

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 OF *AMICUS CURIAE* NATIONAL
FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
IN SUPPORT OF RESPONDENT**

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INTEREST OF *AMICUS CURIAE*¹

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. Founded in 1943, NFIB is the nation's oldest and largest nonprofit, nonpartisan organization dedicated to representing the interests of small business owners in all 50 states and Washington, D.C. NFIB has 350,000 members that own and operate independent businesses spanning every industry sector. The typical NFIB member business has 10 employees and gross annual sales of approximately \$500,000. NFIB members reflect American small business.

NFIB Legal Center has a strong interest in this case because small businesses consistently incur unreasonable and unintended expenses fighting small-dollar Telephone Consumer Protection Act (TCPA) claims in federal courts. State small-claims courts are best equipped to resolve small-dollar suits fairly, informally, and cheaply. Knowing this, Congress made filing in state court an explicit requirement of any private action to enforce the TCPA. Petitioner, like many other TCPA plaintiffs, attempted to bypass

¹ No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or *amicus's* counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

this express limitation—and defy Congress’s intent—by filing his private TCPA claims in federal court. Allowing such federal-court actions to be implied in the TCPA would have severe financial consequences for many small business defendants.

INTRODUCTION

Enacted in 1991, the TCPA creates a private right of action to complement existing state-law prohibitions on abusive telemarketing. Congress, acting at the states’ request, adopted this distinct federal statute because state laws could not adequately deter *interstate* telemarketing misconduct. Consistent with its intent to help the states’ enforcement efforts, Congress instructed that private TCPA suits should proceed in state courts, and only “if otherwise permitted by the laws or rules of court of a State” 47 U.S.C. § 227(b)(3). In essence, section 227(b)(3) creates, if a state so chooses, a private cause of action in state court governed by the parameters set forth by Congress.

The TCPA’s private right of action has spurred disagreement among the courts of appeals regarding whether private TCPA claims may proceed in federal court. Six circuits have concluded that there is no federal-question jurisdiction over private TCPA claims. *See* Resp. Br. in Opp’n Cert. 4. Two circuits have reached the opposite conclusion. *See id.* at 5. Four circuits have held that federal courts may exercise diversity jurisdiction over private TCPA claims. *See id.* at 6; *see also Charvat v. NMP, LLC*, __ F.3d __, No. 10-3390, 2011 WL 3805618, at *5 (6th Cir. Aug. 30, 2011). And one circuit has held that federal courts may exercise supplemental jurisdiction over private TCPA claims. *See Landsman & Funk*

PC v. Skinder-Strauss Assocs., 640 F.3d 72, 88–89 (3d Cir. 2011).

Amicus agrees with Respondent that the majority approach—and the conclusion reached by the Eleventh Circuit in this case—is correct, because it honors Congress’s intent to limit private TCPA claims to state courts. The distinctive state-law focused language of section 227(b)(3), naturally read, confines claims arising under the statute to state courts. *See* Resp. Br. 12–27. The availability of a federal forum would inflict undue costs and unnecessary burdens on TCPA defendants—and small businesses in particular—who must retain outside counsel to defend these simple, small-dollar claims under the Federal Rules of Civil Procedure.

But even were Petitioner correct that section 227(b)(3) does not strip federal courts of general federal-question jurisdiction under 28 U.S.C. § 1331, this Court should affirm the decision below on the alternative ground that Petitioner failed to state a claim upon which relief can be granted because he filed his private TCPA claims in federal court. By its unique terms, section 227(b)(3) creates a private right of action that does not exist outside of a permissive state’s courts. And, because of the carefully-tailored way in which Congress framed this cause of action, the Court does not have to decide whether section 227(b)(3)’s state-court requirement is a jurisdictional provision or a substantive limitation on the cause of action itself; these inquiries coalesce. Thus, even if Congress did not eliminate the availability of federal-question jurisdiction by assigning jurisdiction to state courts, the TCPA’s express terms require the dismissal of Petitioner’s claims because he improperly filed them in federal court.

