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IN THE SUPREME COURT OF THE UNITED STATES

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MARCUS D. MIMS, :

Petitioner :

v. : No. 10-1195

ARROW FINANCIAL SERVICES, LLC. :

- - - - - x

Washington, D.C.

Monday, November 28, 2011

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:04 a.m.

APPEARANCES:

SCOTT L. NELSON, ESQ., Washington, D.C.; on behalf of
Petitioner.

GREGORY G. GARRE, ESQ., Washington, D.C.; on behalf of
Respondent.

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P R O C E E D I N G S

(11:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next this morning in Case 10-1195, Mims v. Arrow Financial Services.

Mr. Nelson.

ORAL ARGUMENT OF SCOTT L. NELSON

ON BEHALF OF THE PETITIONER

MR. NELSON: Mr. Chief Justice, and may it please the Court:

The Federal question jurisdiction statute, 28 U.S.C. section 1331, broadly grants Federal courts jurisdiction over all actions arising under Federal law unless Congress has provided otherwise. That grant of jurisdiction encompasses rights of action that are created and governed by substantive Federal law.

The Telephone Consumer Protection Act sets forth such a right of action. It provides detailed substantive standards, and it grants a private right of action to recover for their violation. The TCPA permits that action to be filed in a State court if State court allows such actions, but it says nothing one way or another about whether the action may also be filed in Federal court.

JUSTICE KAGAN: Mr. Nelson, do you think

1 that there is a clear statement rule that applies when
2 Congress attempts to divest a Federal court of
3 jurisdiction over claims of this kind?

4 MR. NELSON: Well, sometimes the Court
5 has -- has talked about clear statement rules in terms
6 like "Congress must make unmistakably plain." I'm not
7 sure it rises to that level, but what the Court has said
8 is that jurisdiction granted by statute exists unless
9 Congress has affirmatively displaced it and that the
10 Court is unwilling to -- to defeat jurisdiction by mere
11 implication.

12 So, I think it -- it may be something a
13 little less than -- than what this Court has sometimes
14 referred to as a clear statement rule, but it is a
15 requirement that Congress act --

16 JUSTICE SCALIA: Do you have anything more
17 than implication here?

18 MR. NELSON: No. There -- there's not even
19 implication here, Justice Scalia. There's -- there's
20 really nothing at all.

21 CHIEF JUSTICE ROBERTS: You -- you'd have --
22 the same private right of action that could be brought
23 in State court without subsection 5 at all, right?

24 MR. NELSON: I -- I think that's very
25 likely, Your Honor. I mean, under -- under Tafflin, and

1 going back to the -- to over a century ago in Claflin,
2 there's a presumption that concurrent jurisdiction over
3 a transitory cause of action created by Federal law
4 exists in State courts. But as the Court pointed out in
5 Tafflin, that -- that presumption has sometimes, as in
6 the antitrust cases, been found to have been displaced
7 by implication from Federal policy.

8 CHIEF JUSTICE ROBERTS: What is the basis --
9 you assert that you could bring this -- bring a Federal
10 cause of action in Federal court.

11 MR. NELSON: Pardon me?

12 CHIEF JUSTICE ROBERTS: You think that you
13 can bring the Federal cause of action in Federal court.

14 MR. NELSON: Yes. I --

15 CHIEF JUSTICE ROBERTS: What is -- what is
16 the basis for -- putting aside jurisdiction, what is the
17 basis for the Federal cause of action?

18 MR. NELSON: Oh, you mean the existence of
19 the cause of action at all?

20 CHIEF JUSTICE ROBERTS: Yes. Yes.

21 MR. NELSON: I mean -- the -- you know, what
22 this Court has -- has, I think, said in its
23 interpretation of statutes is that where a statute
24 creates a right of recovery from A to B in a court under
25 circumstances Y, that is a right of action. And the --

1 CHIEF JUSTICE ROBERTS: But we -- we said
2 that 40 years ago. More recently, we've said that
3 Congress must be fairly express in creating a private
4 cause of action. And my -- my concern is if you put it
5 against that context, that our cases require fairly
6 direct evidence, express evidence, that Congress meant
7 to give a private right of action, in that context the
8 existence of an express State cause of action or Federal
9 cause of action that can only be brought in State court,
10 the implication that there isn't one that can be brought
11 on its own in Federal court is fairly strong.

12 MR. NELSON: Well, I think that's not
13 correct. I think, Your Honor, that that is actually
14 confusing the concept of whether there's a right of
15 action, which is a substantive right of recovery that
16 can be pursued in a court, and the question of
17 jurisdiction, which is in what court may that be
18 brought.

19 CHIEF JUSTICE ROBERTS: Well, that -- I
20 understand that -- that proposition. Assuming that
21 distinction is correct and that there is no
22 free-standing Federal cause of action, what good does
23 having Federal jurisdiction give you?

24 MR. NELSON: Well --

25 CHIEF JUSTICE ROBERTS: Because I take it

1 that at that point everybody can immediately --
2 defendants can remove -- never mind. Cross that off.

3 What benefit do you have if as soon as you
4 file your action, everybody says congratulations, you
5 have Federal jurisdiction, and you're kicked out of
6 court because you have no cause of action?

7 MR. NELSON: Well, what I'm saying, Your
8 Honor, is that -- is that it is not in fact the case
9 that there's no right of action.

10 CHIEF JUSTICE ROBERTS: No, no. I'm
11 assuming that we don't see a cause --

12 MR. NELSON: If there were no right of
13 action that -- that is available somehow in Federal
14 court, then, of course, it does no good to be in Federal
15 court. But that's not how the Court has -- has treated
16 rights of action. Limitations on the court in which a
17 right of action can be brought are not part of the right
18 of action. They're matters of jurisdiction.

19 JUSTICE ALITO: Can Congress create a cause
20 of action that does not arise under Federal law?

21 MR. NELSON: No, I don't really think it
22 can. Congress doesn't have the power to enact State
23 law. So, if Congress creates a cause of action and --
24 and establishes Federal law that governs it, that is
25 necessarily a cause of action that arises under Federal

1 law.

2 JUSTICE ALITO: And there's no dispute that
3 there is a cause of action here that was created by
4 Congress; isn't that right?

5 MR. NELSON: Yes, that -- that's correct. I
6 mean, you know, this is not an implied right of action.
7 It's an express right of action. Congress said in
8 227(b)(3) that if this right is violated, you can
9 recover X amount, \$500 per violation or up to three
10 times that much in the case of a willful violation. And
11 the question is simply whether by saying that it may be
12 filed in State court, the court has -- that Congress has
13 displaced the jurisdiction that would otherwise be
14 available --

15 JUSTICE BREYER: All right. So, the basic
16 reason seemed to me that it might mean "may," and I'm
17 following up on the Chief Justice here, who withdrew
18 this interesting part of his question. The -- the
19 Congress seemed to want to have ordinary people be able
20 to go into small claims court in a State and bring an
21 action for \$500 because they were pestered by these
22 salesmen on the phone in violation of the Act.

23 Now, if you're right, they could go into
24 Federal court. But so could the defense. And so, any
25 case they bring in small claims court, I guess, could be

1 removed, couldn't it? And how is that -- am I right
2 about that?

