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 PETITIONER

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QUESTION PRESENTED

Did Congress divest the federal district courts of their federal-question jurisdiction under 28 U.S.C. § 1331 over private actions brought under the Telephone Consumer Protection Act, 47 U.S.C. § 227?

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INTRODUCTION

Since 1875, federal trial courts have been empowered by statute to adjudicate cases arising under federal law. That grant of jurisdiction, now embodied in 28 U.S.C. § 1331, embraces "all civil actions arising under the Constitution, laws or treaties of the United States." Section 1331 authorizes federal district courts to hear cases falling within that description except where Congress has, in some more specific statute, disabled the courts from exercising jurisdiction over a particular type of action otherwise within the scope of the statutory grant.

At the core of the district courts' federal-question jurisdiction under § 1331 are actions in which a plaintiff asserts "a cause of action created by federal law." *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). This case fits that description precisely: The plaintiff, petitioner Marcus Mims, asserts a federal statutory claim for damages and injunctive relief created by the Telephone Consumer Protection Act (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (1991), *codified as amended at* 47 U.S.C. § 227. The question posed by the case is whether the TCPA forecloses the invocation of federal-question jurisdiction because it provides that the right of action it creates "may" be brought in state courts that are empowered to hear such claims. 47 U.S.C. § 227(b)(3). The lower courts' holding that the TCPA strips the federal district courts of their jurisdiction under § 1331 is contrary to well-established principles of statutory construction teaching that a permissive grant of authority to one set of courts does not choke off access to another set of courts under an otherwise available grant of jurisdiction.

OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the Appendix to the Petition for Certiorari (Pet. App.) at 1a. The order of the United States District Court for the Southern District of Florida dismissing the complaint is unreported and is reproduced at Pet. App. 4a.

JURISDICTION

Petitioner Mims invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331 and 1337 on the ground that this action arises under a law of the United States—specifically, 47 U.S.C. § 227(b)(3), which creates a private right of action for actual and statutory damages and injunctive relief for violations of the TCPA. The district court's final order dismissing the complaint in its entirety for lack of subject-matter jurisdiction was entered on April 4, 2010. The court of appeals had jurisdiction over Mr. Mims's timely appeal, noticed April 29, 2010, under 28 U.S.C. § 1291.

The court of appeals affirmed the district court's dismissal of the action in a per curiam opinion dated November 30, 2010. On February 22, 2011, Justice Thomas granted a timely request for an extension of time, to and including March 30, 2011, to file a petition for a writ of certiorari. Mr. Mims filed his petitioner for a writ of certiorari on March 30, 2011. This Court granted the petition on June 27, 2011, and has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The federal-question jurisdictional statute, 28 U.S.C. § 1331, provides:

> **§ 1331. Federal question.**
>
> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

The operative provisions of the TCPA, codified at 47 U.S.C. § 227, together with the congressional findings set forth in § 2 of the TCPA (105 Stat. 2394-95, 47 U.S.C. § 227 note), are reprinted in their entirety in the appendix to this brief. The portion of the TCPA at issue here, 47 U.S.C. § 227(b)(3), provides:

> **(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.

STATEMENT OF THE CASE

A. The Telephone Consumer Protection Act.

Advances in telecommunications technology have provided tremendous benefits to our society. But those benefits are not cost-free. New technologies have often brought with them new ways to intrude on individual privacy and waste the time and money of consumers and businesses alike. The latter years of the last century brought an explosion of abuses of telephone and telecopier technology, including the use of autodialers to clog telephone lines with unwanted calls, "robocalls" that leave unsolicited, prerecorded messages, and "junk faxes" that consume the recipients' paper and ink and interfere with the transmission of legitimate messages.

In 1991, Congress responded to these abuses by passing the TCPA. In enacting the TCPA, Congress made findings that telemarketing had become "pervasive due to the increased use of cost-effective telemarketing techniques." TCPA § 2(1). Congress further found that "[u]nrestricted telemarketing … can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety," and that "[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." *Id*. §§ 2(5) & (6). "[R]esidential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." *Id*. § 2(10). Although many states had enacted restrictions on such practices, Congress found that "telemarketers can evade their prohibitions through interstate opera-

tions; therefore, Federal law is needed to control residential telemarketing practices." *Id*. § 2(7).

The TCPA's findings also reflect Congress's conclusion that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." *Id*. § 2(9). Because most individuals have no practical way to avoid unwanted calls and faxes themselves, Congress found that "[b]anning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion." *Id*. § 2(12). In addition, Congress found that "[b]usinesses also have complained to the Congress and the Federal Communications Commission [(FCC)] that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce." *Id*. § 2(14). In light of these concerns, Congress found that the FCC needed regulatory authority both to fine-tune the protections Congress was granting to consumers and to consider extending similar protections to businesses. *Id*. §§ 2(13) & (15).

The operative provisions of the TCPA are codified, as amended, in 47 U.S.C. § 227. The critical substantive provisions of the statute outlaw four specific types of practices: (1) making calls using automatic dialing equipment, prerecorded messages, or artificial voices to emergency telephone lines, rooms in hospitals and similar facilities, mobile phones and similar

devices, or any service for which the receiving party is charged for an incoming call; (2) making nonemergency calls using prerecorded messages or artificial voices to residential phone lines (absent prior consent); (3) sending unsolicited advertisements to facsimile machines (absent a preexisting business relationship between sender and receiver); and (4) using autodialers to tie up multiple telephone lines of a commercial establishment. 47 U.S.C. § 227(b)(1). The statute also provides regulatory authority to the FCC to extend protection against unwanted calls to businesses, as well as to exempt certain calls from the statute's prohibitions. 47 U.S.C. § 227(b)(2). And the law authorizes the FCC to establish, by regulation, "do not call" protection for residential telephone subscribers who wish to avoid commercial solicitation calls. 47 U.S.C. § 227(c).[1]

The TCPA provides several complementary means of enforcing its substantive provisions. It allows state attorneys general to bring actions to remedy a pattern or practice of violations, and provides that such actions may result in both injunctive relief and the recovery of statutory damages on behalf of individuals who received calls or faxes in violation of the statute. 47 U.S.C. § 227(f)(1). The Act explicitly provides that

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[1] In addition, the TCPA requires that all faxes show the date and time of transmission and identify the sender (and the sender's fax or telephone number). 47 U.S.C. § 227(d)(1)(B). And it authorizes the FCC to establish, by regulation, additional "technical and procedural standards" for fax transmissions and telephone calls with prerecorded messages, including requirements that prerecorded messages identify the caller and that they release the line of the person being called within five seconds after she hangs up. *Id.* §§ 227(d)(2) & (3).

the federal district courts "shall have exclusive jurisdiction over all" such actions. *Id*. § 227(f)(2). The TCPA provides for FCC participation in actions brought by state attorneys general, *id*. § 227(f)(3), and it also contemplates independent enforcement actions by the FCC, which, during their pendency, foreclose the filing of any state attorney general action based on the same violations, *id*. § 227(f)(7).

Of most importance here, the TCPA also creates a private right of action to enforce its terms. Subsection (b) of § 227, after setting forth the basic prohibitions applicable to autodialers, recorded messages, and junk faxes (and providing supplemental regulatory authority to the FCC), provides that in the case of a violation of any of those prohibitions (or any implementing regulation issued by the FCC), the victim may bring an action seeking injunctive relief and/or actual or statutory damages of $500 per violation (or up to $1500 per violation in the case of willful or knowing violations). 47 U.S.C. § 227(b)(3). The provision states that such an action "may, if otherwise permitted by the laws or rules of court of a State," be brought "in an appropriate court of that State," *id*., but does not explicitly address jurisdiction of the federal courts or say that state-court jurisdiction is exclusive.[2]

Since the TCPA's enactment, the federal courts of appeals have been divided on whether federal district courts may exercise federal-question jurisdiction under 28 U.S.C. § 1331 over actions under § 227(b)(3). Panels of six circuits have held that federal-question

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[2] Section 227(c)(5) uses similar language to provide a right of action to victims of violations of the "do not call" regulations authorized by the TCPA.

jurisdiction is unavailable. *Int'l Sci. & Tech. Inst. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 514 (5th Cir. 1997); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *modified*, 140 F.3d 898 (11th Cir. 1998); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.*, 156 F.3d 432, 435 (2d Cir. 1998); *ErieNet, Inc. v. Velocity Net, Inc*., 156 F.3d 513, 519 (3d Cir. 1998); *Murphey v. Lanier*, 204 F.3d 911, 915 (9th Cir. 2000).