ARGUMENT**I. DEFENDING SMALL-DOLLAR TCPA CLAIMS IN FEDERAL COURT IMPOSES UNDUE AND UNINTENDED BURDENS ON SMALL BUSINESSES**

Small businesses shoulder a disproportionate burden of tort liability in the United States: although they generate only 22 percent of total business revenue, small businesses pay 81 percent of tort liability costs. See U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, *TORT LIABILITY COSTS FOR SMALL BUSINESSES*, at 9 (2010) (“TORT LIABILITY COSTS”); see also Testimony of Elizabeth Milito, Senior Executive Counsel, NFIB Small Business Legal Center, H.R. 966, Lawsuit Abuse Reduction Act, House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Serial No. 112-18 (March 11, 2011), available at http://judiciary.house.gov/hearings/printers/112th/11218_65079.PDF (last visited October 28, 2011). Nearly half of small businesses are involved annually in a legal dispute requiring counsel. See WILLIAM J. DENNIS, JR., NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *NATIONAL SMALL BUSINESS POLL: THE USE OF LAWYERS*, at 11 (2005).

Lawsuits are a significant concern for small-business owners. Small businesses pay \$35.6 billion annually, out of pocket, to resolve claims against them. See *TORT LIABILITY COSTS*, *supra*, at 9. While big-dollar damages awards capture headlines and fuel debate over tort reform, it is small-dollar suits, such as private TCPA actions, that small businesses face most often. No single TCPA claim will bankrupt a small business. But in the aggregate, private TCPA claims can be pernicious and expensive—particularly

in federal court—threatening small businesses with death by a thousand cuts. Unlike large companies, small businesses cannot easily pass on the costs of litigation and settlement to their customers and remain competitive in a tough marketplace. Because many small businesses operate at the margin, even modest savings can mean the difference between solvency and bankruptcy.

Many business defendants prefer to litigate in federal, not state, court. *See* 5 MICHAEL J. WEAVER & ROBERT G. KNAIER, *BUS. & COM. LITIG. FED. CTS.* § 54:2 (Am. Bar Ass’n, 2d ed. 2010) (noting that “many of us far prefer to litigate within the federal court system”). At least for small businesses, however, state fora are preferable for TCPA claims because litigating small-dollar claims in federal court takes longer, and ultimately costs more, than state small-claims actions.

Congress was acutely aware of these realities when it enacted section 227(b)(3), and Congress accordingly expected that TCPA plaintiffs would seek relief in state small-claims court. Senator Hollings, who sponsored the TCPA, expressed “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.” 137 Cong. Rec. 30,821 (1991). As Senator Hollings explained: “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.*” *Id.* (emphasis added).

State small-claims courts resolve disputes more quickly than even the most efficient federal courts. For example, trial in Florida small-claims court—where Petitioner should have filed his TCPA claims—ordinarily must occur within 110 days of the filing of the complaint. FLA. SMALL CLAIMS R. 7.090(b), (d). In California, small-claims trials typically proceed within 20 to 70 days of filing. CAL. CIV. PROC. CODE § 116.330(a). In Illinois, trial takes place between 14 and 40 days after issuance of the summons. ILL. S. CT. R. 283.

Federal courts, by contrast, are not designed for speedy resolution of small-dollar claims. On average, federal district courts take roughly 9.3 months to dispose of ordinary civil cases, and 23.3 months if the case goes to trial. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS MARCH 31, 2010, Table C-5, “U.S. District Courts—Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition, During the 12-Month Period Ending March 31, 2010,” *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf> (last visited October 28, 2011). These delays adversely affect a small business’s bottom line. The longer a legal dispute goes unresolved, the more time, money, and energy it must devote to small-stakes litigation, at the expense of serving its customers, employees, and other stakeholders.