3 MR. NELSON: It's theoretically possible
4 that it could be removed --

5 JUSTICE BREYER: Well --

6 MR. NELSON: -- Justice Breyer, yes.

7 JUSTICE BREYER: Well, why wouldn't they --
8 I mean, you know, if they're really pests -- I'm not
9 saying they're all pests; some might be. But if they're
10 pests and they want to drag it out, what they do is they
11 just remove it from small claims court. They tell their
12 lawyer: Remove everything, remove everything. And so,
13 what was Congress's objective, seemingly to provide a
14 simple, clear, easy thing for the average American to do
15 when he's pestered, suddenly becomes a major legal
16 problem since the defense lawyer is instructed remove
17 every case to Federal court. Now, that's something
18 that's bothering me. So, I'd like to know what your
19 response is.

20 MR. NELSON: Yes, Justice Breyer. Well,
21 there are several -- several parts to the answer. The
22 first is that -- that the strategy itself is
23 self-defeating. If you have a \$500 claim being brought
24 by an individual in a small claims court, to pay a
25 lawyer, to pay the filing fee to remove it --

1 JUSTICE BREYER: Oh, it's not
2 self-defeating, because we keep it up, and the word will
3 get around.

4 MR. NELSON: Well, when you're --

5 JUSTICE BREYER: And in case, by the way,
6 anyone doubts it, before he even files it -- one of the
7 things that we'll instruct our salesmen to say is: If
8 you sue us, we're going to remove it to -- you know,
9 there are many ways of it getting around.

10 MR. NELSON: Well, Justice Breyer --

11 JUSTICE BREYER: Okay, what's the second?

12 MR. NELSON: To begin with -- now I want to
13 -- I want to -- I want to stay on this one because --

14 JUSTICE BREYER: Okay.

15 MR. NELSON: -- before I go on to the next
16 one.

17 JUSTICE BREYER: All right.

18 MR. NELSON: The -- the reason that that
19 strategy doesn't really work with respect to individual
20 plaintiffs filing in small claims court is they're not
21 necessarily -- in fact, they're most likely not going to
22 be repeat players. So, they don't have any real way to
23 find out about it, absent -- absent the -- the
24 telemarketer telling them in the phone call that you
25 have a right of action, which seems even more unlikely.

1 JUSTICE KENNEDY: I'm not sure I'm
2 understanding your answer, because I have one of the
3 same problems as Justice Breyer. Of -- the design of
4 this statute, from what I can infer what the
5 congressional intent was, is for an individual person to
6 be able to go into small claims court. And the
7 defendant will usually be the telephone company that
8 wants to remove it to Federal court and, as
9 Justice Breyer said, instruct the attorneys always go to
10 Federal court; the word will get out. And you're
11 saying, oh, don't worry about that; that won't happen?
12 That will happen. That's exactly what's going to
13 happen.

14 MR. NELSON: Justice Kennedy, I think that
15 word getting out is very unlikely to happen if you're
16 talking about the individual, uncounseled --

17 JUSTICE KENNEDY: Whether the word gets out
18 or not, they will all go to Federal court.

19 MR. NELSON: But -- and I'd also --

20 JUSTICE GINSBURG: Do we have any
21 information on the -- I mean, there are small claims
22 courts in State court. Is there any practice of
23 removing \$500 claims and paying much more than the \$500
24 that's at stake?

25 MR. NELSON: No. No, Justice Ginsburg, and

1 that was the -- the second part of the answer --

2 JUSTICE BREYER: But is there any reason to
3 think before you brought this suit that people thought
4 they could remove it to Federal court?

5 MR. NELSON: Well, in fact, in the Seventh
6 Circuit, defendants have been aware for the past 6
7 years, I believe, that they can remove these claims to
8 Federal court. And the ones that have been removed are
9 large class actions.

10 JUSTICE GINSBURG: In this -- in this case,
11 could -- could this case have been brought in a small
12 claims court? Where does it come from?

13 MR. NELSON: It comes from Florida, Your
14 Honor. It could not have been brought in small claims
15 court for two reasons. The complaint on its face
16 alleges 12 calls and more, and at -- at the \$1,500,
17 trebled -- the 500 trebled, that would far exceed the
18 \$5,000 jurisdictional limit of a Florida small claims
19 court.

20 The action also seeks injunctive relief,
21 which is not available.

22 JUSTICE BREYER: All right. Aside from the
23 individual ones, what's actually worrying me, which I've
24 tried to bring out, is I'm pretty certain Congress in
25 this statute was trying to protect the average person

1 who can't afford a lawyer who is pestered with these
2 calls. That's their object.

3 And I can think that if you can bring this
4 suit in Federal court, so can the defendants.

5 MR. NELSON: And --

6 JUSTICE BREYER: And, therefore, I think,
7 gee, I'm not so sure about this. They don't gain much
8 advantage, the plaintiffs, by being able to go into
9 Federal court, and there could be some advantage on the
10 defense side to making things more complex, raising
11 legal fees. Okay?

12 So, that's where I am at this moment. Now,
13 I'm asking you this because I would like your best
14 answer to disabuse me of this notion which cuts against
15 your case.

16 MR. NELSON: Well, I think -- I think the
17 further thing that cuts against it, Justice Breyer, is
18 you've received three amicus briefs on the other side
19 from people who participate in the industry, and what
20 they all say repeatedly is that there are tremendous
21 benefits to both plaintiffs and defendants to being in
22 small claims court in the truly small claims.

23 The defendant -- you know, if the defendant
24 removes, it's the defendant that's going to be racking
25 up the legal fees, not the pro se small claims

1 plaintiff.

2 CHIEF JUSTICE ROBERTS: But why is that?
3 Wouldn't the -- I think you're fighting Justice Breyer's
4 hypothetical. Wouldn't the -- I can imagine if you've
5 got a, you know, small claim type case because you got
6 the -- one of these calls, and the first thing you get
7 is the notice of removal and this. I mean, you're going
8 to say forget about it; I'm not going to hire a lawyer.
9 Right? I mean, the idea is they would drop it right
10 away.

11 MR. NELSON: Well, I mean, the -- the
12 experience is, I think -- and there's an interesting
13 article in a -- in a publication called the Consumer
14 Finance Law Quarterly Report from the spring of 2002
15 called "Defending TCPA Actions in San Diego Small Claims
16 Court."

17 And there are some repeat players on the
18 plaintiffs' side in small claims court, and the advice
19 that the author gives is, whatever you do, don't try to
20 escalate with those people; don't even remove it up to
21 the -- to the State court of general jurisdiction,
22 because you're just going to find yourself in a morass;
23 it's going to cost you the defendant much more money to
24 move this claim out of small claims court.

25 JUSTICE GINSBURG: Could the -- could these

1 claims be brought in State court as class actions?