Two circuits, by contrast, have held that § 227(b)(3) does not divest the federal district courts of the jurisdiction otherwise provided by § 1331 to hear "all civil actions arising under the … laws … of the United States." *See Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005) (Posner, J.); *Charvat v. Echostar Satellite LLC*, 630 F.3d 459 (6th Cir. 2010) (Sutton, J.); *see also ErieNet*, 156 F.3d at 521 (Alito, J., dissenting). Recently, a panel of the Third Circuit divided three ways on the jurisdictional consequences of § 227(b)(3), leading that court to grant en banc rehearing. *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72 (3d Cir. 2011), *reh'g en banc granted*, __ F.3d __, 2011 WL 1879624 (May 17, 2011).

In contrast to their disagreement over federal-question jurisdiction, those courts of appeals that have addressed the issue thus far have agreed that the TCPA does not bar the courts from exercising diversity jurisdiction over TCPA claims under 28 U.S.C. § 1332. *See*, *e.g.*, *Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006) (Sotomayor, J.).

B. The Proceedings in This Case.

This case began after petitioner Marcus Mims received a series of telephone calls on his cell phone from respondent Arrow Financial Services, in connection with efforts by Arrow Financial to collect a debt said to be owed by Mr. Mims. *See* JA 9-13. Alleging that the calls were made using an automated dialer, prerecorded message, or artificial voice, and that he had not consented to receive such calls, JA 14, Mr. Mims filed suit against Arrow in the United States District Court for the Southern District of Florida, alleging violations of the TCPA. *See* JA 8, 18-19.

Because Mr. Mims's complaint invoked the district court's federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1337, Arrow Financial, relying on Eleventh Circuit precedent denying such jurisdiction over TCPA claims, moved to dismiss for lack of subject-matter jurisdiction. *See Nicholson*, 136 F.3d 1287.[3] The district court, following *Nicholson*, entered a final order dismissing the TCPA claim for lack of subject-matter jurisdiction. Pet. App. 4a, JA 5-6, DEs 27-28. Mr. Mims appealed, and the Eleventh Circuit af-

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[3] Mr. Mims's complaint also asserted claims under the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692d & 1692e, for which jurisdiction would have been available under 15 U.S.C. § 1692k and 28 U.S.C. § 1331. *See* JA 8, 14-16. Arrow Financial conceded liability on these claims, undertook to satisfy them in full, and moved to dismiss them for lack of a case or controversy. *See* JA 4, DEs 11 & 14. The FDCPA claims were later settled and dismissed by stipulation. *See* JA 5, DE 26. The question presented here does not include whether the FDCPA claims' presence in the complaint would have given the district court jurisdiction over the TCPA claim through supplemental jurisdiction under 28 U.S.C. § 1367.

firmed in a short per curiam opinion citing its earlier decision in *Nicholson*. Pet. App. 1a.

SUMMARY OF ARGUMENT

The general federal-question jurisdiction statute, 28 U.S.C. § 1331, provides the federal courts with broad jurisdiction over all civil actions arising under federal law. However uncertain the outer limits of that jurisdiction may be, over a century of expansion of statutory federal-question jurisdiction has made one thing clear: When federal law creates a right of action and provides the substantive rules of decision for that action, the claim arises under federal law. *Grable & Sons*, 545 U.S. at 312. When such a claim is asserted, § 1331 provides the federal district courts with jurisdiction unless Congress has, by statute, divested them of it. *Verizon Md., Inc. v. Pub. Serv. Comm'n*, 535 U.S. 635, 642-43 (2002).

The TCPA, without doubt, is a federal law that both creates a right of action and provides the detailed substantive standards that decide it. Section 1331 thus provides jurisdiction unless Congress has, by statute, withdrawn it. Nothing in the TCPA's language indicates an intent to divest the courts of their jurisdiction under § 1331: The TCPA permits state courts to exercise jurisdiction over private TCPA claims (under specified conditions), but the relevant provision says nothing at all about whether federal courts may do so. As this Court has long held, "the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *United States v. Bank of N.Y. & Trust Co.*, 296 U.S. 463, 479 (1936). That principle, as more recently applied in such cases as *Tafflin v. Levitt*, 493 U.S. 455 (1990),

forecloses any reading of the TCPA's text as an ouster of otherwise available jurisdiction.

Moreover, reading the TCPA to preclude § 1331 jurisdiction is not necessary to give effect to its reference to state-court jurisdiction. Although state courts would likely be able to exercise jurisdiction even absent such language, the statute's reference to state-court proceedings is not superfluous. Rather, it eliminates any possibility that the statute could be read to make *federal* jurisdiction over private actions exclusive, as it is for actions brought by state attorneys general. And by providing that state courts must entertain TCPA actions if state laws and rules of court "otherwise permit[]," 47 U.S.C. § 227(b)(3), the TCPA's language also serves to substitute a statutory standard for the court-made rule of *Testa v. Katt*, 330 U.S. 386 (1947), that a state may not discriminate against federal causes of action.

Finally, and contrary to the suggestion of some lower courts that have rejected federal jurisdiction, the TCPA serves important federal interests identified by Congress: protecting individuals against invasions of privacy and other costs associated with unwanted telemarketing, and balancing the competing interests of telemarketers. Denying a federal forum under § 1331 would impair those interests by potentially making the availability of the remedies prescribed by Congress dependent on the grace of the state courts and/or the accident of diversity of citizenship, neither of which is likely to have been intended by the Congress that created the TCPA to combat telemarketing abuses and provide effective remedies against them.

ARGUMENT

I. An Action Under the TCPA Falls Within Section 1331's Grant of Federal Jurisdiction Over Cases Arising Under Federal Law.

A. Congress Has Conferred Broad Federal-Question Jurisdiction on the Federal District Courts.

Article III of the Constitution provides that the "judicial Power" of the United States extends to cases "arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority." Article III empowers Congress to "confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 492 (1983) (citing *Osborn v. Bank of the United States,* 22 U.S. 738 (1824)). The statutory grant of federal-question jurisdiction in 28 U.S.C. § 1331 tracks the constitutional language by giving the district courts jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." Although this Court has not read the statute as conferring jurisdiction over the full range of federal-question cases that the Constitution might permit, *see Verlinden*, 461 U.S. at 494-95, the Court has recognized that § 1331 was intended to, and does, "provide a broad jurisdictional grant to the federal courts." *Powell v. McCormack*, 395 U.S. 486, 515 (1969).

The last century and a half have seen the steady rise to ascendancy of statutory federal-question jurisdiction. By contrast, for most of the first century following ratification of the Constitution, Congress had

conferred broad diversity and admiralty jurisdiction on the federal trial courts but granted them original or removal jurisdiction over only a relatively narrow slice of cases involving federal questions. For the most part, those cases involved particular parties whose litigation implicated issues of federal law (such as national banks or federal officers) or specific subject-matters (such as cases involving import, tax, and postal laws, cases brought under laws regulating the slave trade, patent and copyright cases, and, in the aftermath of the Civil War, cases arising under the new federal civil-rights statutes). *See, e.g.,* Rev. Stat. §§ 563, 629, 643, 644 (2d ed. 1878) (compiling jurisdictional provisions extant as of 1874).

That state of affairs changed significantly in 1875, when Congress gave the federal circuit courts (the principal federal trial courts of the day) jurisdiction over all civil suits "arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority," provided the amount in controversy exceeded $500. Jurisdiction & Removal Act of 1875, ch. 137, § 1, 18 Stat. 470. As this Court has said,

> By that statute "… Congress gave the federal courts the vast range of power which had lain dormant in the Constitution since 1789. These courts ceased to be restricted tribunals of fair dealing between citizens of different states and became the *primary* and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."

