERTOCCHI  
PETER E. PEDERSON  
*Counsel of Record*  
HINSHAW & CULBERTSON LLP  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601-1081  
(312) 704-3000  
ppederson@hinshawlaw.com  
*Attorneys for Amicus Curiae,  
ACA International*

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	4
ARGUMENT.....	5
I. Small Claims Courts Offer Parties in Private TCPA Litigation Significant Efficiencies over the Federal District Courts.....	7
II. Private TCPA Actions Filed in Federal Court Have Mushroomed in Recent Years.....	12
CONCLUSION .....	13

## TABLE OF AUTHORITIES

CASES	Page
<i>American Well Works Co. v. Layne &amp; Bowler Co.</i> , 241 U.S. 257 (1916).....	5
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	9
<i>Bridge v. Ocwen Fed. Bank</i> , 669 F. Supp. 2d 853 (N.D. Ohio 2009).....	11
<i>Fillichio v. M.R.S Associates, Inc.</i> , No. 09–612629–CIV, WL 4261442 (S.D. Fla. Oct. 19, 2010).....	11
<i>First American Financial Corp. v. Edwards</i> , No. 10-708 (2011).....	3
<i>Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.</i> , 156 F.3d 432 (2d Cir. 1998).....	6
<i>Grothen v. Marshall Field &amp; Co.</i> , 625 N.E.2d 343 (Ill. App. 1993).....	11
<i>Holtzman v. Turza</i> , No. 08 C 2014, WL 3076258 (N.D. Ill. Oct. 29, 2010) .....	11
<i>Int’l Science &amp; Tech. Inst., Inc. v. Inacom Comm., Inc.</i> , 106 F.3d 1146 (4th Cir. 1997).....	4, 5-6, 13
<i>Jerman v. Carlisle, McNellie, Rini, Kramer &amp; Ulrich LPA</i> , 559 U.S. ---, 130 S. Ct. 1605 (2010) .....	3
<i>Merrell Dow Pharmaceuticals Inc. v. Thompson</i> , 478 U.S. 804 (1986).....	5
<i>Mitchem v. Illinois Collection Serv., Inc.</i> , 271 F.R.D. 617 (N.D. Ill. 2011) .....	11

## TABLE OF AUTHORITIES—Continued

	Page
<i>Powell v. W. Asset Mgmt., Inc.</i> , 773 F. Supp. 2d 761 (N.D. Ill. 2011) .....	10-11
<i>Sawyer v. Atlas Heating &amp; Sheet Metal Works, Inc.</i> , 642 F.3d 560 (7th Cir. 2011)....	11
<i>Shoshone Mining Co. v. Rutter</i> , 177 U.S. 505 (1900) .....	5
 STATUTES	
19 U.S.C. § 1581 .....	5
28 U.S.C. § 1331 .....	4, 5, 11
28 U.S.C. § 1491 .....	5
28 U.S.C. § 1658 .....	11
47 U.S.C. § 227(a)(1) .....	3
47 U.S.C. § 227(b) .....	5
47 U.S.C. § 227(b)(1)(A)(iii). .....	3, 7, 10
47 U.S.C. § 227(b)(3) .....	10, 11
47 U.S.C. § 227(b)(3)(B) .....	5
Ca. Code Civ. Pro. § 116.220(a)(1) .....	10
Ca. Code Civ. Pro. § 116.221 .....	10
Ca. Code Civ. Pro. § 116.310(b) .....	8
Ca. Code Civ. Pro. § 116.330 .....	7
Ca. Code Civ. Pro. § 116.530 .....	8
Mass. Gen. Laws. c. 218 § 21 .....	10
NYCCCA § 1801 .....	10

