

In The
Supreme Court of the United States

MARCUS D. MIMS,
Petitioner,

v.

ARROW FINANCIAL SERVICES, LLC,
Respondent.

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

BRIEF OF NATIONAL CONSUMER LAW CENTER AND
NATIONAL ASSOCIATION OF CONSUMER ADVOCATES AS
AMICI CURIAE IN SUPPORT OF PETITIONER

Richard J. Rubin
Counsel of Record
ATTORNEY AT LAW
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418
dickrubin@cs.com

Joanne S. Faulkner
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395
jsfaulkner@snet.com

Counsel for Amici Curiae

Dated: May 2, 2011

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Current Split Among The Circuits Is Profound And Irreconcilable.....	3
II. This Unsettled Jurisprudence Has Impaired TCPA Enforcement While Aiding Industry Non- Compliance	4
CONCLUSION	9

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Dickson v. Verizon West Virginia, Inc.</i> , W. Va. PUC LEXIS 3046 (2005).....	6
<i>ErieNet, Inc. v. Velocity Net, Inc.</i> , 156 F.3d 513 (3d Cir. 1998)	3, 4
<i>Foxhall Realty Law Offices, Inc. v.</i> <i>Telecomms. Premium Servs., Ltd.</i> , 156 F.3d 432 (2d Cir. 1998)	4
<i>Gottlieb v. Carnival Corp.</i> , 436 F.3d 335 (2d Cir. 2006)	4
<i>Landsman & Funk, PC v.</i> <i>Skinder-Strauss Associates</i> , ___ F.3d ___, 2011 WL 1226371 (3d Cir. 2011).....	3, 4
<i>Lewis v. City of Chicago, Ill.</i> , __ U.S. ___, 130 S. Ct. 2191 (2010).....	8
<i>Rubin v. Bell-Atlantic Pennsylvania</i> , Pa. PUC LEXIS 30 (2011)	5
 STATUTES	
28 U.S.C. § 1331	8
47 U.S.C. § 227	2

47 U.S.C. § 227(b)(3)..... *passim*
47 U.S.C. § 227(f)(2)..... 8

RULES

Sup. Ct. R. 10(a) 3
Sup. Ct. R. 37.6..... 1

OTHER AUTHORITIES

Douglas B. Brown, “Class Actions Under the
Federal Telephone Consumer Protection Act
of 1991,” *Fed’n Def. & Corp. Couns. Q84*
(2010)..... 5

Fair Debt Collection, Consumer Credit and
Sales Legal Practice Series (6th ed. 2008 and
Supp.) 1

Pub. L. 96-486, December 1, 1980,
94 Stat. 2369 8

Unfair and Deceptive Acts and Practices,
Consumer Credit and Sales Legal Practice
Series (7th ed. 2008 and Supp.) 1

**STATEMENT OF INTEREST OF
*AMICI CURIAE***

The National Consumer Law Center (NCLC) is a national legal organization focusing on the legal needs of consumers, particularly low-income and elderly consumers. NCLC publishes the widely praised seventeen-volume *Consumer Credit and Sales Legal Practice Series*. Among the treatises in the Series is *Unfair and Deceptive Acts and Practices* (7th ed. 2008 and Supp.), and *Fair Debt Collection* (6th ed. 2008 and Supp.), which include coverage of the Telephone Consumer Protection Act (TCPA). NCLC's sole interest before the Court is enforcement of the TCPA to protect consumer privacy and prevent abusive and unlawful telephone debt collection as Congress intended.¹

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and by serving as a voice for its members as well as consumers in the ongoing effort to curb unfair and abusive business practices. Compliance with federal consumer

¹ In blanket letters of consent filed with the Clerk, the parties have consented to the filing of this brief *amici curia*. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party and that no one other than *amici* made a monetary contribution to the preparation or submission of this brief.

protection laws in general and the TCPA in particular are a continuing concern of NACA.