2 MR. NELSON: Well, that depends, Justice
3 Ginsburg, on the State. As the Court probably may
4 recall, in the State of New York you probably couldn't
5 bring this action as a class action because of --

6 JUSTICE GINSBURG: But you could remove it
7 to the Federal courts, and then you could.

8 MR. NELSON: Right. In Federal court, I
9 think that although there's -- there's actually some
10 disagreement among the courts of appeals on this point
11 between the Second and Third Circuits over whether State
12 procedural law would apply in Federal court, we think
13 the best answer is Federal procedural law applies when
14 the claim is brought in Federal court. Then in some
15 States, there has been a recent decision in New Jersey
16 where a New Jersey court said that a class action was
17 not superior for --

18 JUSTICE GINSBURG: But it's up to -- it's up
19 to the State.

20 MR. NELSON: It's up to the State --

21 JUSTICE GINSBURG: Congress --

22 MR. NELSON: -- if it's brought in State
23 court, Your Honor.

24 JUSTICE GINSBURG: Congress said you bring
25 it according to your law and your rules of procedure.

1 So, the State could make it -- Congress may have been
2 interested in the small claims court, but it certainly
3 didn't limit the States to bringing -- to putting these
4 claims in small claims court.

5 MR. NELSON: No. And -- and in fact, number
6 one, it probably couldn't. Number two, the -- you know,
7 the statute creates rights to recovery and a right to
8 injunctive relief. That's actually the first listed
9 claim for relief that the private right of action gives
10 you. That is -- you know, injunctive relief claims are
11 virtually by definition beyond the scope of -- of
12 jurisdiction of small claims courts. So, it created a
13 right of action that in some instances would be
14 appropriate for small claims court.

15 And I think the incentives are that -- that
16 those that are really truly small claims court matters,
17 they'll be brought there, they'll stay there. Those
18 that are not, cases where it's worth litigating in
19 Federal court or worth litigating in a State court of
20 general jurisdiction and claims that may be possibly
21 suitable for class action status will be brought in
22 other types of courts, such --

23 JUSTICE KAGAN: Mr. Nelson, it's an odd
24 provision, this little clause, "if otherwise permitted
25 by the laws or a court of a State." What -- what is

1 your account of that provision and what it's doing here?

2 MR. NELSON: Well, I think -- I think what
3 it does is, principally, it displaces what would
4 otherwise be the rule of *Testa v. Katt*, that --

5 JUSTICE KAGAN: And why did Congress want to
6 do that? I mean, you would think -- and this goes back
7 to Justice Breyer's point -- you know, most of these
8 claims, they're small claims, they typically are better
9 situated in a State's small claims court, and yet here
10 Congress says, well, the State doesn't have to entertain
11 these, in which case they could only be brought in
12 Federal court.

13 MR. NELSON: Well, it's not clear that it
14 means, you know, how much freedom it gives them not to
15 entertain them. It may -- and again, you know, that's
16 an issue that the -- that the State supreme courts are
17 divided on, although it's a theoretical division at this
18 point because no State has actually precluded these
19 claims at this stage.

20 But, you know, I think that, especially read
21 against the backdrop of the general principle that,
22 while States can't discriminate against Federal rights
23 of action, they're also not required to create courts
24 that have jurisdiction over them, that what this statute
25 was intended to do was -- was recognize the flexibility

1 that the courts would have to define which courts and
2 under which procedures it would entertain these actions.

3 JUSTICE ALITO: Well, if the State thought
4 that its courts were just being overwhelmed by these
5 cases, even the small claims courts, there were so many
6 of them, would they be permitted to bar them completely?

7 MR. NELSON: That's a possible reading of
8 the statute, Justice Alito. That's what the Texas
9 Supreme Court has held. In fact, the Texas Supreme
10 Court has held that the State has to affirmatively
11 authorize them. Other State supreme courts have said
12 that what it means by "if otherwise permitted" is if
13 there's a court of general jurisdiction that hears cases
14 like this and we haven't affirmatively excluded them.
15 And then some State supreme courts such as Illinois have
16 said we don't even have the power to exclude them. But
17 I -- you know, that is one of the readings of the
18 statute.

19 But -- but what's clear is that the "if
20 otherwise permitted" does mean -- mean something.
21 It provides a statutory standard for when the action may
22 be brought in a State court, which is a matter of --
23 it's certainly not superfluous.

24 CHIEF JUSTICE ROBERTS: But is it just when
25 the action can be brought in State court or when the

1 action can be brought at all? It says you may bring an
2 action -- and that's what I understood your basis for
3 the Federal cause of action to be -- if it's permitted
4 by the law or rules of -- of a court of that State.

5 MR. NELSON: Well, I think what it says is
6 "may," may bring an action in the courts of that State
7 if otherwise permitted. And I think if you think about
8 what the -- what reason Congress would have to put "if
9 otherwise permitted by State laws or rules of court,"
10 it's very unlikely that it would use that phrase to
11 denote --

12 CHIEF JUSTICE ROBERTS: Yes.

13 MR. NELSON: -- when you have a right of
14 action in Federal court --

15 CHIEF JUSTICE ROBERTS: What you can
16 always --

17 MR. NELSON: -- as opposed to which State
18 court you would go to.

19 I'm sorry.

20 CHIEF JUSTICE ROBERTS: So, if -- could an
21 individual -- you say there's a Federal cause of action
22 in this case apart from the State cause of action that's
23 provided. Could that Federal cause of action be brought
24 in State court even though the State cause of action
25 could not be?

1 MR. NELSON: Mr. Chief Justice, with all due
2 respect, I don't think that this statute creates a,
3 quote, "State cause of action." It creates a Federal --

4 CHIEF JUSTICE ROBERTS: Right. Let's say
5 you have two --

6 MR. NELSON: -- Federal cause of action that
7 may be brought in both State and Federal court.

8 CHIEF JUSTICE ROBERTS: Got it, got it. But
9 just to follow up. The cause of action could be brought
10 in both, except if the State courts say it can't be
11 brought there. The State cause of action can't be
12 brought in State court because of this "if otherwise
13 permitted," right?

14 The Federal cause of action, though -- I
15 thought the State courts couldn't discriminate against
16 the Federal cause of action, any Federal cause of
17 action. So, you can sue in State court and say: I'm
18 bringing my Federal cause of action; so, the fact that
19 you don't permit a State cause of action doesn't bar me.

20 MR. NELSON: Again, I think that the premise
21 of the question is really not correct.

22 JUSTICE GINSBURG: This goes back to
23 Justice Alito's point --

24 MR. NELSON: The statue does not create --

25 JUSTICE GINSBURG: Justice Alito said this

1 claim arises under Federal law; the substantive law that
2 governs is not State law.

3 MR. NELSON: Exactly right, Justice
4 Ginsburg.

5 JUSTICE GINSBURG: It's a --

6 CHIEF JUSTICE ROBERTS: But that's fine.
7 That may be exactly right. But the cause of action
8 under subsection (3) asks whether or not this action --
9 it provides an action that can be brought in State court
10 if otherwise permitted, right?

11 MR. NELSON: It provides an action, says
12 that that action may be brought in State court if
13 otherwise permitted. That is the creation of a Federal
14 right of action over which State courts have
15 jurisdiction if their laws otherwise allow. It's not
16 the creation of two causes of action, one State and one
17 Federal.