## TABLE OF AUTHORITIES—Continued

	Page
NYCCCA § 1803.....	8
NYCCCA § 1804.....	8
NYCCCA § 1809.....	8
Tex. Gov. Code § 28.003(a) .....	10
Tex. Gov. Code § 28.003(e).....	8
Tex. Gov. Code § 28.033(b) .....	8
Tex. Gov. Code § 28.033(e).....	8
Wash. Rev. Code § 12.40.010.....	10
Wash Rev. Code. § 12.40.030.....	7
Wash. Rev. Code § 12.40.080.....	8
Wash. Rev. Code § 12.40.090.....	8
 RULES	
Fed. R. Civ. P. 23.....	9, 11
Fed. R. Civ. P. 23(c)(1)(A) .....	9
Fed. R. Civ. P. 23(c)(3) .....	9
Fed. R. Civ. P. 26(b) .....	9
Fed. R. Civ. P. 26(d) .....	9
Fed. R. Civ. P. 26(f) .....	9
Fed. R. Civ. P. 30.....	9
Fed. R. Civ. P. 31.....	9
Fed. R. Civ. P. 32.....	9
Fed. R. Civ. P. 33.....	9

## TABLE OF AUTHORITIES—Continued

	Page
Fed. R. Civ. P. 34.....	9
Fed. R. Civ. P. 35.....	9
Fed. R. Civ. P. 36.....	9
Fed. R. Civ. P. 37.....	9
Fed. R. Civ. P. 56.....	9
Fla. Sm. Cl. R. 7.010(b).....	10
Fla. Sm. Cl. R. 7.050(a)(2) .....	8
Fla. Sm. Cl. R. 7.090(b).....	7
Fla. Sm. Cl. R. 7.090(c) .....	8
Fla. Sm. Cl. R. 7.090(d).....	7
Ill. Sup. Ct. R. 281.....	10
Ill. Sup. Ct. R. 282(b) .....	8
Ill. Sup. Ct. R. 283.....	7
Ill. Sup. Ct. R. 286(a) .....	7, 8
Ill. Sup. Ct. R. 287(a) .....	8
Ill. Sup. Ct. R. 287(b) .....	8
Mass. Trial Ct. R. III.....	8
Mass. Unif. Sm. Cl. R. 3(b) .....	8
Mass. Unif. Sm. Cl. R. 5.....	8
 OTHER AUTHORITIES	
137 Cong. Rec. S16205-06 (Nov. 7, 1991).....	6

## TABLE OF AUTHORITIES—Continued

	Page
Collections Recon Press Release, <i>FDCPA and Other Consumer Lawsuit Statistics, September 16-30, 2011</i> (available at <a href="http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-september-16-30-2011/">http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-september-16-30-2011/</a> ) (last visited on Oct. 17, 2011).....	12
Collections Recon Press Release, <i>FDCPA and Other Consumer Lawsuit Statistics, December 16-31, 2010</i> (available at <a href="http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-december-16-31-2010/">http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-december-16-31-2010/</a> ) (last visited on Oct. 17, 2011).....	12
Div. of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control, <i>Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008</i> , (available at <a href="http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf">http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf</a> ) (last visited on Oct. 18, 2011)...	12, 13
Div. of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control, <i>Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2010</i> , (available at <a href="http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf">http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf</a> ) (last visited on Oct. 18, 2011)...	12, 13

## TABLE OF AUTHORITIES—Continued

	Page
<i>In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 18 FCC Rcd. 14014 (2003) .....	2-3
National Economic Consulting Group, <i>Value of Third-Party Debt Collection to the U.S. Economy: Survey and Analysis</i> (Price-waterhouseCoopers LLP, June 27, 2006) (available at <a href="http://wacollectors.org/MiscFiles/Press%20Room/price%20cooper%20waterhouse%20study.pdf">http://wacollectors.org/MiscFiles/Press%20Room/price%20cooper%20waterhouse%20study.pdf</a> ) .....	2
Statistical Tables for the Federal Judiciary compiled by the Administrative Office of the United States Courts, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases, (available at <a href="http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C05Dec10.pdf">http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C05Dec10.pdf</a> ) (last visited on Oct. 14, 2011) .....	7-8, 9

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**BRIEF FOR ACA INTERNATIONAL  
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**INTEREST OF *AMICUS CURIAE***

Founded in 1939, ACA International (“ACA”) is a not-for-profit trade association of businesses and professionals that assist creditors in managing and collecting accounts receivables.<sup>1</sup> ACA members include approximately 3,000 third-party collection agencies, 650 credit grantors, 225 asset buyers, 200

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<sup>1</sup> No counsel for a party authored any part of this brief – the filing of which has been consented to by all parties – and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

vendor affiliates, and 850 attorneys. Collectively, ACA members employ nearly 150,000 collector-employees. ACA members range from small businesses that operate within a single state to multinational companies that operate domestically and abroad. About half the collection agencies that are members of ACA have fewer than ten employees. Many ACA members are wholly or partly owned or operated by minorities or women. ACA serves as the voice of its members before legislatures and regulatory authorities. It also provides a variety of services that help its members comply with the laws that regulate debt collection.