SUMMARY OF ARGUMENT

Notwithstanding Congress's clearly stated intentions, extensive non-compliance by national and international telemarketing and related industries under the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA) is not at all uncommon. One reason for this unfortunate state of affairs is the failure of the TCPA's private right of action, § 227(b)(3), to provide the vigorous enforcement and effective deterrence mechanism that Congress envisioned when it adopted this law.

Effective public enforcement of the TCPA is virtually impossible given limited public resources, the scope of the problem, and the ever-expanding technology that drives the telemarketing industry. Accordingly, Congress relied on individual consumers who have been subjected to TCPA violations to police the industry. Congress therefore included in the TCPA facially robust private remedies with seemingly attractive financial incentives to achieve this goal. Unfortunately, this experiment to privatize law enforcement to date has been unsuccessful, in significant part because of the diversion of efforts to litigating the foundational issue of jurisdiction.

Even now, nearly 20 years after Congress enacted the TCPA, the federal courts are intractably split over the substantive and procedural complications caused by Congress's failure to explicitly (albeit unnecessarily) grant federal district

court jurisdiction to enforce the TCPA through private litigation. This disarray within the federal judiciary has itself become a focal point of the litigation, derailing the primary objective of effective law enforcement. *Amici* urge this Court to grant the petition for certiorari to provide the certainty that is now absent for consumers who wish to enforce their rights as well as to reduce the substantial peripheral litigation over the application of jurisdictional and substantive differences between federal and state law.

ARGUMENT

I. The Current Split Among The Circuits Is Profound And Irreconcilable

The petition for certiorari surveys the array of conflicting Circuit Court opinions and presents the compelling reasons to support the Court's granting the writ of certiorari under the first clause of Rule 10(a). Strikingly, just days after the submission of that petition, on April 4, 2011, the Third Circuit re-emphasized the fractured jurisdictional interpretations among the Circuits by issuing its opinion in *Landsman & Funk, PC v. Skinder-Strauss Associates*, ___ F.3d ___, 2011 WL 1226371 (3d Cir. 2011). *Landsman* generated three separate opinions from the three-judge panel: Judge Rendell concluded that federal courts may hear TCPA claims under federal diversity jurisdiction but not under federal question jurisdiction, adhering to Circuit precedent from her own majority opinion in *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513 (3d Cir. 1998); Judge McKee opined in his concurrence that both federal question and diversity jurisdiction applied, asserting

that *ErieNet* is no longer authoritative even within the Third Circuit because intervening jurisprudence established that the “Supreme Court has since vindicated Judge Alito’s analytical approach” in his dissent in *ErieNet*; and Judge Garth, who had joined the majority in *ErieNet*, issued a dissent that persisted in denying any federal jurisdiction at all – under either federal question or diversity jurisdiction – to adjudicate claims under § 227(b)(3).

Landsman is a timely illustration of the split among the Circuits on the question presented. In addition, *Landsman* dramatically demonstrates the inconsistent intra-Circuit treatment of the federal question/diversity jurisdiction issues in other jurisdictions. Compare *Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006) (finding TCPA diversity jurisdiction), with *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432 (2d Cir. 1998) (finding no TCPA federal question jurisdiction). The positions and sub-positions among the Circuits are truly irreconcilable. Awaiting additional decisions from other federal courts will not resolve the questions or crystallize the issues. *Amici* accordingly urge the Court to grant review at this time and bring order to the chaos under which the federal courts and private litigants now labor.

II. This Unsettled Jurisprudence Has Impaired TCPA Enforcement While Aiding Industry Non-Compliance

A natural consequence of the disarray that is the hallmark of this TCPA jurisprudence has been to afford the telemarketing and debt collection industries abundant opportunities to obstruct

effective enforcement. Industry insiders have identified this jurisdictional quagmire as a defense tactic for its members who are subject to private enforcement. See Douglas B. Brown, “Class Actions Under the Federal Telephone Consumer Protection Act of 1991,” Fed’n Def. & Corp. Couns. Q84, 89 (2010) (“Because circuits are split as to whether the TCPA grants federal or state jurisdiction over private claims, jurisdiction issues for class action claims under the TCPA should be carefully examined in every case.”). Of course litigants cannot be faulted for taking advantage of all legitimate legal arguments that exist, particularly where as here each of the conflicting legal positions enjoys substantial support. The critical point is simply that the petition for certiorari now presents a paradigmatic situation where the Court’s intervention is truly warranted.