18 And that's why "if otherwise permitted" may
19 give the States some leeway, maybe more than they would
20 have under *Testa v. Katt*, to exclude them. But it
21 doesn't actually affect the availability of the action
22 in Federal court. Although even if it did, Chief
23 Justice Roberts, in this case there has been no
24 dispute --

25 CHIEF JUSTICE ROBERTS: What about --

1 MR. NELSON: -- that this action is
2 otherwise permitted by Florida law.

3 CHIEF JUSTICE ROBERTS: What about a
4 diversity action? You could not bring this action in
5 State court because it's contrary to the law, the rules
6 of the court of that State, but there's diversity. Can
7 you bring that diversity action in Federal court?

8 MR. NELSON: Well, there's a -- there's a
9 split in the circuits over that question at this point.
10 But my answer is yes, because it's -- it's a Federal
11 cause of action governed by substantive Federal law, as
12 the -- as the Second Circuit's opinion in Gottlieb held.
13 The implication of that is if there's any basis for
14 jurisdiction, whether diversity or Federal question, you
15 have the right of action in Federal court, and it's not
16 contingent on whether State law allows the -- the right
17 of action.

18 JUSTICE SCALIA: Well, how is that? I mean,
19 the description of the right of action is that it exists
20 only if permitted by the laws or rules of court of a
21 State.

22 MR. NELSON: I think, again, Justice --

23 JUSTICE SCALIA: That's --

24 MR. NELSON: Justice Scalia, that's --
25 that's a description of the conditions under which it

1 may be brought in State court. It's not --

2 JUSTICE SCALIA: What -- what is a
3 description of the cause of action then?

4 MR. NELSON: The description of the cause of
5 action is that if the statute is violated --

6 JUSTICE SCALIA: Where is it in the statute?
7 I mean, I'm reading the section --

8 MR. NELSON: It's in --

9 JUSTICE SCALIA: -- that says -- under
10 "Protection of subscriber privacy rights," subsection
11 (5) is entitled "Private right of action," and the only
12 right of action it describes is that a person who has
13 received more than one telephone call -- blah, blah,
14 blah -- "may, if otherwise permitted by the laws or
15 rules of court of a State, bring in an appropriate court
16 of that State" actions. Now, even if you say that that
17 cause of action is bringable in Federal court, why
18 wouldn't it be still governed by the laws of a State?

19 MR. NELSON: Well, it -- it goes to the
20 question again -- and back to my answer to Chief Justice
21 Roberts -- of what you consider "if otherwise available"
22 to modify. And to me, I think the most natural reading
23 is that it modifies "may bring in State court," because
24 that is the only thing that it makes sense to have State
25 rules of court affect.

1 JUSTICE SCALIA: That's fine. Then where is
2 the creation of a private right of action bringable in
3 Federal court apart from State laws? Where does that
4 exist in this statute? I don't see it here.

5 MR. NELSON: It's in the section as a whole.
6 I think you're looking at (c) (5). (B) (3) is the one
7 that's actually at issue here, but its -- its phrasing
8 is the same. It's at 10a in the blue brief. And the
9 Act -- the statute as a whole creates an entitlement to
10 bring an action that yields certain recoveries.

11 And, you know, this Court has never looked
12 at statutory provisions that create rights of action and
13 say they may be brought in particular courts. It hasn't
14 read the reference to "may be brought in the courts" as
15 limiting the right of action. In Tafflin, for example,
16 the RICO statute says you may bring an action in Federal
17 court to recover damages for a violation of
18 that section.

19 CHIEF JUSTICE ROBERTS: Counsel, do you
20 know -- do you know why the Solicitor General is not
21 here defending the proposition that Federal law provides
22 a Federal cause of action that can be brought in Federal
23 court?

24 MR. NELSON: No, I don't know why. They
25 don't tell you, when they're not filing a brief, their

1 reasons why, Mr. Chief Justice. I think --

2 JUSTICE GINSBURG: Is it because the FCC
3 once took a position that the action was limited to
4 State courts?

5 MR. NELSON: No, the FCC has never taken the
6 position that it's limited to State courts. They have,
7 in a number of things that they have written about the
8 statute, said in the words of the statute that an action
9 may be filed in State court. They have never stated one
10 way or another a position on the question whether it may
11 be filed in Federal court. In the Charvat case, they
12 did file an amicus brief in the Sixth Circuit, taking
13 the position that the right of action created by the
14 statute is in all respects governed by substantive
15 Federal law. They didn't say anything one way or
16 another about whether the Sixth Circuit actually had
17 jurisdiction. It would seem kind of odd if they took
18 the view that it didn't, that they wouldn't have
19 mentioned it. But --

20 JUSTICE BREYER: What happens --

21 JUSTICE KENNEDY: Could you clarify one
22 point for me. You indicated that no State has said that
23 you cannot bring an action, and yet -- then you said
24 that Texas said it has to be specifically authorized.
25 Did the legislature of Texas specifically authorize it?

1 MR. NELSON: Yes, it --

2 JUSTICE KENNEDY: Don't let me misstate what
3 you said.

4 MR. NELSON: It's -- the Texas legislature
5 has enacted statutes that says a plaintiff may go to
6 court and bring an action under the TCPA, in those -- in
7 so many words, in addition to whatever right of action
8 it may have under Texas law.

9 If there are no further questions, I'll
10 reserve the remainder of my time for rebuttal.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Nelson.

13 Mr. Garre.

14 ORAL ARGUMENT OF GREGORY G. GARRE

15 ON BEHALF OF THE RESPONDENT

16 MR. GARRE: Thank you, Mr. Chief Justice,
17 and may it please the Court:

18 Whether this Court concludes that a
19 12(b) (1) or a 12(b) (6) label is the better fit, it
20 should hold that Congress did not intend for private
21 TCPA claims to be brought in Federal court under 28
22 U.S.C. 1331. The private right of action that Congress
23 expressed is distinct in three different and meaningful
24 ways. And if you look at the right of action, which is
25 on page --

1 JUSTICE KAGAN: Mr. Garre, you don't contest
2 the background rule, do you, which is that when Congress
3 creates a cause of action, there is Federal question
4 jurisdiction unless Congress does something to divest
5 the Federal courts of that jurisdiction?

6 MR. GARRE: We don't, and we haven't
7 contested that the action here arises under
8 Federal law. But what you've got is the question of the
9 interplay between two statutes, 1331 and the private
10 right of action here, in the same way the Court has
11 dealt with the interaction between section 1983 and
12 other private rights of action, for example, the City of
13 Rancho Palos Verdes v. Abrams case. And in that
14 context, the Court hasn't said, oh, if it's covered by
15 1983, of course you've got to bring it under -- you can
16 bring it under 1983 unless Congress has unmistakably
17 cleared that you can't.

18 JUSTICE KAGAN: But if you say, if you don't
19 contest the background principle, then the question is
20 whether Congress has clearly enough divested the Federal
21 courts of jurisdiction over this case essentially by
22 giving jurisdiction to the State courts. And we've had
23 a number of cases going the other way that suggest that
24 you don't divest one court of jurisdiction by giving
25 jurisdiction explicitly to another court. And the

1 question here is why is this any different, and has
2 Congress by granting jurisdiction to one court spoken
3 with the kind of clarity needed to divest the Federal
4 courts of their pre-existing jurisdiction?