ACA members assist businesses of all sizes in collecting payment for goods and services that they provide to their customers. In 2005, the collections industry recovered \$39.3 billion in debt for businesses, and these recoveries saved the average American household \$351 that would have otherwise been spent had businesses been forced to raise prices due to bad debt. *See* National Economic Consulting Group, PricewaterhouseCoopers LLP, *Value of Third-Party Debt Collection to the U.S. Economy: Survey and Analysis* (June 27, 2006) (available at <http://www.collectors.org/MiscFiles/Press%20Room/price%20cooper%20waterhouse%20study.pdf>) (last visited on October 24, 2011).

To collect debts efficiently, ACA members call consumers using predictive dialers,<sup>2</sup> which, according

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<sup>2</sup> A predictive dialer has the capacity to dial specified telephone numbers from a database or list and time the calls so that a live representative is likely to be available when a call is answered. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*,

to the Federal Communications Commission (“FCC”), fall within the definition of “automatic telephone dialing system” under the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(a)(1). The TCPA prohibits using automatic telephone dialing systems to make calls to numbers that are assigned to wireless telephones without the prior express consent of the called party. § 227(b)(1)(A)(iii).

As the popularity of mobile phones has risen in recent years, consumers have filed hundreds of TCPA actions against debt collectors in federal court, typically alleging that the debt collector violated the TCPA by using a predictive dialer to call the consumer on a mobile phone. The increasing number of private TCPA actions filed in federal courts threatens to render the collections process ineffective, which in turn would threaten the viability of the businesses that ACA members serve and raise the prices that consumers pay. Because many ACA members are defendants in private TCPA litigation, they have a keen interest in urging the Court to hold that such litigation should be resolved in state courts, which can dispose of the litigation more efficiently than federal courts, and which are the forums that Congress selected when it enacted the statute.

ACA has participated as *amicus curiae* in other cases before the Court involving issues of interest to its members. See *First American Financial Corp. v. Edwards*, No. 10-708 (2011); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. ---, 130 S. Ct. 1605 (2010).

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18 FCC Rcd. 14014, 14090-91 ¶¶ 130-31 (July 3, 2003) (2003 WL 21517853).

## SUMMARY OF ARGUMENT

This Court should affirm the Eleventh Circuit's conclusion that Congress removed private TCPA actions from the grant of federal-question jurisdiction in 28 U.S.C. § 1331 for the ample reasons developed in Respondent's brief. ACA submits this *amicus* brief in order to bring to the Court's attention the significant efficiencies that would be achieved if, consistent with Congress's intent, private claims under the TCPA were adjudicated in state small claims courts, instead of federal courts.

In small claims courts, TCPA actions can be resolved in as little as a few weeks. The streamlined procedures of small claims courts spare litigants the cost of retaining counsel, conducting discovery, and filing dispositive motions. In federal courts, by contrast, TCPA claims often are not resolved until after years of costly litigation because the Federal Rules of Civil Procedure allow for broad discovery, the possibility of class certification, and the presentation of dispositive motions before trial.

In the TCPA, Congress made clear its intent to avoid "opening federal courts to the millions of potential private TCPA claims" by assigning jurisdiction over these actions to the state courts. *Int'l Science & Tech. Inst., Inc. v. Inacom Comm., Inc.*, 106 F.3d 1146, 1157 (4th Cir. 1997). The TCPA's authorization of state-court jurisdiction over private TCPA claims was intended to prevent the rising number of private TCPA actions that are now being filed in federal courts. The Eleventh Circuit's decision should be affirmed because it is consistent with Congress's intent and it would reduce the costs associated with private litigation under the TCPA.