Zwickler v. Koota, 389 U.S. 241, 256 (1967) (quoting Frankfurter & Landis, *The Business of the Supreme*

Court: A Study in the Federal Judicial System 65 (1928) (emphasis added by Court)).

The 1875 Act's grant of jurisdiction over federal-question cases was the direct ancestor of the one now found in 28 U.S.C. § 1331. That jurisdictional grant transferred to the federal district courts (with an increase in the required amount in controversy to $3,000) when the circuit courts were abolished in 1911. Judicial Code of 1911, § 24(1), 36 Stat. 1087. Simultaneously, Congress further expanded federal-question jurisdiction by giving the district courts jurisdiction over "all suits and proceedings arising under any law regulating commerce," without regard to amount in controversy—the forerunner of today's 28 U.S.C. § 1337. Judicial Code of 1911, § 24(8).

When Title 28 of the United States Code was enacted into law in 1948, the major heads of federal district court jurisdiction that had been combined in § 24 of the Judicial Code of 1911 were placed in separate sections. The grant of general federal-question jurisdiction became § 1331. It was substantively unchanged, although the wording of the basic jurisdictional grant was simplified to its present form, covering all cases "arising under the Constitution, laws or treaties of the United States" that satisfied the amount-in-controversy requirement, which remained at $3,000. Act of June 25, 1948, ch. 646, 62 Stat. 930. At the same time, the parallel grant of jurisdiction over cases arising under federal laws regulating commerce (without regard to amount in controversy) became 28 U.S.C. § 1337.

In 1958, Congress raised § 1331's jurisdictional amount to $10,000, together with the amount-in-controversy requirement for diversity cases, which

§ 1331's jurisdictional amount had paralleled since 1875. The increase reflected Congress's desire to keep small-value *diversity* cases out of the federal courts, not an intent to significantly limit federal-question jurisdiction, which Congress anticipated would be largely unaffected by the change. *See* 13D Wright, Miller, *et al.*, *Federal Practice & Procedure* § 3561.1 (3d ed. 2011). In 1976, Congress moved § 1331 decidedly in the opposite direction from diversity jurisdiction by eliminating § 1331's jurisdictional amount requirement for cases involving challenges to federal agency actions. Pub. L. No. 94-574, § 2, 90 Stat 2721. The 1976 legislation was intended to eliminate "an unfortunate gap in the statutory jurisdiction of the Federal courts," which resulted in "denial to litigants of a Federal forum for Federal claims considered incapable of dollars and cents valuation or too small in monetary amount." H.R. Rep. No. 94-1656, at 12, 1976 U.S.C.C.A.N. 6121, 6134-45.

Section 1331 assumed its current form in 1980 with the complete elimination of the jurisdictional amount requirement. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2(a), 94 Stat. 2369. The 1980 legislation completed the job of uncoupling federal-question jurisdiction from the amount-in-controversy requirement originally developed principally for diversity cases. The change reflected Congress's view that federal courts should have primary "responsibility [for] deciding all questions of federal law." H.R. Rep. No. 96-1461, at 1, 1980 U.S.C.C.A.N. 5063.[4]

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[4] The 1980 legislation left in place an amount-in-controversy requirement for one federal right of action, under the Consumer

(*Footnote continued*)

Thus, since 1980, § 1331 has provided a basis for federal district court jurisdiction generally applicable to all civil actions arising under federal law, without regard to amount in controversy. Section 1331 jurisdiction now subsumes the jurisdiction that was already available under § 1337, irrespective of amount in controversy, over cases arising under federal laws enacted pursuant to the Commerce Clause. *See* 13D Wright, Miller, *et al.*, *supra* § 3574.[5]

By contrast to this marked expansion of statutory federal-question jurisdiction, Congress has in recent decades cast conventional diversity jurisdiction (which was liberally granted in the early history of the republic) into relative disfavor, greatly increasing the amount-in-controversy requirement for diversity cases from $10,000 to $50,000 in 1988 and to $75,000 in 1996. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642 (1988); Federal Courts Improvement Act, Pub. L. No. 104-317, § 205, 110 Stat. 3847, 3850 (1996).

Product Safety Act, by amending that Act to provide a right of action only for claims involving damages greater than $10,000. *See* 15 U.S.C. § 2072(a).

[5] Section 1337 was amended in 1978 to add an amount-in-controversy requirement applicable to one specific type of case that had "led to a deluge of cases seeking small sums," *id.*—cases under the "Carmack Amendment," 49 U.S.C. §§ 11706, 14706, which allows shippers to sue interstate freight carriers for loss of or damage to articles shipped. In terms applicable to § 1331 as well as § 1337, the amendment provides that district courts may exercise original jurisdiction over a Carmack Amendment claim only if the amount in controversy exceeds $10,000. *See* Pub. L. No. 95-486, § 9, 92 Stat. 1629, *codified at* 28 U.S.C. § 1337(a).

B. Section 1331 Provides Jurisdiction Over Cases Asserting Rights of Action Created and Governed by Federal Law.

Both the wording of the statutory grant of federal-question jurisdiction, which closely follows that of Article III, and the sparse legislative history of its original 1875 enactment, suggest that Congress "meant to 'confer the whole power which the Constitution conferred'" over federal-question cases. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 8 n.8 (1983) (quoting 2 Cong. Rec. 4986 (1874) (Sen. Carpenter)); *see also* Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 160 & n.22 (1953). This Court, however, has long construed the statute to confer something less than the full Article III judicial power to hear federal-question cases. *See Verlinden*, 461 U.S. at 494-95; *Powell*, 395 U.S. at 515-16; *Zwickler*, 389 U.S. at 246 n.8; *Romero v. Int'l Terminal Operating Co.,* 358 U.S. 354, 379 (1959).

The Court has refrained from "stating a 'single, precise, all-embracing' test" to define the full extent of jurisdiction under § 1331. *Grable*, 545 U.S. at 314 (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 821 (1988) (Stevens, J., concurring)). But however uncertain the *outer* bounds of § 1331 may be, there is no uncertainty about its core: A claim arises under federal law for purposes of § 1331 if federal law creates the right of action and provides the rules of decision that govern the merits of the claim. As Justice Holmes famously stated in *American Well Works Co. v. Layne & Bowler Co.*, "[a] suit arises under the law that creates the cause of action." 241 U.S. 257, 260 (1916). Subsequent decisions of this Court have explained that this principle is more suited to

describing those claims that necessarily satisfy § 1331 than to identifying those that do not—that is, it is "'more useful for inclusion than for … exclusion.'" *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 809 n.5 (1986) (quoting *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.)). Thus, "[t]he 'vast majority' of cases that come within this grant of jurisdiction" are "those in which federal law creates the cause of action." *Id.* at 808 (quoting *Franchise Tax Bd.*, 463 U.S. at 8-9). In other words, though not always *necessary* for federal jurisdiction, "a federal cause of action [is] a *sufficient* condition for federal-question jurisdiction," at least where federal substantive law provides the applicable rules of decision governing the right of action. *Grable & Sons*, 545 U.S. at 317 (emphasis added).

For decades the Court has consistently sustained the invocation of federal-question jurisdiction under § 1331 when a plaintiff's complaint asserts even a merely colorable right of action under federal law. *E.g.*, *Verizon Md.,* 535 U.S. at 642-43 (right of action asserted under Telecommunications Act of 1996); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (right of action asserted under Emergency Planning and Community Right-To-Know Act of 1986); *Oneida Indian Nation v. Oneida County, N.Y.*, 414 U.S. 661, 666-67 (1974) (right of action asserted under Nonintercourse Act*); Illinois v. City of Milwaukee*, 406 U.S. 91, 98-100 (1972) (right of action asserted under federal common law); *Powell v. McCormack*, 395 U.S. at 515-16 (right of action asserted under Article I of the Constitution); *Romero*, 358 U.S. at 359 (right of action asserted under Jones Act); *Lauritzen v. Larsen*, 345 U.S. 571, 575 (1953) (same); *Mont.-Dak. Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246,

249 (1951) (right of action asserted under Federal Power Act); *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) (right of action asserted under Fourth and Fifth Amendments); *Peyton v. Ry. Express Agency*, 316 U.S. 350, 352-53 (1942) (right of action asserted under Carmack Amendment);[6] *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (right of action asserted under patent laws).