5 MR. GARRE: And all of those cases dealt
6 with the constitutional presumption of concurrent State
7 court jurisdiction. And, of course, where the question
8 is whether the -- whether the Constitution has been
9 displaced, this Court has required Congress to speak
10 with unmistakable clarity. This case is the first case
11 where this Court is confronted with the question of
12 whether there's any similar presumption going the other
13 way. There's no constitutional foundation for that
14 presumption. It's just the interplay between statutes.
15 And for that reason we think the section 1983 paradigm
16 is more important.

17 JUSTICE KAGAN: But nobody has ever said
18 that Federal question jurisdiction as granted by 1331 is
19 some kind of junior sister when it comes to
20 jurisdiction, is some kind of weaker jurisdictional
21 default provision. I mean, once Congress has granted
22 Federal question jurisdiction by 1331, that's the
23 background rule. The Federal courts have jurisdiction
24 in the same way that the background rule is that the
25 State courts have jurisdiction.

1 MR. GARRE: Well, no. The background
2 rule -- the -- right. There's a background rule
3 provided by a statute which Congress can displace by a
4 later enacted more specific statute, and then there's
5 the background rule provided by the Constitution. And
6 our position is that usually when the Court talks about
7 Congress displacing, disrupting the traditional balance
8 of powers protected by the Constitution, it does require
9 Congress to speak with unmistakable clarity.

10 It doesn't apply that kind of presumption
11 when you're talking about an earlier more general
12 statute and a later more specific statute. In fact, in
13 that situation, the Court's general rule is that the
14 later more specific statute trumps the earlier more
15 general one. And I don't think there's any reason to
16 carve 1331 out, as venerable as it is.

17 JUSTICE GINSBURG: Mr. Garre, do you have
18 any example, other than this statute which is odd -- is
19 there any other example of a claim that arises under
20 Federal law, as this does under Federal statute -- the
21 substantive law is Federal -- that one may not bring in
22 State court?

23 MR. GARRE: I can't cite you another
24 example. The Shoshone case is another anomaly. It's a
25 little bit different. But I think -- I think the Court

1 should give credit to what Congress did here. And if
2 you look at the right of action, it's distinct in three
3 different ways.

4 First, Congress only spoke of bringing suits
5 in State courts. Petitioner hasn't identified another
6 Federal cause of action where Congress has done -- done
7 that.

8 Second, Congress modified the entire right
9 of action based on "and otherwise permitted by the laws
10 or rules of the court of a State." Under the rules of
11 grammar, there's no question that that clause modifies
12 the "may," not anything else that follows in the
13 statute.

14 And the third way it's distinct, Justice
15 Ginsburg, is that Congress spoke of the limitations on
16 State courts and State laws before it even expressed the
17 violation. In the typical way that Congress expresses a
18 private right of action -- and I've looked at a lot of
19 them in the last few days -- Congress talks about the
20 violation, and then it at times provides as a
21 descriptive matter where it could be brought. Here, in
22 the first --

23 JUSTICE GINSBURG: Is the law any different,
24 the violation and the governing law, any different than
25 if the Attorney General had brought suit or if the FCC

1 sought to enforce this law? I mean, the substance of
2 the law -- whoever sues, the Attorney General, the FCC,
3 the Federal law that governs is the same, isn't it?

4 MR. GARRE: Well, I think there's separate
5 provisions that allow the State attorneys general to go
6 into Federal court, and the FCC has its own enforcement
7 authority. They aren't conditioned by this limitation.
8 We're talking about this private right of action.

9 JUSTICE GINSBURG: But I'm talking about the
10 claim of the -- the violation, the wrongful conduct is
11 the same whether the Attorney General is suing, whether
12 the FCC is enforcing.

13 MR. GARRE: I think the basic elements of
14 the cause of action are going to be the same, but State
15 law can limit the availability of that cause of action,
16 the ability to bring it in a court. And under -- for
17 example, by a class action rule or just saying you can't
18 bring those claims at all or statute of limitations.

19 Petitioner's view is that a plaintiff can
20 circumvent those limitations altogether, authorized by
21 Congress in the most important clause of this private
22 right of action, simply go into Federal court and be
23 gone with those limitations.

24 JUSTICE SCALIA: Can --

25 JUSTICE SOTOMAYOR: Mr. Garre, what's the

1 logic of your position? Congress does a whole study
2 about how these harassing calls and e-mails and other
3 things are to citizens, and all of a sudden it's going
4 to limit the rights of those citizens to recover under
5 the Act to those States that are going to say okay. Why
6 even bother passing a Federal law if it was going to
7 give States the option to protect against this kind of
8 conduct alone?

9 MR. GARRE: Well, it created a public
10 Federal right. Congress all the time creates Federal
11 legal protections --

12 JUSTICE SOTOMAYOR: But generally it does.
13 You've just admitted --

14 MR. GARRE: -- but it doesn't give private
15 right of actions.

16 JUSTICE SOTOMAYOR: You've just admitted to
17 Justice Ginsburg nowhere else has it created a Federal
18 right with a private cause of action in which it's
19 limiting the protections of the Federal law to those
20 States that decide they want to do it too. I mean,
21 generally Congress creates a Federal right because they
22 don't think the States are doing enough.

23 MR. GARRE: And there's no question that
24 they would have a Federal right. And, of course, this
25 -- this private right of action is distinct. My point

1 is only it's not unusual for Congress to create a
2 Federal right and not provide a private right of action;
3 for example, under the provision in Gonzaga v. Doe --

4 JUSTICE SOTOMAYOR: Unquestionably. But
5 it's -- it is unusual for them to create a Federal right
6 with a cause of action and then limit its application to
7 those States that say it's okay. I go back to my
8 question --

9 MR. GARRE: Well, it wouldn't --

10 JUSTICE SOTOMAYOR: Why not simply say to
11 the States, please, do something about this problem?

12 MR. GARRE: I think that -- I would point
13 you to the statutory findings and, if you thought it
14 appropriate, look at Senator Hollings' statement as
15 well. And the reason why it makes sense is Congress is
16 dealing with a situation that, when it acted, the vast
17 majority of States had passed laws to allow consumers to
18 deal with this problem at the State level. They
19 identified this interstitial void that Your Honor spoke
20 about in your opinion on the Second Circuit, and
21 Congress acted to close that enforcement loophole to
22 authorize States to allow consumers to go after
23 interstate calls.

24 JUSTICE GINSBURG: Mr. Garre, was it really
25 a loophole? What would -- I mean, if this -- if conduct

1 -- if the telemarketers are calling from out of State,
2 but the impact is in the State, the person who is being
3 called, it seems to me that there certainly would be
4 jurisdiction over the out-of-State tortfeasor who's
5 doing something out of State that has this impact. It
6 targets the State, and it has its impact.