**ARGUMENT**

Under the federal-question statute, the district courts have jurisdiction “of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “A suit arises under the law that creates the cause of action,” and thus a cause of action that is created by a federal statute generally will come within federal-question jurisdiction. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)). A cause of action created by a federal statute, however, may not be brought in the district courts when the statute that creates the cause of action assigns exclusive jurisdiction to another court. *See, e.g.*, 28 U.S.C. § 1491 (Court of Federal Claims has exclusive jurisdiction over takings claims in excess of \$10,000); 19 U.S.C. § 1581 (Court of International Trade has exclusive jurisdiction over suits under § 516 of the Tariff Act of 1930); *c.f. Shoshone Mining Co. v. Rutter*, 177 U.S. 505, 509 (1900) (suits authorized by federal law to determine mining claims did not arise under federal law for purposes of 28 U.S.C. § 1331 because they did not involve “any question as to the construction or effect of the Constitution or laws of the United States”).

Congress excluded private actions under the TCPA from § 1331’s grant of federal-question jurisdiction by assigning exclusive jurisdiction over those actions to the state courts.<sup>3</sup> *See, e.g., Int’l Science*, 106 F.3d at

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<sup>3</sup> Under the TCPA, a person “may, if otherwise permitted by the laws or rules of court of a State, bring in any appropriate court of that State,” an action for statutory and actual damages for each violation of 47 U.S.C. § 227(b). 47 U.S.C. § 227(b)(3)(B) (emphasis added).

1157; *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998). In particular, Congress envisioned that plaintiffs would bring TCPA claims in the small claims courts established by the states. The bill's sponsor, Senator Ernest Hollings, stated:

it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court....

Small 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 of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 Cong. Rec. S16205-06 (daily ed. Nov. 7, 1991).

As explained below, Congress's decision to grant the state courts exclusive jurisdiction over private TCPA actions was a wise one because the streamlined procedures available in small claims courts allow for faster and less costly resolution of TCPA claims than the Federal Rules of Civil Procedure. The proliferation of private TCPA actions in the federal courts is contrary to Congress's intent as expressed in the statute's text and legislative history.

## **I. Small Claims Courts Offer Parties in Private TCPA Litigation Significant Efficiencies over the Federal District Courts.**

Private actions under the TCPA present a straightforward set of issues. A violation of § 227(b)(1)(A)(iii) occurs if a defendant uses an autodialer to call the plaintiff at a number assigned to a wireless phone and the plaintiff has not consented to receive the call. 47 U.S.C. § 227(b)(1)(A)(iii). Small claims courts can resolve these simple claims more efficiently than the federal district courts because they are governed by streamlined procedural rules.

In many states, the rules applicable to small claims require that cases be called for trial less than four months after the plaintiff files suit. *See, e.g.*, Ca. Code Civ. Pro. § 116.330 (the clerk must set the hearing 20 to 70 days after the plaintiff files the claim); Fla. Sm. Cl. R. 7.090(b), (d) (the court must conduct the trial within 110 days after the plaintiff files the claim); Ill. Sup. Ct. R. 283, 286(a) (the court must try the case on the day set for appearance in the summons, which is to be no more than 40 days after issuance); Revised Code of Washington (“RCW”) § 12.40.030 (the trial is to be held on the first appearance date unless dispute resolution services are offered or local rules provide for a different date). Getting a case ready for trial in the United States district courts takes significantly more time. For cases that the district courts disposed of at trial in 2010, the median interval from the filing of the case to its disposition was 23.0 months.<sup>4</sup>

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<sup>4</sup> *See* Statistical Tables for the Federal Judiciary compiled by the Administrative Office of the United States Courts, Table C-

The rules governing small claims courts often provide that the parties may not take discovery or file non-dispositive motions except upon leave of court. *See, e.g.*, Ca. Code Civ. Pro. § 116.310(b) (exempting small claims from certain discovery procedures); Fla. Sm. Cl. R. 7.090(c) (obviating pretrial motions); Ill. Sup. Ct. R. 287(a)-(b) (barring discovery and non-dispositive motions); Mass. Trial Ct. R., Rule III: Unif. Sm. Cl. R. 5 (barring discovery except upon cause shown); NYCCCA § 1804 (barring discovery without leave of court); Tex. Gov. Code § 28.033(e) (limiting discovery to what is considered reasonable by the presiding judge). Defendants in small claims courts are not required to file an answer to the claim; instead, the substantive allegations are deemed denied. Fla. Sm. Cl. R. 7.090(c); Ill. Sup. Ct. R. 286(a); Mass. Unif. Sm. Cl. R. 3(b); NYCCCA § 1803; Tex. Gov. Code § 28.033(b); RCW § 12.40.090.