State small-claims proceedings also cost litigants less money than federal litigation. By design, small-claims proceedings are informal, speedy, and inexpensive. States thus require the resolution of such claims to be free of technical or complicated

procedures such that a layperson can navigate the system.² *See generally* F. P. Renner, Annotation, *Statutory or Constitutional Provisions Relating to Participation by Attorney or Representative in Small Claims Court*, 167 A.L.R. 827 (1947) (“The purpose of these courts is to provide a speedy hearing at low cost to the litigants . . .”). Parties typically do not appear with counsel and, in many jurisdictions, by law *cannot* have an attorney present. *See id.*; *see also* James C. Turner & Joyce A. McGee, *Small Claims Reform: A Means of Expanding Access to the American Civil Justice System*, 5 UDC/DCSL L. REV. 177, 180–81 (2000) (noting that at least 10 states either outright prohibit or severely limit appearances by counsel).

² *See, e.g.*, ARIZ. REV. STAT. ANN. § 22-501 (“[S]mall claims division’ means a forum in justice courts in which procedures shall allow the inexpensive, speedy and informal resolution of small claims.”); CAL. CIV. PROC. CODE § 116.510 (“The hearing and disposition of the small claims action shall be informal, the object being to dispense justice promptly, fairly, and inexpensively.”); IND. SMALL CLAIMS R. 8(A) (“The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.”); KY. REV. STAT. ANN. § 24A.200 (small-claims court intended “to provide an efficient and inexpensive forum with the objective of dispensing justice in a speedy manner” and “to simplify practice and procedure in the commencement, handling, and trial of such cases in order that plaintiffs may bring actions in their own behalf, and defendants may participate actively in the proceedings rather than default”); ME. R. SMALL CLAIMS P. 1 (small-claims rules “shall be construed to secure the just, speedy, and inexpensive determination of every action in a simple and informal way”); MASS. GEN. LAWS ANN. ch. 218, § 21 (small-claims proceedings should be “simple, informal and inexpen-

In federal court, however, proceedings are governed by the rigors of the Federal Rules of Civil Procedure, and parties are ill-advised to represent themselves. Accordingly, small business defendants facing private TCPA claims in federal court likely would incur substantial counsel fees—greatly increasing the costs of litigation—withstanding Congress’s aim of quick and efficient resolution. Moreover, because the statute contains no fee-shifting provision, small businesses are unable to recover counsel fees under the TCPA even in cases involving frivolous claims.

sive”); NEV. JUSTICE CT. R. CIV. P. 96 (“No formal pleading other than the claim and notice shall be necessary, and the trials and dispositions of all such actions shall be informal, with the sole object of dispensing fair and speedy justice between the parties.”); OKLA. ST. ANN. tit. 12, § 1761 (“The hearing and disposition of such actions shall be informal with the sole object of dispensing speedy justice between the parties.”); VT. STAT. ANN. tit. 12, § 5531(a) (small-claims proceedings must be “simple, informal, and inexpensive”); WASH. REV. CODE ANN. § 12.40.090 (“The hearing and disposition of the actions shall be informal, with the sole object of dispensing speedy and quick justice between the litigants.”); *see also Cleveland Bar Ass’n v. Pearlman*, 832 N.E.2d 1193, 1196 (Ohio 2005) (“Thus, by design, proceedings in small claims courts are informal and geared to allowing individuals to resolve uncomplicated disputes quickly and inexpensively.”); *Henriksen v. Gleason*, 643 N.W.2d 652, 656 (Neb. 2002) (“Proceedings in small claims courts are conducted on a very informal basis, with a minimum of procedural requirements.”); *Isaac v. Truck Serv., Inc.*, 752 A.2d 509, 515 (Conn. 2000) (“Our small claims system is statutorily designed to achieve the inexpensive, prompt, informal and final adjudication of contested monetary claims involving limited amounts of money.” (citing CONN. GEN. STAT. ANN. § 51-15)); *Lau v. City of Oelwein*, 336 N.W.2d 202, 203 (Iowa 1983) (“[T]he legislature intended to provide a simple, informal, and inexpensive procedure for the trial of a small claim in a trial conducted by the court itself without regard to technicalities of procedure.”).