7 MR. GARRE: I've struggled over that, too,
8 Justice Ginsburg, but the one thing I can say is that
9 Congress perceived that enforcement gap that's
10 identified in the statutory findings reproduced in the
11 addendum here. And Congress, you would presume, acted
12 to fill the gap that it saw, and it did this by keeping
13 it at the State level, keeping in mind that we're
14 talking about something with an enormous potential for
15 volumes of claims.

16 JUSTICE BREYER: Well, this is the part
17 that's worrying me. On your side, it's hard, and it's
18 an unusual statute, but the -- certainly -- and I agree
19 with you that the language of the statute suggesting a
20 kind of reverse pre-emption, something like that, and
21 certainly Senator Hollings' comment, and certainly the
22 fact that they specifically provide for an attorney
23 general to bring an action in State court suggests that
24 they wanted the smaller private actions in State -- I
25 mean, in Federal court -- in State court; that favors

1 you.

2 All right. But then I thought, as you were
3 speaking, what about diversity jurisdiction? And -- and
4 I don't see why there wouldn't diversity jurisdiction in
5 terms of trying to get these out-of-State people. And
6 if there's diversity jurisdiction, why in heaven's name
7 would they want to say but there is no "arising under"
8 jurisdiction?

9 MR. GARRE: Well --

10 JUSTICE BREYER: So, I'm -- so, I'm pushed
11 the other way by that. So -- so, what do you think?
12 What do you think?

13 MR. GARRE: Well, ultimately, all of the
14 Federal circuits that have grappled with this problem
15 have concluded that recognizing diversity jurisdiction
16 isn't fundamentally incompatible with saying there's no
17 Federal question jurisdiction, for a couple of reasons.

18 JUSTICE BREYER: I know. But why, if you
19 were sitting in Congress and somebody did tell you --
20 Senator Hollings apparently never thought of this -- but
21 say to Senator Hollings, Senator, there will be
22 diversity jurisdiction here. And he, when he thinks
23 about it, says, hey, great, that's wonderful, because
24 these people are all in State A, and they're phoning
25 people in State B.

1 Now, if that was his reaction, then someone
2 would say what about "arising under" jurisdiction? And
3 what I'm thinking is, if I imaginatively put myself in
4 his position, I think, huh, why not?

5 MR. GARRE: For two reasons, Justice Breyer.

6 JUSTICE BREYER: What?

7 MR. GARRE: The first is amount in
8 controversy. Diversity has an amount in controversy
9 requirement of \$75,000, which makes it more likely,
10 where a plaintiff has that, it would be in a situation
11 where it would incur the costs of an attorney and other
12 expenses to go into Federal court. Federal question has
13 no amount in controversy after --

14 JUSTICE BREYER: That's true. So, there's a
15 "flooding the courts" problem.

16 MR. GARRE: Exactly, and the amount in
17 controversy checks that.

18 The second reason is that, to the extent
19 that Congress created this unique Federal right and
20 intended it to behave like State laws, as Judge
21 Calabresi described it on the Second Circuit, then it's
22 more natural to think of diversity jurisdiction allowing
23 the Federal courts to entertain what is in effect a
24 State cause of action than it would be for Federal
25 question jurisdiction where you have the anomalous

1 situation of someone going into Federal court and saying
2 I'm not bound by the State law limitations, for example,
3 the limitation on the class action, because I can bring
4 this Federal private right of action under Federal
5 question for \$500 wherever it is. I mean --

6 JUSTICE GINSBURG: How about supplemental
7 jurisdiction? Which says it doesn't have an amount in
8 controversy.

9 MR. GARRE: We would put that in the same
10 category of diversity, which is to say -- I mean,
11 ultimately, I think it -- particularly if you look at
12 this as the private right of action, Congress did not
13 express a private right of action for someone to go into
14 Federal court here. If this Court looked at it through
15 the lens of its private right of action jurisprudence,
16 the Court would say, I would think, you did not confer a
17 private right of action to go into Federal court in the
18 unique way that you express it here.

19 If the question was, if this private right
20 of action said you can sue an in-State company and a
21 plaintiff came here saying, well, it says in-State but
22 they didn't say you can't sue an out-of-State, this
23 Court would say, no, Congress said in-State; we --
24 that's the private right of action it created.

25 JUSTICE GINSBURG: But Congress -- Congress

1 also -- it made -- for attorney general suits, it said:
2 And Federal court jurisdiction is exclusive. So, it's
3 given Federal court exclusive jurisdiction to adjudicate
4 this claim, because the claim, as you -- I think as you
5 recognize, is the same whether it's brought by the FCC,
6 the attorney general, or private. So, if you use the
7 word "exclusive" there, it said nothing in this private
8 right of action about the State courts being exclusive.

9 MR. GARRE: And I think on that -- I mean,
10 first, it makes sense that they would authorize Federal
11 jurisdiction for the State attorney generals' actions
12 because they authorized the FCC to intervene there. It
13 also makes sense that they said "exclusive" there
14 because there they were dealing with the constitutional
15 presumption that State courts have concurrent
16 jurisdiction unless Congress affirmatively says they
17 don't. This Court had decided Tafflin a year earlier.
18 And so, it -- to give Congress its due, it would make
19 sense if you presume they're aware of this Court's
20 decisions, that it would say "exclusive" there. The
21 constitutional --

22 JUSTICE ALITO: You -- you seem to be
23 arguing for a three-tier standard for displacing
24 jurisdiction. So, if Congress wants to make a Federal
25 claim cognizable only in Federal court, it has to be

1 very, very clear. If it wants to displace diversity
2 jurisdiction, it doesn't have to be that clear, but
3 maybe it has to be certain -- clear to a certain degree.
4 If it wants to displace Federal question jurisdiction,
5 it doesn't have to be nearly as clear.

6 MR. GARRE: But we're not.

7 JUSTICE ALITO: Well, what --

8 MR. GARRE: We're certainly not arguing for
9 a distinction between diversity and Federal question.
10 And ultimately, if pushed, we would take the position
11 that because Congress was clear it wasn't authorizing
12 suit in Federal court, we think diversity should go,
13 too.

14 My response to Justice Breyer was that it --
15 it's a closer call because of the -- the amount in
16 controversy and the extent to which Congress created a
17 right --

18 JUSTICE SCALIA: When there is suit in
19 Federal court, let's say these attorney general suits,
20 what are the suit -- what is the suit governed by? Is
21 it governed by State law?

22 MR. GARRE: I think it would be governed by
23 Federal law. I think to the extent there's a --

24 JUSTICE SCALIA: Well, I mean, I -- Federal
25 law mirroring State law?

1 MR. GARRE: No, because the -- the public
2 right of action isn't conditioned the same way that the
3 private right of action is. And --

4 JUSTICE SCALIA: Well, it's the authority to
5 enforce, right?

6 MR. GARRE: If you look at the public right
7 of action, it's not --

8 JUSTICE SCALIA: Civil actions brought under
9 the subsection.

10 MR. GARRE: Right. The public right of
11 action isn't brought under (b)(3), which is a private
12 right of action. And the anomalies arise when you think
13 of allowing these claims in Federal court --

14 JUSTICE SCALIA: So, you have a different --
15 a different -- a different law applied if -- and the
16 State law limitations don't apply if it's a suit in
17 Federal court by -- by an attorney general?