In California, attorneys are barred from representing any parties, including corporations, in small claims courts. Ca. Code Civ. Pro. § 116.530. Washington law bars parties in small claims courts from appearing through counsel without the consent of the judicial officer hearing the case. RCW § 12.40.080. Other states grant corporations a dispensation from the general requirement that corporations appear through counsel in litigation. *See* Fla. Sm. Cl. R. 7.050(a)(2); Ill. Sup. Ct. R. 282(b); NYCCCA § 1809; Tex. Gov. Code § 28.003(e).

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5, U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases (available at <http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C05Dec10.pdf>) (last visited on October 14, 2011).

The federal district courts cannot resolve private TCPA litigation as efficiently as the small claims courts because more time is necessary for the parties to comply with the Federal Rules of Civil Procedure. For example, the Federal Rules allow for broad discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b), 30-37. The parties, however, may not commence discovery until they have had a planning conference under Federal Rule 26(f). Fed. R. Civ. P. 26(d). And the district court may stay discovery pending disposition of a defendant’s motion to dismiss the complaint under Federal Rule 12(b). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (“a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed”).

In putative class actions, the district court cannot hold the trial until the parties have taken discovery regarding, and briefed, whether the case meets the requirements for class certification under Rule 23. *See* Fed. R. Civ. P. 23(c)(1)(A); 1966 Federal Rules Advisory Committee Notes on Subdivision (c)(3) of Rule 23. A party may move the court for summary judgment under Federal Rule 56, which can further delay the ultimate resolution of the case. Class certification, broad discovery, and dispositive motions are simply unnecessary to resolve the limited issues presented by private TCPA claims. Given the complexity of the procedures available under the Federal Rules, it is no surprise that litigants needed 23 months to prepare federal cases for trial in 2010. *See* note 4 *supra*.

Moreover, the damages that can be recovered by private TCPA plaintiffs typically are within the jurisdiction of small claims courts. Statutory damages under the TCPA are \$500 per violation, unless the defendant acted willfully or knowingly, in which case damages are increased to \$1,500 per violation. § 227(b)(3). Thus, if a defendant made five phone calls that violated § 227(b)(1)(A)(iii), the plaintiff's damages would be limited to \$2,500 or \$7,500 — a range that is well within the jurisdictional limit of most small claims courts. *See* Ca. Code Civ. Pro. § 116.220(a)(1), § 116.221 (natural persons may sue in small claims courts to recover up to \$7,500 in damages); Fla. Sm. Cl. R. 7.010(b) (plaintiffs may sue in small claims courts to recover up to \$5,000 in damages); Ill. Sup. Ct. R. 281 (small claims include tort and contract claims for damages up to \$10,000); M.G.L. c. 218 § 21 (small claims courts have jurisdiction over actions involving tort and contract claims for up to \$7,000); NYCCCA § 1801 (small claims courts have jurisdiction of any cause of action for an amount not in excess of \$5,000, exclusive of interest and costs); Tex. Gov. Code § 28.003(a) (small claims courts have jurisdiction over claims for damages up to \$10,000); RCW § 12.40.010 (small claims courts have jurisdiction over claims for up to \$5,000).

Because of the mistaken view that private actions under the TCPA fall within federal-question jurisdiction, some district courts have applied federal law to decide TCPA claims even though Congress intended for these claims to be governed by state law. For example, district courts have concluded that, as a matter of federal law, consumers have no duty to mitigate their damages under the TCPA by asking a defendant to stop calling them on a wireless phone. *Powell v. W. Asset Mgmt., Inc.*, 773 F. Supp. 2d 761,

764 (N.D. Ill. 2011); *Holtzman v. Turza*, No. 08 C 2014, 2010 WL 3076258, at \*5 (N.D. Ill. Oct. 29, 2010); *Fillichio v. M.R.S Associates, Inc.*, No. 09–612629–CIV, 2010 WL 4261442, at \*5 (S.D. Fla. Oct. 19, 2010). State law, however, “imposes a duty upon the injured party to exercise reasonable diligence and ordinary care in attempting to minimize the damages after injury has been inflicted.” *Grothen v. Marshall Field & Co.*, 625 N.E.2d 343, 347 (Ill. App. 1993).