American citizens and small businesses suffer the consequences of the increasing volume of TCPA abuse. No public agency has been given the means to redress the literally millions of junk faxes, robocalls, and unlawful cell phone contacts that intrude every day into the solitude of American consumers and companies, and no authority has allocated scarce federal or state resources sufficient to address a problem of such magnitude. Moreover, the inability of consumers to have their TCPA complaints adequately addressed before state regulatory commissions underscores the need for effective federal TCPA enforcement. See e.g. *Rubin v. Bell-Atlantic Pennsylvania*, 2001 Pa. PUC LEXIS 30 (although consumer established that he “received a series of phone calls which contained ethnic epithets as well as threats of physical violence

surrounding an alleged debt,” sympathetic Public Utility Commission nevertheless dismissed customer’s complaint); and *Dickson v. Verizon West Virginia, Inc.*, 2005 W. Va. PUC LEXIS 3046 (in recommended decision, Chief Administrative Law Judge notes that state Public Utility Commission is unable to award damages where customer alleged that telecommunications provider (as creditor) maliciously harassed customer, ruined his credit, and engaged debt collection agencies to collect a debt that he disputed).

Congress provided the tools and incentives to foster efficient and effective private enforcement by enacting § 227(b)(3):

(3) Private right of action

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--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection,

the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 U.S.C. § 227(b)(3).

However, the TCPA jurisdictional morass has stymied this private enforcement mechanism. With public TCPA enforcement limited, the jurisdictional discouragement of private enforcement has blunted meaningful enforcement.

As to the substance of the question presented, *amici* submit that it seems improbable that Congress intended that private TCPA claims be actionable only in state courts. Under the current view of the majority of Circuits as reflected in the decision below, TCPA protections are available to consumers and others only on a state-by-state basis. However, *amici* are committed to the view that American consumers are entitled to equal and consistent treatment under federal law irrespective of their state of residence. Industry deserves the same. Differences in degrees of federal consumer protection based on state residency are unacceptable; that the TCPA's minimal standards of privacy are unenforceable now in at least two states – Maryland and Texas² – is a result that should attain only with the explicit and unambiguous Congressional approval that is lacking here.

Other indications that Congress did not intend that private TCPA claims be actionable only

² See Petition for a Writ of Certiorari, pp. 11-12 n.5.

in state courts are found in the statute itself. First, § 227(f)(2) allows state attorneys general or other state designees to pursue in federal court the same \$500/\$1,500 claims on behalf of state residents as are available to private actors. Plainly, Congress did not deem the potentially small amounts at stake as a disqualification of federal court jurisdiction, as it concluded in 1980 when it removed the minimum amount in controversy requirement for all federal questions under 28 U.S.C. § 1331. Pub. L. 96-486, December 1, 1980, 94 Stat. 2369. Perhaps most significant, § 227(f)(2)'s grant of exclusive jurisdiction in federal district courts for actions brought by these state officials unmistakably shows Congress's awareness and willingness to invoke exclusive jurisdiction, yet it failed to invoke exclusive jurisdiction in § 227(b)(3). The proclivity of the court below to graft that exclusivity language into § 227(b)(3) under these circumstances when Congress itself chose not to do so improperly rewrites the TCPA. *See e.g. Lewis v. City of Chicago, Ill.*, ___ U.S. ___, ___, 130 S. Ct. 2191, 2200 (2010) ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.").

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Richard J. Rubin
(Counsel of Record)
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418
dickrubin@cs.com

Joanne S. Faulkner
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395
jsfaulkner@snet.net