18 MR. GARRE: The State law limitations apply
19 to the private right of action. The Congress didn't
20 say, here's the Federal --

21 JUSTICE SCALIA: I mean, it's so weird. I
22 can't understand that.

23 MR. GARRE: But, Your Honor, it's only weird
24 if you say they can bring the private right of action in
25 Federal court. If you say that Congress meant these to

1 be limited to State court, it makes perfect sense.
2 Congress was making clear: States, you have authority
3 to address this problem; you can address it under your
4 own law and rules of court.

5 JUSTICE KAGAN: I think, Mr. Garre, what
6 Justice Ginsburg and Justice Alito were suggesting, is
7 that this is a momentous thing for Congress to do to, to
8 deprive the Federal courts of jurisdiction over a cause
9 of action that has been created by Congress and a cause
10 of action that has Federal law as the rule of decision.
11 The usual presumption is that, of course, Federal courts
12 have jurisdiction over those matters under section 1331.

13 And this is one peculiar way of divesting
14 those Federal courts of jurisdiction. Obviously,
15 Congress knew how to write an exclusive jurisdiction
16 statute. It didn't here. So, why should we give
17 Congress the benefit of the doubt and sort of say, well,
18 Congress must have had something else in mind, even
19 though Congress didn't articulate that?

20 MR. GARRE: And if Congress has to say
21 "exclusive," then we lose. I'm not arguing otherwise.
22 But I think our position is, is what Congress did here
23 was unmistakably different and clear enough. And the
24 flip side of what you've just said is to say that
25 Congress meant nothing when it went out of its way to

1 create what all agree is an extraordinarily unique
2 private right of action.

3 JUSTICE KAGAN: No, I don't think that's
4 right because this is not superfluous, because of the
5 that provision that, you know, the Testa provision which
6 says that State courts don't have to entertain this
7 cause of action. So, in the usual case, State courts
8 would have to entertain this cause of action. Here,
9 Congress is saying, no, if they feel as though that
10 would deluge State courts, they have an out.

11 MR. GARRE: And if Congress had intended
12 that, Your Honor, I think the more natural way for it to
13 have said would -- would have been something like, in an
14 action brought in State court, it may be limited by the
15 laws or rules of that court. Here Congress cabined the
16 entire right of action: "may" comma -- subordinate
17 clause which modifies the "may." And there's just -- in
18 any other case, I think, Your Honor, the Court would
19 read the "if otherwise permitted" clause as modifying
20 the "may" and, therefore, the entire right of action.

21 JUSTICE SCALIA: Can Congress create a
22 Federal -- can Congress in effect delegate to the States
23 the contours of a -- a Federal cause of action? I mean,
24 you keep talking about it as a Federal cause of action.

25 MR. GARRE: I think --

1 JUSTICE SCALIA: But it's not really, if --
2 if its existence or non-existence depends upon State
3 law; or at least it depends upon State law, you say, if
4 it's brought in State courts; however, if it's brought
5 in Federal court by the Attorney General, you have a
6 totally different law applying, a Federal law.

7 MR. GARRE: I think in the Shoshone case
8 Congress created a right of action whose content was --
9 was supplied by State law. So --

10 JUSTICE KENNEDY: In which case? I
11 didn't --

12 MR. GARRE: The Shoshone Mining case.
13 It's -- it's cited in our brief.

14 JUSTICE KAGAN: But that is not this case.

15 MR. GARRE: No --

16 JUSTICE KAGAN: Nobody thinks that that's
17 this case.

18 MR. GARRE: No, but we're not saying that
19 this case is on fours with that case, but I think it's
20 an example where State law would fill the content of the
21 Federal right.

22 JUSTICE BREYER: Well, why wouldn't the --
23 the problem that Justice Scalia just identified or you
24 were talking about suggest -- actually favor their side,
25 that that "in conformity with State law" is talking

1 about procedure?

2 I mean, imagine that State law has a 2-year
3 limitation period or a 1-year. You see -- I don't know
4 what the limitation period is here. It may be longer.
5 And so, what happens is where you go into -- if the
6 attorney general brings the action, you're going to say
7 it's 4 years, but if it's in a State court and a private
8 person, it would be 1 year? That doesn't seem to me to
9 make sense.

10 It then seems to make sense if you interpret
11 that provision as saying what court you could go into in
12 the State. If the State permits you to go to the
13 superior court or the small claims court or the -- in
14 other words, procedural rules.

15 MR. GARRE: Well, and Congress didn't just
16 say "procedure," it said "laws or rules of court of the
17 State."

18 JUSTICE BREYER: It did, but look what --
19 well, how do you get out of the mess then -- what
20 happens when the State attorney general brings an action
21 in a Federal court, as he is permitted to do? What
22 statute of limitation or substantive rule do you apply?

23 MR. GARRE: It would be the general 4-year
24 Federal statute of limitations. I mean, the way --

25 JUSTICE BREYER: But that's now really odd

1 because we are then going to get different statutes of
2 limitations, depending upon whether a State attorney
3 general or an individual --

4 MR. GARRE: But it's not odd if you give
5 effect to the language of (b) (3), which in a sense says
6 we're going to leave this up to the States. Congress
7 contemplated through this language that there could be
8 50 different rules about how private TCPA claims would
9 be brought in State court. I think that's undisputed.

10 The question is whether or not you --
11 plaintiffs can just say I want out of that and go into
12 Federal court, and conversely whether a defendant can
13 remove any claim brought in State court --

14 CHIEF JUSTICE ROBERTS: I'm having --

15 MR. GARRE: -- into Federal court.

16 CHIEF JUSTICE ROBERTS: Im sorry. I'm
17 having trouble, Mr. Garre, figuring out what exactly is
18 at issue here. It seems to me that there are two
19 possible views on it. First is, is there Federal
20 jurisdiction over one of these actions? The second of
21 all is, is there a private right of action apart from
22 the one that can be brought under subsection (b) (3),
23 which is one in State court?

24 MR. GARRE: Right.

25 CHIEF JUSTICE ROBERTS: Now, which -- which

1 are we supposed to decide? I can see the Federal
2 question jurisdiction issue being straightforward.
3 Federal law creates this cause of action; therefore, you
4 can say that it is -- under 1331, there's jurisdiction,
5 but then you can't do anything once you're in Federal
6 court because the private right of action is limited to
7 State court.

8 MR. GARRE: And our position is ultimately
9 both are at issue. Certainly, the focus of this case
10 has been on the jurisdictional question, which is the
11 12(b)(1). But if the Court thinks that there's Federal
12 jurisdiction, then it should say the cause of action
13 fails under 12(b)(6) because both arguments are based on
14 the same exact statutory language.

15 This Court has recognized, for example, in
16 the Merrell Dow Pharmaceuticals case, that the
17 availability of a private right of action intersects
18 with jurisdiction. The Court recognized the same point
19 in the National Passengers Association case, 414 U.S.
20 453.

21 JUSTICE GINSBURG: Let's go back to the --
22 this -- this claim -- unlike the Shoshone Mining, this
23 claim arises under Federal law. There's no question
24 about that, is there?