In addition, district courts have applied Federal Rule 23 to decide whether to certify private claims under the TCPA as class actions. *See, e.g., Mitchem v. Illinois Collection Serv., Inc.*, 271 F.R.D. 617, 620 (N.D. Ill. 2011). Finally, courts in the Sixth and Seventh Circuits have held that private TCPA claims are subject to the four-year, catch-all statute of limitations in 28 U.S.C. § 1658. *See Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 561 (7th Cir. 2011); *Bridge v. Ocwen Fed. Bank*, 669 F. Supp. 2d 853, 859 (N.D. Ohio 2009). Applying federal law in these cases is at odds with Congress’s decision to authorize private plaintiffs to sue only in state courts and only when “otherwise permitted by the laws or rules of court of a State.” 47 U.S.C. § 227(b)(3).

By assigning jurisdiction over TCPA claims to state courts, Congress sought to ensure that private TCPA litigation would be conducted in accordance with the state law. But because of the erroneous conclusion that TCPA claims fall within § 1331’s grant of jurisdiction, the federal courts are deciding private TCPA claims in accordance with Federal Rules of Civil Procedure, which increases the costs associated with private TCPA litigation and delays the resolution of these claims. The Eleventh Circuit’s decision should be affirmed because it is consistent with Congress’s

intent and it would eliminate the delays and increased costs associated with the litigation of private TCPA claims in the federal courts.

## **II. Private TCPA Actions Filed in Federal Court Have Mushroomed in Recent Years.**

According to WebRecon, LLC, plaintiffs filed in federal court 28 private TCPA actions in 2009, 234 private TCPA actions in 2010, and 310 private TCPA actions in the first nine months of 2011 alone.<sup>5</sup> The number of TCPA filings increased a staggering 1,067% from 2009 to 2011. The dramatic growth in private TCPA litigation is a consequence of the increasing number of consumers who use wireless telephones to receive all or most of their calls. The Centers for Disease Control found that the percentage of households that had wireless phones but no landlines rose to 29.7% at the end of December 2010, up from 7.3% in 2005.<sup>6</sup> During the same period, the percentage of

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<sup>5</sup> See Collections Recon Press Release, *FDCPA and Other Consumer Lawsuit Statistics, December 16-31, 2010* (available at <http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-december-16-31-2010/>) (last visited on October 17, 2011); Collections Recon Press Release, *FDCPA and Other Consumer Lawsuit Statistics, September 16-30, 2011* (available at <http://www.collectionsrecon.com/press-releases/fdcpa-and-other-consumer-lawsuit-statistics-september-16-30-2011/>) (last visited on October 17, 2011).

<sup>6</sup> Compare Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control, *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2008*, Table 1, (available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200905.pdf>) (last visited on October 18, 2011) with *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2010*, Table 1 (available at <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201106.pdf>) (last visited on October 18, 2011).

households that had a landline but lacked a wireless phone fell from 34.4% to 12.9%. *Id.* The percentage of adults who have landlines but who nonetheless receive all or nearly all calls on wireless phones (“wireless-mostly households”) rose to 17.4% at the end of 2010. *See id.* at Table 3.

This trend helps to explain the increase in the number of private TCPA actions like this one, where a consumer claims that a debt collector violated the TCPA by using a predictive dialer to call a wireless telephone. As explained above, and for the reasons put forth by Respondent, Congress made clear its intent to avoid opening the doors of the federal courts to every person who alleges a violation of the TCPA. *Int’l Science*, 106 F.3d at 1157. The Eleventh Circuit’s decision should therefore be affirmed.

### CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

DAVID M. SCHULTZ  
JOEL D. BEROCCHI  
PETER E. PEDERSON  
*Counsel of Record*  
HINSHAW & CULBERTSON LLP  
222 North LaSalle Street  
Suite 300  
Chicago, IL 60601-1081  
(312) 704-3000  
ppederson@hinshawlaw.com  
*Attorneys for Amicus Curiae,*  
*ACA International*