As Justice Frankfurter put it in *Romero*, when a plaintiff "asserts a substantial claim that [a federal statute] affords him a right of recovery," that "assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights." 358 U.S. at 359. Similarly, in *Peyton*, the Court affirmed that a "cause of action [that] has its origin in and is controlled by" an act of Congress "arises under" that act. 316 U.S. at 352. In the words of Justice Holmes, "if the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." *Kohler Die*, 228 U.S. at 25.

This Court has, in one instance, held that a right of action created by a federal statute does not necessarily "arise under" federal law for purposes of § 1331. In *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900), the court held that an "adverse suit" to

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[6] *Peyton* involved 28 U.S.C. § 1337's grant of jurisdiction over actions arising under federal laws regulating commerce, but as the Court there made plain by relying on other decisions construing the general federal-question jurisdictional statute, the scope of "arising under" jurisdiction under §§ 1331 and 1337 is the same. *See* 316 U.S. at 353.

determine ownership of a mining claim, which was permitted by federal statutes, did not necessarily fall within the jurisdiction conferred by § 1331. But the statutory right of action at issue in *Shoshone Mining* was an odd one because it provided that state, territorial, and local statutory and customary law would in many instances provide the rule of decision. *See* 177 U.S. at 508. The Court held that in cases where only matters of state or local law were raised by an adverse suit, and no question of the "construction or effect" of federal law was involved, an adverse suit was not one arising under federal law. *Id.* at 509. By contrast, an adverse suit that actually turned on an issue of federal law *would* arise under federal law for jurisdictional purposes. *Id.* at 508.

Importantly, the Court recognized that if the federal statute at issue had not only created a right of action, but also created the substantive rights to be vindicated and the law to be applied in that action, an action brought under the statute would "necessarily involve[]" the kind of "controversy as to the scope and effect of the statute" that would satisfy the jurisdictional requirement of a federal question in *every* case brought under the statute. *Id*. at 510. Equally importantly, the Court recognized that when Congress enacts a law that does not expressly modify existing jurisdictional statutes, Congress leaves those statutes in place, so that an action under the law is within federal jurisdiction if it satisfies the requirements of the pre-existing jurisdictional statutes, whether based on diversity or federal-question jurisdiction. *See id.* at 506-07 ("Leaving the matter as it did, it unquestionably meant that the competency of the court should be determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts.").

Shoshone thus represents "an extremely rare exception to the sufficiency of a federal right of action" under § 1331, *Grable & Sons*, 545 U.S. at 317 n.4, applicable in the unusual situation where a federal statute purports to confer a right of action not governed by federal law. Outside that situation, the Court has recognized that a right of action conferred by and governed by federal law arises under the laws of the United States for purposes of § 1331. Indeed, the Court has held that even where *state* law creates a right of action, a claim that requires the decision of contested and substantial issues of federal law that are essential to the plaintiff's claim and appear on the face of a well-pleaded complaint (*i.e.*, are not raised in anticipation of a federal-law defense) may arise under federal law for purposes of § 1331. *See Grable & Sons*, 545 U.S. at 312-15; *City of Chicago v. Int'l Coll. of Surgeons,* 522 U.S. 156, 164 (1997); *Gully v. First Nat'l Bank,* 299 U.S. 109, 117-118 (1936); *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180, 199 (1921). As *Grable & Sons* explains, these cases illustrate that a right of action that is both created by and governed by federal law is not *necessary* to federal-question jurisdiction under § 1331, though it is *sufficient* to satisfy § 1331. 545 U.S. at 317.

Because § 1331 broadly confers federal jurisdiction over all civil actions arising under federal law, Congress need not separately express an intention to grant subject-matter jurisdiction when it creates a right of action governed by federal law. Section 1331 stands ready as, in this Court's words, a "catchall" statute under which "jurisdiction is sufficiently established by allegation of a claim under the Constitution or federal statutes." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977). When Con-

gress acts without specifically addressing the matter of federal jurisdiction, it leaves the issue of jurisdiction to be "determined by rules theretofore prescribed in respect to the jurisdiction of the Federal courts," including the accepted judicial construction of § 1331. *Shoshone Mining*, 177 U.S. at 507. In such cases, the question of congressional intent that determines jurisdiction is whether Congress intended to create a federal-law right of action; if there is a colorable claim that it did, jurisdiction is presumptively available under § 1331. *See Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union*, 457 U.S. 15, 21-23 & n.6 (1982). "The significance of statutory general federal question jurisdiction is that when Congress enacts a substantive law, federal district courts immediately and necessarily attain jurisdiction to hear claims under that statute, without Congress having to do anything more." Wasserman, *Jurisdiction and Merits*, 80 Wash. L. Rev. 643, 677-78 (2005).

Analogously, this Court has held that to establish the applicability of the Tucker Act's general waiver of sovereign immunity, which is necessary to establish jurisdiction over actions seeking a money judgment from the United States, congressional intent to create a substantive right to such relief that falls within the scope of the Tucker Act waiver is sufficient; a second expression of intent to waive sovereign immunity is not necessary. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472-73 (2003) (citing *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983)). The common principle is that where Congress provides in general terms for federal jurisdiction over a particular class of cases, and then by statute creates a right of action falling within that class, a sufficient expression

of intent to confer jurisdiction is, by definition, present.

C. A Claim Under the TCPA Arises Under Federal Law Within the Meaning of Section 1331.

The damages claim authorized by the TCPA falls within the heartland of federal-question jurisdiction under § 1331: Not only is the right of action created by a federal statute, but the substantive law governing the right of action is also prescribed by federal law. That is, the TCPA not only provides that a plaintiff may bring an action for damages and injunctive relief, but also supplies the substantive standards whose violation gives rise to the private right of action and specifies the measure of relief for the violation. *See* 47 U.S.C. § 227(b)(3).

The language of the statute leaves no room for doubt that federal law is, in Justice Holmes's words, "the law that creates the cause of action." *American Well Works*, 241 U.S. at 260. The express terms of the TCPA authorize the bringing of an action by a victim of a particularly described form of wrongful conduct for a specified type of recovery from a person responsible for the wrong. As this Court has stated, "to say that A shall be liable to B is the *express* creation of a right of action." *Key Tronic Corp. v. United States*, 511 U.S. 809, 818 n.11 (1994) (quoting *id.* at 822 (Scalia, J., dissenting in part)).

In addition to creating the right of action, the TCPA also provides the substantive law that governs all aspects of a TCPA case. It sets forth, in great detail, standards of conduct for users of automatic telephone dialers, recorded telephone messages, and telephone facsimile machines, *see* 47 U.S.C. § 227(b)(1),

and it authorizes the FCC to provide additional restrictions on the use of such equipment by regulation, *see id.* § 227(b)(2). Only the violation of those federal statutory and regulatory standards gives rise to the liability enforced by the private right of action the TCPA creates: The Act specifies that the action it authorizes must be "based on a violation of this subsection or the regulations prescribed under this subsection." *Id*. § 227(b)(3)(A). The TCPA also prescribes with particularity the remedies available for such violations: injunctive relief, *id*.; actual damages or $500 in statutory damages for each violation, whichever is greater, *id*. § 227(b)(3)(B); and, for a willful or knowing violation, up to three times the actual or statutory damages otherwise available, *id*. § 227(b)(3). In short, federal substantive law governs all aspects of a TCPA claim.

Because federal law both creates the right of action and determines its resolution, a claim under the TCPA "arises under" federal law within the meaning of § 1331. *See Grable & Sons*, 545 U.S. at 317. Because the long-accepted understanding of federal-question jurisdiction under § 1331 readily encompasses TCPA claims, § 1331 "would, standing alone, vest the district courts with jurisdiction over this action." *K Mart Corp. v. Cartier, Inc.*, 485 U.S. 176, 182 (1988).