As a result, the mere *availability* of a federal forum for private TCPA claims shifts the strategic calculus for small-business defendants. A small business might well settle an otherwise frivolous claim simply because the cost of hiring a lawyer and vigorously defending itself in federal court would quickly eclipse the alleged damages. Indeed, most TCPA defendants can avoid liability only by proving one of several fact-intensive affirmative defenses, including, *inter alia*, that they had “the prior express consent of the called party,” 47 U.S.C. § 227(b)(1)(A); made the call “for emergency purposes,” *id.*; or had “an established business relationship with the recipient,” *id.* § 227(b)(1)(C)(i).

Savvy plaintiffs or their attorneys can exploit this strategic advantage to leverage unwarranted settlements. NFIB’s members are especially susceptible targets for such tactics because small businesses often lack in-house counsel that could efficiently assess a claim’s viability. Assuming a modest hourly rate of \$200 per hour to retain outside counsel, it would take less than three hours of legal fees to make settlement of a \$500 TCPA claim the prudent choice.

The fact that individual plaintiffs can seek presumptive, statutory damages in state small-claims tribunals also obviates the need for costly class-action relief. *See, e.g., Local Banking Prods., Inc. v. Kosher Bagel Munch, Inc.*, 23 A.3d 469, 476–77 (N.J. Super. Ct. App. Div. 2011) (“The combination of the TCPA’s design and New Jersey’s procedures suggests that the benefit of a class action has been conferred on a litigant by the very nature of the procedures employed and relief obtained. The cost of litigating for an individual is significantly less than the potential recovery.”); *Rudgayzer & Gratt v. LRS Comms., Inc.*,

789 N.Y.S.2d 601, 603 (N.Y. App. Term 2004) (“[T]he language of the TCPA . . . , in combination with the provisions of CPLR 901(b), makes it clear that no TCPA class action is available in the New York State courts. . . . CPLR 901(b) bars a class action to recover a statutory penalty, such as that provided for by the TCPA, unless the statute providing for the penalty specifically authorizes such a class action.”); *accord Weber v. U.S. Sterling Secs., Inc.*, 924 A.2d 816, 827 (Conn. 2007).

By removing the prospect of full-bore federal litigation, Congress struck a careful balance between the interests of claimants and defendants. Defendants, especially small businesses, are less likely to pay out undeserved settlements when they can afford to contest these cases in state small-claims court, as Congress intended. These practical realities are consistent with Congress’s general view that federal courts are not appropriate fora to resolve small-dollar state-law disputes. *Cf.* 28 U.S.C. § 1332(a) (\$75,000 amount-in-controversy requirement). More importantly, these realities affirm Congress’s careful determination that private TCPA claims have no place in federal court.

II. CONGRESS’S EXPRESS LIMITATION ON THE TCPA PRIVATE RIGHT OF ACTION REQUIRES AFFIRMANCE

The court below dismissed Petitioner’s TCPA claims under Rule 12(b)(1) based on a lack of subject-matter jurisdiction. For the reasons stated by Respondent, that holding is correct. But even if this Court concluded that section 227(b)(3)’s assignment of claims to state courts does not cabin federal courts’ federal-question jurisdiction under 28 U.S.C. § 1331, the

Court nevertheless should affirm the dismissal of Petitioner’s claims under Rule 12(b)(6) because Congress expressly limited the availability of the cause of action to the courts of a state that “otherwise permit[s]” such actions. *See, e.g., Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010) (affirming on Rule 12(b)(6) grounds, rather than remanding for the lower court to put “a new Rule 12(b)(6) label [on] the same Rule 12(b)(1) conclusion”).

Section 227(b)(3) is unique in that its substantive and jurisdictional limits coequally constrain the scope of the private right of action—making it unnecessary to tease out the substantive from the jurisdictional. Thus, were the Court to view the limits set forth in section 227(b)(3) as substantive rather than jurisdictional, Petitioner’s claims still fail on the merits because he improperly filed them in federal court. Section 227(b)(3)’s limitation on “where” a plaintiff can file a private TCPA claim would be no less “important and mandatory” if viewed as a substantive limitation, rather than a jurisdictional one. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1203 (2011). And, as in *Morrison*, because Petitioner’s federal-court TCPA action obviously fails to state a claim for relief, there is no reason for this Court to remand for further proceedings.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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