II. The TCPA Does Not Displace Federal Jurisdiction Under Section 1331.

A. Jurisdiction Under Section 1331 Is Available Unless Congress Has Acted Affirmatively to Remove It.

Congress can and does make exceptions to statutes conferring jurisdiction on the federal district courts,

including § 1331's grant of federal-question jurisdiction. Thus, the district courts are "divested of jurisdiction" otherwise available under § 1331 "if [an] action [falls] within [a] specific grant[] of exclusive jurisdiction" to another court. *K Mart*, 485 U.S. at 182-83. For example, the Hobbs Act, 28 U.S.C. §§ 2342 & 2349, and similar provisions for review of certain agency actions by the federal courts of appeals expressly preclude district court jurisdiction under § 1331 by providing that the jurisdiction of the courts of appeals is exclusive. *See*, *e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729 (1985); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578 (1980); *Foti v. INS,* 375 U.S. 217 (1963).

Likewise, § 1331 will not provide jurisdiction over a claim that otherwise arises under federal law within the meaning of the statute if Congress has provided that § 1331 is unavailable for that particular type of claim. For example, in *Weinberger v. Salfi*, 422 U.S. 749 (1975), the Court held that jurisdiction under § 1331 is unavailable where the Social Security Act, "[o]n its face, … bars district court federal-question jurisdiction over suits … which seek to recover Social Security benefits." *Id*. at 756-57.

The decisive question in such cases is whether the terms of a statute "*divest* the district courts of their authority under 28 U.S.C. § 1331." *Verizon Md.*, 535 U.S. at 642. Because § 1331 otherwise provides a "familiar" grant of federal jurisdiction over *all* civil actions arising under federal law, jurisdiction over such an action cannot be ousted merely because another statute does not affirmatively confer it, but only if a statute "removes the jurisdiction given to the federal

courts." *Whitman v. Dep't of Transp.*, 547 U.S. 512, 513-14 (2006).

The determination of whether Congress has, by statute, precluded the federal courts from exercising jurisdiction under § 1331 over an action arising under federal law must be guided by the principle that the federal courts have an obligation to exercise jurisdiction conferred by Congress and properly invoked by a party. This Court long ago stated in *Cohens v. Virginia*, a federal court "must take jurisdiction if it should." 19 U.S. 264, 404 (1821). A consequence of this principle is that "[w]hen there are statutes clearly defining the jurisdiction of the courts, the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation." *Rosecrans v. United States*, 165 U.S. 257, 262 (1897). Although jurisdiction may not be created by implication, a court may not read a statute to "destroy a jurisdiction otherwise clearly existing, by mere inferences and doubtful construction." *Id.* at 263. Stated more succinctly, "jurisdiction is not defeated by implication." *Galveston, Harrisburg & San Antonio Ry. Co. v. Wallace*, 223 U.S. 481, 490 (1912).

Similarly, the "cardinal rule … that repeals by implication are not favored … counsels a refusal to pare down jurisdiction" granted by statute on the basis of appeals to ambiguous legislative history and negative inferences from subsequent enactments. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 549 (1972). Thus, absent statutory language requiring limitation of their scope, broad jurisdictional provisions such as § 1331 "must be given the meaning and sweep that their origins and their language dictate." *Id.*

B. Congress Has Not Acted to Divest the District Courts of Their Jurisdiction Under Section 1331 Over TCPA Claims.

1. The TCPA's Permissive Authorization of State-Court Actions Does Not Divest Federal Courts of Jurisdiction.

The TCPA's language does not come close to containing the affirmative divestiture of jurisdiction that would be necessary to prevent federal courts from exercising their authority under § 1331 over claims arising under federal law. The argument that federal courts lack federal-question jurisdiction over TCPA claims rests on statutory language providing, in permissive terms, that an action under the TCPA "may, if otherwise permitted by the laws or rules of court of a State," be brought "in an appropriate court of that State." 47 U.S.C. § 227(b)(3). The statute's language, on its face, does not make resort to state courts mandatory for one wishing to pursue a claim (through the use of a term such as "shall"). It does not state that state-court jurisdiction is exclusive. Nor does the TCPA say that any otherwise available source of federal jurisdiction may not be invoked for claims under it. Indeed, the provision creating the private right of action does not purport to address federal-court jurisdiction at all.

Such statutory language is insufficient to preclude a court from exercising jurisdiction it otherwise possesses, for "the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *Bank of N.Y.*, 296 U.S. at 479. This Court reaffirmed this principle and applied it to directly analogous statutory language in *Tafflin v. Levitt*, 493 U.S.

455. *Tafflin* concerned the Racketeering Influenced and Corrupt Organizations Act (RICO), which, like the TCPA, provides a private right of action and, in the same sentence, says that a person "may" bring the action in a particular court (without mentioning any other courts). Specifically, RICO's private right of action provision states: "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). The issue in *Tafflin* was whether the statute's reference to the federal courts precludes state courts from exercising the jurisdiction they would otherwise possess over a RICO claim under the long-established principle that state courts of general jurisdiction have concurrent jurisdiction with federal courts over claims arising under federal law. *See Claflin v. Houseman,* 93 U.S. 130, 136-37 (1876); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 507-08 (1962); *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 477-78 (1981).

Holding that RICO does not divest state courts of jurisdiction, *Tafflin* observed that RICO's "grant of federal jurisdiction is plainly permissive, not mandatory, for '[t]he statute does not state nor even suggest that such jurisdiction shall be exclusive. It provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be.'" 493 U.S. at 460-61 (quoting *Dowd Box*, 368 U.S. at 506). The Court emphasized that "[i]t is black letter law ... that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action." *Id*. at

461 (quoting *Gulf Offshore*, 453 U.S. at 479). The Court found "nothing in the language of RICO—much less an 'explicit statutory directive'—to suggest that Congress has, by affirmative enactment, divested the state courts of jurisdiction to hear civil RICO claims." *Id*. at 460.

Likewise, in *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), the Court held that Title VII, by permitting actions to be brought in federal courts (and saying nothing about state-court jurisdiction), does not preclude state courts from exercising concurrent jurisdiction over Title VII claims. As in *Tafflin*, the Court stressed that the statute "contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction." *Id*. at 823. That "omission" was "strong, and arguably sufficient, evidence that Congress had no such intent." *Id*.

The TCPA has exactly the same features that the Court found dispositive in *Tafflin* and *Donnelly*. Its authorization of state-court litigation is permissive, not mandatory; it nowhere states that an action *must* be brought in state court; and it contains no language making state-court jurisdiction exclusive or otherwise ousting federal courts of their presumptive concurrent jurisdiction over federal claims under § 1331. In short, if the statutory language in *Tafflin* or *Donnelly* did not divest state courts of jurisdiction over RICO and Title VII claims, the statutory language here does not divest federal courts of jurisdiction over TCPA claims.

That the issue in *Tafflin* and *Donnelly* was whether *state* courts were ousted of jurisdiction, while the issue here is whether *federal* courts have been divest-

ed of jurisdiction, does not change the analysis. *Tafflin* and *Donnelly*, after all, rested on the presumption of *concurrent* state and federal-court jurisdiction over federal-question cases. That presumption, by definition, goes both ways—that is, it is a presumption that *both* court systems possess jurisdiction unless Congress says otherwise. In the case of the state courts, the presumption that they have such jurisdiction rests both on the notion that a court of general jurisdiction has the power to hear and determine "any civil and transitory cause of action created by" the law of another jurisdiction, *Galveston, Harrisburg & San Antonio Ry. Co.*, 223 U.S. at 491, and on the idea that, under the Supremacy Clause, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are." *Tafflin*, 493 U.S. at 469 (Scalia, J., concurring) (quoting *Claflin*, 93 U.S. at 136-37). In the case of the federal courts, presumptive jurisdiction over federal claims rests on Congress's express conferral of broad jurisdiction over all cases arising under federal law. In either case, jurisdiction exists unless Congress takes it away.

Thus, this Court has applied the same analysis to assess both arguments that federal statutes foreclose state-court jurisdiction and arguments that statutes preclude exercise of federal-question jurisdiction under § 1331. In the first type of case, as the Court said in *Tafflin* and *Donnelly*, the issue is whether Congress has "ousted" state courts of jurisdiction they otherwise possess. Similarly, the Court in *Verizon Maryland* and *Whitman* stated that when a claim otherwise falls within § 1331's broad grant of federal-question jurisdiction, the jurisdictional issue turns on whether some other statute "divests" them of or "re-

moves" such jurisdiction. *Verizon Md.*, 535 U.S. at 642; *Whitman*, 547 U.S. at 513-14. Given the analytical equivalence of the two inquiries, statutory language insufficient to accomplish the former also fails to do the latter.

Other decisions of this Court confirm that divestiture of § 1331 jurisdiction may not be inferred from provisions permitting, but not requiring, particular types of actions to be brought in other courts. For example, in *Bowen v. Massachusetts*, the Court held that § 1331 provides subject-matter jurisdiction for an action against the United States seeking monetary relief exceeding $10,000 (if there is an applicable waiver of sovereign immunity). 487 U.S. 879, 891 & nn. 15-16, 910 (1988). The Court so held even though the Tucker Act, 28 U.S.C. § 1491, grants jurisdiction to the Court of Federal Claims over actions seeking such monetary relief (while the Little Tucker Act, 28 U.S.C. § 1346(a)(2), provides the district courts with concurrent jurisdiction only if monetary claims do not exceed $10,000). As *Bowen* noted, the Tucker Act does not grant *exclusive* jurisdiction to the Court of Federal Claims, and thus the statutory scheme does not oust the district courts of their federal-question jurisdiction over claims for monetary relief exceeding $10,000. District courts therefore may exercise federal-question jurisdiction over such claims if and when there is an applicable waiver of sovereign immunity and a statutory right of action. 487 U.S. at 910 n.48.[7]

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[7] In *Bowen*, both the right of action and the applicable waiver of sovereign immunity were found in the Administrative Procedure Act (APA), 5 U.S.C. § 702. As the Court pointed out, in most instances, the Court of Federal Claims will be the exclusive

(*Footnote continued*)

Likewise, in *Verizon Maryland*, the Court rejected the proposition that a provision of the Telecommunications Act of 1996, 47 U.S.C. § 252(e)(6), which allows district courts to review certain orders issued by state public service commissions, impliedly forecloses the exercise of the courts' otherwise available federal-question jurisdiction under § 1331 to review other types of orders. 535 U.S. at 643. The Court emphasized that in light of § 1331's facial applicability, the issue was whether § 252(e)(6)'s terms were "enough to eliminate jurisdiction under § 1331." *Id*. Because the statute at issue "d[id] not even mention subject-matter jurisdiction," and merely, in permissive terms, authorized a right of action under other circumstances, the Court concluded that it left "the jurisdictional grant of § 1331 untouched." *Id*. at 644.

This Court has also held that statutes giving it non-exclusive original jurisdiction over cases to which states are parties do not impliedly preclude the district courts from exercising federal-question jurisdiction over such actions if they arise under federal law within the meaning of § 1331. *See Illinois v. City of Milwaukee*, 406 U.S. at 100-01; *Ames v. Kansas*, 111 U.S. 449 (1884). As the Court explained in *Ames*, the

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court available for monetary relief claims against the United States for more than $10,000, because the APA waiver does not extend to claims for "money damages," which the monetary claims in *Bowen* were held not to be. *See* 487 U.S. at 910 & n.48; *see also Van Drasek v. Lehman*, 762 F.2d 1065, 1071 n.10 (D.C. Cir. 1985) ("[T]he jurisdiction of the Court of [Federal] Claims for suits claiming more than $10,000 is not exclusive; rather, there is rarely any statute available that waives sovereign immunity for suits in the district court, other than the Tucker Act with its $10,000 limit.").

availability of jurisdiction in this Court over such actions does not "exempt[]" suits involving states from the "operation" of § 1331 where the terms of the statute otherwise provide "the requisite jurisdiction." 111 U.S. at 470.

Similarly, in *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691 (2003), this Court held that a provision in the Fair Labor Standards Act (FLSA) stating that an action "may be maintained … in any State or Federal court of competent jurisdiction," 29 U.S.C. § 216(b), did not preclude the exercise of removal jurisdiction under 28 U.S.C. § 1441 (based on the existence of original federal-question jurisdiction under § 1331) over the objection of a plaintiff who wished to "maintain" the action in state court. The Court observed that "[n]othing on the face of 29 U.S.C. § 216(b) looks like an express prohibition of removal, there being no mention of removal, let alone of prohibition." 538 U.S. at 694. The Court accordingly held that the statutory permission to litigate claims in state court does not impliedly displace the federal courts' removal jurisdiction under § 1441 over cases otherwise falling within § 1331's jurisdictional grant.

The common thread in all these decisions is that otherwise existing jurisdiction, such as the federal courts' jurisdiction over federal-question cases under § 1331, is not taken away by a statutory provision that permits some other exercise of judicial authority without mentioning, let alone limiting, the jurisdiction already available. That principle is fully applicable to the TCPA, which says not a word to indicate that state-court jurisdiction is exclusive or otherwise to disturb the jurisdiction already conferred by statute on the federal courts.

The absence of any textual suggestion that state-court jurisdiction is exclusive is particularly striking because another TCPA provision, § 227(f)(2), expressly provides that federal-court jurisdiction over actions brought by state attorneys general to enforce the act is "exclusive." Thus, "§ 227(f)(2) is explicit about exclusivity, while § 227(b)(3) is not; the natural inference is that the state forum mentioned in § 227(b)(3) is optional rather than mandatory." *Brill*, 427 F.3d at 451. The fact that "where otherwise applicable jurisdiction was meant to be excluded, it was excluded expressly" strongly "reinforce[s] the conclusion that [the statute's] silence on the subject leaves the jurisdictional grant of § 1331 untouched." *Verizon Md.*, 535 U.S. at 644.

This conclusion is underscored by the so-far unanimous agreement of the courts of appeals that the district courts may exercise *diversity* jurisdiction over TCPA claims under 28 U.S.C. § 1332. *See*, *e.g.*, *Gottlieb*, 436 F.3d at 338-41. As the Second Circuit observed in *Gottlieb*, "[n]othing in § 227(b)(3), or in any other provision of the statute, expressly divests federal courts of diversity jurisdiction over private actions under the TCPA." *Id.* at 340. Thus, *Gottlieb* held, § 1332 jurisdiction is available because "diversity jurisdiction is presumed to exist for all causes of action so long as the statutory requirements are satisfied" unless it has been "expressly abrogated by Congress." *Id.*

Exactly the same is true with respect to federal-question jurisdiction: Nothing in the TCPA expressly divests federal courts of federal-question jurisdiction, and, as *Verizon Maryland* and the many other decisions discussed above establish, jurisdiction under

§ 1331 is presumptively available for cases that meet its statutory requirements unless Congress has acted to remove that jurisdiction. There is no basis for holding that diversity jurisdiction should be given preferential treatment over federal-question jurisdiction in determining whether another statute has abrogated otherwise available jurisdiction. Indeed, the history of the last century and a half of jurisdictional legislation is that Congress has, if anything, expressed a preference for federal-question jurisdiction by consistently liberalizing its availability while limiting diversity jurisdiction. *See supra* 12-16. There is, therefore, no more reason to find a divestiture of federal-question jurisdiction in the language of TCPA than there is to find that the statute displaces diversity jurisdiction.

To be sure, Congress can and occasionally has prohibited the exercise of federal-question jurisdiction while allowing diversity jurisdiction, but accomplishing that result requires language of a kind absent from the TCPA. For example, the Federal Arbitration Act (FAA), 9 U.S.C. § 4, provides federal jurisdiction to entertain a suit seeking to compel arbitration only if the federal court "would have jurisdiction, 'save for [the arbitration] agreement,' over 'a suit arising out of the controversy between the parties.'" *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1267-68 (2009). Although the FAA makes federal law determinative of the substantive entitlement to arbitrate, the words of § 4 preclude the assertion of federal-question jurisdiction on the basis of that issue of federal law, because the federal question would not exist "save for" the agreement to arbitrate. *Id*. at 1271-72, 1273-75: "The phrase 'save for [the arbitration] agreement' indicates that the district court should assume the absence of the arbitration agreement and determine whether it

'would have jurisdiction under title 28' without it." *Id.* at 1273. The statutory language would be superfluous if § 1331 jurisdiction could be based on the federal-law claim that an arbitration agreement should be enforced. *Id.* at 1273-74. The TCPA contains no language specifically aimed at achieving a similar "'anomaly' in the realm of federal legislation," *id.* at 1271, by precluding federal-question jurisdiction while allowing diversity jurisdiction.

2. Giving Effect to Section 1331's Grant of Jurisdiction Over Claims Arising Under the TCPA Does Not Make Section 227(b)(3)'s Language Superfluous.

The argument that the TCPA strips the federal courts of jurisdiction under § 1331 rests largely on the notion that § 227(b)(3)'s language providing that an action may be brought in a state court would otherwise be superfluous, because even without that language a state court would presumptively have concurrent jurisdiction over a claim under the TCPA, *see Gulf Offshore Co.,* 453 U.S. at 478, and would be obligated to entertain such claims under the principles of *Testa v. Katt*, 330 U.S. 386, which forbid state courts to discriminate against federal causes of action. Unless § 227(b)(3)'s words exclude federal jurisdiction, the argument goes, they do nothing at all.

Of course, the same could have been said in *Tafflin*: Even if the provision creating the RICO right of action did not say that a RICO plaintiff "may sue … in any appropriate federal district court," the federal district courts would have had jurisdiction over such actions under § 1331 (and § 1337), and thus a plaintiff could bring such a suit in whatever district court was

"appropriate" under the venue statutes. The arguable superfluity of the words, however, did not lead the Court to give them a meaning they could not bear—namely, that concurrent state-court jurisdiction was precluded. As this Court has recently observed, "the rule against giving a portion of text an interpretation which renders it superfluous does not prescribe that a passage which could have been more terse does not mean what it says." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1078 (2011). By the same token, the rule cannot require interpreting statutory text to mean what it does *not* say.

In any event, the statutory permission to bring an action in state court is hardly superfluous if it is not read to foreclose federal jurisdiction. First, as Judge Posner has pointed out, the language puts to rest any suggestion that *federal* jurisdiction might be exclusive—a matter of some significance given that litigation over whether RICO and Title VII conferred exclusive federal jurisdiction (despite the absence of language in the statutes saying so) generated "decades of litigation" even in the face of precedents such as *Gulf Offshore*, *Dowd Box*, and *Claflin* that indicated a strong presumption in favor of concurrent jurisdiction. *Brill*, 427 F.3d at 451.

Moreover, § 227(b)(3) does not merely provide that a plaintiff may bring a TCPA action in state court; it provides that she may do so "if otherwise permitted by the laws or rules of court of a State." Thus, the statute spells out the conditions under which a state court must entertain a TCPA action. Whatever the precise scope of that language may be (a question that is not presented here), it is far from clear that it prescribes exactly the same standard that would prevail

under the nondiscrimination principle of *Testa v. Katt* in the absence of the language allowing an action in state court "if otherwise permitted."

For example, it seems debatable whether the outcome in *Haywood v. Drown*, 129 S. Ct. 2108 (2009), would have been the same if 42 U.S.C. § 1983 provided that an action under it could be brought in state court only if otherwise permitted by state law or rules of court. *Haywood* held that, under *Testa*'s nondiscrimination principle, a § 1983 damages action against a state prison employee may be brought in a state court despite a state-law jurisdictional provision foreclosing such actions (whether based on state or federal law) and providing an alternative remedy in the form of a damages claim against the state in another court. Certainly the analysis of the issue, even if not the ultimate result, would have been different had it turned on the meaning of a statute with language similar to that of § 227(b)(3) rather than on the scope of the judicially created rule of *Testa*.

In short, the language of § 227(b)(3) "may serve the further function of freeing states from *Testa's* rule that they may not discriminate against federal claims." *Brill*, 427 F.3d at 451. At a minimum, it substitutes a statutory standard that is phrased quite differently from *Testa*'s nondiscrimination principle.[8]

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[8] Possible interpretations of the "otherwise permitted" language are canvassed in *MLC Mortgage Corp. v. Sun America Mortgage Co.*, 212 P.3d 1199 (Okla. 2009). These include: (1) the view that the statute requires affirmative state statutory authorization for TCPA actions; (2) the view that the statute permits states to forbid TCPA actions; and (3) the view that the statutory standard is similar to *Testa*'s nondiscrimination principle, and permits only neutral state jurisdictional statutes.

3. Legislative History Does Not Support Reading the TCPA to Displace Federal-Question Jurisdiction Under Section 1331.

Lower courts that have held that the TCPA precludes exercise of federal-question jurisdiction over claims arising under the Act have placed considerable reliance on the TCPA's legislative history. *See*, *e.g.*, *ErieNet*, 156 F.3d at 515; *Int'l Sci.*, 106 F.3d at 1152-53. But the fragment of legislative history that addresses the significance of the Act's reference to state courts provides no support for reading into the Act a limitation on § 1331 that is not present on the face of the TCPA.

To begin with, reliance on legislative history to find the clear indication of congressional intent necessary to withdraw jurisdiction already provided by another statute is highly suspect when the statutory language itself does not even address federal jurisdiction. As Justice Scalia stated in his concurrence in *Taflin*, "it is simply wrong in principle to assert that Congress can effect this affirmative legislative act by simply talking about it …." 493 U.S. at 472. Thus, in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546 (2005), the Court refused to rely even on apparently clear statements in legislative history materials to override a facially applicable congressional grant of jurisdiction to the federal courts:

> [T]he authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous

> terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however ….

Id. at 568.

The Court in *Exxon* identified "two serious criticisms" frequently applicable to legislative history: Its often ambiguous and unilluminating nature, and its tendency to represent the views only of particular members of Congress (or even their staffs) because it is not, unlike a statute passed by both the House and Senate, subjected to the "requirements of Article I." *Id.* As in *Exxon*, "in this instance both criticisms are right on the mark." *Id.* at 569. The legislative history reflects only the views of a single member, and contains no clear suggestion—indeed, no suggestion of any kind—that the TCPA was intended to make state-court jurisdiction exclusive.

Specifically, the legislative history cited by the lower courts consists of a floor statement by one of the congressional sponsors of the TCPA, Senator Hollings:

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court ....

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

"[O]rdinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980). And here, the floor statement does not even address the relevant question: Whether the statute forecloses reliance on otherwise-available bases of federal jurisdiction. Senator Hollings's statement for the most part only repeats what the statutory language provides—namely, that the private right of action created by the TCPA would "allow" actions in state court if otherwise permitted by state law. If, as *Tafflin* holds, such permissive language in a statute does not oust a court of jurisdiction it otherwise possesses, surely the mere repetition of the same permissive language by a congressional sponsor cannot transform the statute's words into an ouster of jurisdiction.

Similarly, Senator Hollings's expression of hope that the states will allow actions to be brought in their courts, and particularly that small-claims courts will be available for small-damages actions, in no way suggests that federal-court actions are precluded. It merely represents his view that many TCPA actions will be suited for resolution by small-claims courts. In *Donnelly*, this Court held that the expectation of members of Congress that Title VII actions would be brought in federal court, "even if universally shared," was "not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction." 494 U.S. at 824-25. The same is necessarily true of the hopes of a single Senator.

In sum, as in *Donnelly* and *Tafflin*, the cited legislative history contains *no* discussion one way or the other of conferring exclusive jurisdiction over the private right of action on any court, "much less any suggestion that Congress affirmatively intended to confer exclusive jurisdiction over such claims on the [state] courts." *Tafflin*, 493 U.S. at 461. "Like its plain text, the legislative history of the Act affirmatively describes the jurisdiction of the [state] courts, but is completely silent on any role of the [federal] courts …." *Donnelly*, 494 U.S. at 825. As in *Tafflin* and *Donnelly*, such legislative history cannot supply what the TCPA's text does not: an affirmative ouster of the jurisdiction § 1331 provides over claims arising under federal law.

4. Reading an Ouster of Federal-Question Jurisdiction Into the TCPA Would Impede Important Federal Policies.

a. The TCPA Serves Significant Federal Interests.

Some of the lower courts that have held that § 227(b)(3) precludes the exercise of federal-question jurisdiction have asserted that the TCPA does not embody significant federal interests, because its passage was primarily motivated by the perceived need to supplement state laws that could not effectively achieve their objectives because many telemarketers operate across state lines. *See*, *e.g.*, *ErieNet*, 156 F.3d at 518 (citing TCPA § 2(7), 105 Stat. 2394). The absence of a real federal interest underlying the law, these courts have suggested, diminishes the need for the exercise of federal-question jurisdiction.

This view is mistaken on several levels. To begin with, federal-question jurisdiction under § 1331 does not depend on the nature of the interests served by the federal law on which a particular action is based: It depends on whether the action arises under federal law. The notion that the courts are authorized to excise some matters arising under federal law from their jurisdiction because they view the interests served by a congressional enactment to be insufficiently "federal" finds no support in this Court's jurisprudence.

In addition, the idea that enactments motivated in whole or in part by the perceived inefficacy of state efforts to control interstate transactions do not serve federal interests is fundamentally wrong. Many critically important congressional enactments rest on precisely that basis. The Federal Power Act, for example, was enacted in large part because, following this Court's decision in *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), states lacked the ability to control wholesale rates for electricity sold in interstate commerce. *See New York v. FERC*, 535 U.S. 1, 5-6 (2002). Yet no one would seriously suggest that the Federal Power Act does not serve a real federal interest. Indeed, under the Commerce Clause, controlling interstate commercial activities that escape state regulation could be considered the quintessential federal interest.

Moreover, if Congress saw no federal interest in protecting consumers against unwanted telemarketing calls, junk faxes, and the like, the inadequacy of state efforts to regulate such practices would have been of no concern. The findings supporting the TCPA demonstrate that Congress was not pursuing

policies to which it was indifferent merely because the states could not do so by themselves. Rather, Congress found that both individuals and businesses have legitimate interests in avoiding being targeted by intrusive and costly telemarketing practices, and that such practices interfere with interstate commerce, a particularly weighty federal concern. *See* TCPA §§ 2(5)-(6), (10)-(15), 105 Stat. 2394 (discussed *supra* at 4-5).

Congress also found that the legitimate interests it saw in regulating telemarketing abuses had to be balanced against other important federal interests—namely, interests in "commercial freedoms of speech and trade." *Id*. § 2(9). Precisely because of the importance of the interests on both sides, Congress struck much of the balance itself: It did not simply rely on existing state-law restrictions, but supplied its own set of prohibitions and remedies, supplemented by delegations of regulatory authority to a *federal* agency, the FCC. *See* 47 U.S.C. §§ 227(b), (c), (d) & (f). At the same time, Congress permitted a *separate* sphere for state regulation by providing that state-law restrictions would generally not be preempted by the TCPA. *See* 47 U.S.C. § 227(e). In short, the congressional findings supporting the TCPA, together with the reticulated scheme of regulation created by the statute, refute any suggestion that the TCPA does not serve genuine or important federal interests.

b. Precluding Federal-Question Jurisdiction Would Impair the Federal Interests Served by the TCPA.

This Court has occasionally held that the federal interest in uniform interpretation of a federal statute is significant enough to preclude, by implication, con-

current state-court jurisdiction over matters arising under the statute. *See Tafflin*, 493 U.S. at 471 (Scalia, J., concurring) (discussing the Court's precedents holding Sherman and Clayton Act cases to be within exclusive federal jurisdiction). But the notion that there could be a comparable interest in *disabling* federal courts from uniformly interpreting federal law seems doubtful at best. Any such view would be particularly farfetched with respect to the TCPA, given that the Act expressly provides that actions by state attorneys general challenging widespread patterns and practices of abuse *must* be brought in federal court. 47 U.S.C. § 227(f)(2).

Far from serving the policies of the TCPA, precluding federal-question jurisdiction would substantially undermine them. The structure of the Act makes clear the important role that the private right of action serves in enforcing the Act, because the only governmental actions expressly authorized by the statute are those where a pattern or practice of misconduct can be identified. *See id.* § 227(f)(1). In addition, the Act's provisions for statutory damages and substantial enhancement of those damages in cases involving knowing or willful violations make clear that Congress intended the private right of action to be a remedy with teeth. *See id*. § 227(b)(3).

But because the statute makes a plaintiff's ability to proceed in state court contingent on whether a state's laws and rules of court "otherwise permit[]" such an action, reading the TCPA to foreclose federal-question jurisdiction could threaten to pull those teeth. Although the scope of the "otherwise permitted" language is uncertain, it at least suggests the possibility that states could channel TCPA actions in-

to inconvenient fora or even refuse altogether to entertain them. Indeed, the Supreme Court of Texas has held that TCPA actions may not be entertained by Texas courts in the absence of specific state statutory authorization, *see The Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.3d 707 (Tex. 2006), and other state courts, while not adopting this "opt-in" requirement, have indicated that states are free to "opt out" of allowing TCPA actions in their courts. *See, e.g.*, *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907 (Mo. 2002).[9] Thus, reading § 227(b)(3) to oust the federal courts of jurisdiction under § 1331 threatens to leave some victims of telemarketing abuses without the remedy that Congress intended to provide.

That result is hardly what one would expect from a Congress so concerned with the inadequacy of the state-by-state approach to regulating telemarketing, and with the privacy and other interests that unregulated autodialing, robocalling, and junk faxing threaten, that it created a uniform set of federal prohibitions, authorized the FCC to provide a uniform set of regulatory refinements to those prohibitions, and created a remedial scheme including a private right of action. As Judge Posner put it, "the proviso that actions may be filed in state court 'if otherwise permitted by the laws or rules of court of a State' implies that federal jurisdiction under § 1331 or § 1332 is available; otherwise where would victims go if a state

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[9] Other state courts have held that the "otherwise permitted" language does not permit states to discriminate against the TCPA right of action. *See*, *e.g.*, *Italia Foods, Inc. v. Sun Tours, Inc.*, __ N.E.2d __, 2011 WL 2163718 (Ill. June 3, 2011).

elected not to entertain these suits?" *Brill*, 427 F.3d at 451.

The possible availability of diversity jurisdiction even if federal-question jurisdiction is precluded does little to ameliorate the potential negative impact of making the federal courts unavailable under § 1331. For starters, a holding that § 1331 jurisdiction is precluded would threaten the consensus among the lower courts that § 1332 jurisdiction is available, because "if state jurisdiction really is 'exclusive,' then it knocks out § 1332 as well as § 1331." *Brill*, 527 F.3d at 450. Even if that were not the case, however, the availability of diversity but not federal-question jurisdiction would create its own set of conundrums: Plaintiffs whose states did not "otherwise permit[]" a TCPA action to be brought in their courts would have the ability to recover only if, by happenstance, there were diversity of citizenship and enough violations to create an amount in controversy exceeding $75,000 in an individual action or an aggregate amount in controversy exceeding $5 million in a class action. See 28 U.S.C. §§ 1332(a) & (d)(2). That result would be both arbitrary and contrary to the general rule that neither diversity jurisdiction nor the availability of a class action is supposed to affect whether a plaintiff has a claim as a matter of substantive law. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010). There is no reason to think that Congress—especially a Congress that set out to create a uniform set of federal rules governing telemarketers—intended such a topsy-turvy state of affairs.

This is not to denigrate the important objective served by Congress's authorization for state courts to entertain TCPA actions. As discussed above, the sta-

tute reflects the hope of its congressional sponsors that the states would make their courts, and particularly small-claims courts, available for actions that the parties consider appropriate for litigation in those fora. *See supra* at 40-41. But encouraging the availability of state courts is a far different matter from depriving the parties of the possibility of a federal forum in a matter otherwise within the scope of the federal courts' statutorily conferred jurisdiction, or, worse yet, potentially depriving a plaintiff who has been subjected to a TCPA violation of *any* remedy if a state chooses to withhold one. The Court should not interpret a statute that is *silent* on the matter of federal jurisdiction to bring about such an extraordinary result.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case remanded for further proceedings on the merits of the TCPA claims.

Respectfully submitted,

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