25 MR. GARRE: We don't dispute that, Your

1 Honor.

2 JUSTICE GINSBURG: Okay. So, Federal law
3 creates the cause of action, and when Federal law
4 creates the cause of action, the rule has always been
5 there's 1331 jurisdiction.

6 MR. GARRE: Unless a later-enacted statute
7 precludes that rule. And here the later-enacted statute
8 doesn't win it --

9 JUSTICE GINSBURG: But the later-enacted
10 statute doesn't say that Federal law no longer creates
11 the cause of action.

12 MR. GARRE: The later-enacted statute
13 creates the cause of action. Federal -- 1331 doesn't
14 create a cause of action. It's jurisdictional only.
15 They need to have a cause of action.

16 JUSTICE GINSBURG: You have jurisdiction
17 when Federal law creates a cause of action.

18 MR. GARRE: Unless it has been displaced by
19 a later-enacted provision. And I --

20 JUSTICE KAGAN: Mr. Garre, do you have any
21 examples of that, places where we've said Congress has
22 divested the court of Federal question jurisdiction and
23 by what means?

24 MR. GARRE: I don't have an example in 1331.
25 I have do have section 1983, which I think is a perfect

1 parallel, because there you've got a venerable, general
2 provision, section 1983, which is actually older than
3 1331, and the question comes along from time to time
4 whether a later-enacted Federal right can be enforced
5 through 1983. And the Court, in that context, says
6 although we generally presume that you can go through
7 1983, if there's a later-enacted specific enforcement
8 mechanism, we give the facts of that --

9 JUSTICE KAGAN: And how specific does it
10 have to be? I mean, how vague are we willing to go here
11 and say, okay, Congress has done a good enough job
12 because somehow we have some idea that they wanted these
13 cases to end up in small claims court?

14 MR. GARRE: I think, if you look at the City
15 of Rancho Palos Verdes case, which I would encourage you
16 to look at, I think it doesn't have to be nearly as
17 specific as my friend is claiming.

18 I think you look at all signposts of
19 congressional intent. Here you've got the language
20 which is unmistakably distinctive. The State-law,
21 State-court-focused. You've got a structure of an act
22 where Congress, when it wants concurrent jurisdiction or
23 Federal jurisdiction, it says so. It provides the rules
24 for venue and what not. You've got legislative
25 statutory findings indicating that Congress both was

1 aware of the vast volumes of calls which could create
2 potential claims, wanting to address a particular
3 problem of an enforcement gap at the State level. And
4 then if you choose to look at it, you've got the
5 legislative history of the sponsor of this very unusual
6 provision saying --

7 JUSTICE GINSBURG: When Congress creates a
8 Federal claim, it usually doesn't. I mean, the
9 assumption is that it's going to be concurrent
10 jurisdiction.

11 MR. GARRE: Yes, and we're not -- I mean,
12 the question is whether or not that assumption should be
13 displaced here, and we're saying that Congress's
14 expressions of intent displace it here. And, again, I
15 think if Petitioner --

16 JUSTICE GINSBURG: Can we go back to your
17 1983 example? Because I was thinking about that, and
18 you said, well, the later specific statute is another
19 Federal statute. You have -- Congress has another
20 Federal statute that makes the more general 1983 not
21 available because you have the more specific Federal
22 statute.

23 MR. GARRE: And I think that's why the
24 parallel seems apt to us here. You -- instead of
25 dealing with Congress displacing case -- State court

1 jurisdiction with constitutional presumption, you have
2 an earlier-enacted Federal statute, 1331, and the
3 later-enacted statute, the TCPA private right of action
4 here.

5 JUSTICE SCALIA: Yes, but the difference is
6 that the 1983 cases don't deal with what this deals
7 with, which is displacement of the jurisdiction of
8 Federal courts. And we are jealous of our jurisdiction,
9 not only in the constitutional cases that you refer to,
10 but in all cases.

11 And I had thought that the general rule that
12 you have to be clear when you take cases out of the
13 Federal courts -- I thought that that applies not just
14 where you're dealing with a constitutional jurisdiction
15 but also where you're dealing with already-conferred
16 statutory jurisdiction. And why shouldn't I apply that
17 presumption?

18 MR. GARRE: But I think this Court has a
19 more generous attitude toward section 1983. And I think
20 in your opinion in the Rancho Palos Verdes case, you
21 spoke of a rebuttable presumption that Congress doesn't
22 mean to -- to displace section 1983, but yet you found
23 it there because of a specific enforcement mechanism. I
24 think the enforcement mechanism here is much more
25 specific and meaningful than even the one in the Rancho

1 Palos Verdes --

2 JUSTICE SCALIA: It didn't deal with the
3 jurisdiction of Federal courts. That's what gets our
4 hackles up --

5 MR. GARRE: It did not --

6 JUSTICE SCALIA: -- when you're telling us
7 we have been ousted of jurisdiction.

8 MR. GARRE: It did not --

9 JUSTICE SCALIA: We don't like that.

10 (Laughter.)

11 CHIEF JUSTICE ROBERTS: Counsel, I -- we've
12 been talking about where this provision fits, basically,
13 into our general jurisprudence in this area. But I've
14 never seen a statute remotely like this before. Is
15 there any one, where you have a Federal -- where you
16 have Congress creating a cause of action that can be
17 brought in State courts unless the State court says it
18 can't, saying nothing at all about whether there's a
19 Federal cause of action? This is the strangest statute
20 I've ever seen.

21 MR. GARRE: We totally agree, but I think
22 the important point from our perspective is either
23 Congress meant what it said, and this Court should give
24 effect to what it said in its very distinct and unusual
25 way, or it's rendered, you know, largely meaningless,

1 except in the most generalized sense, because if
2 Petitioner's right, you can bring a claim in State or
3 Federal court. The claim that you bring in Federal
4 court is in no way limited -- limited by the laws or
5 rules of a State court. And all of the stuff that
6 Congress said about the State courts and the
7 State-law-focused language at the very beginning of its
8 cause of action is meaningless, because Congress didn't
9 have to say any of this to authorize people to go into
10 State court under concurrent jurisdiction conferred by
11 the Constitution.

12 And our position is, is that this Court
13 should give effect to the words in the private right of
14 action, distinct as it is, that Congress created, and
15 hold that Congress did not intend for plaintiffs to be
16 able to bring -- to circumvent these limitations by
17 going into Federal court under 1331.

18 JUSTICE SOTOMAYOR: Could you tell me why
19 you seem to be taking somewhat contradictory positions?
20 You seem to be conceding that this is not a Federal
21 subject matter jurisdiction issue, but the scope of the
22 cause of action that was created. The judgment was on
23 the basis of lack of Federal subject matter
24 jurisdiction. Aren't you trying to alter the judgment?
25 And didn't you need to cross-petition to do that?

1 MR. GARRE: Well, I probably wasn't clear
2 enough, Justice Sotomayor. Our position is that
3 ultimately there is no Federal question jurisdiction;
4 that although it arises under 1331, the specific
5 provision here was never intended to be enforced through
6 1331 and, instead, was only authorizing State courts.

7 JUSTICE SOTOMAYOR: So, you're saying that a
8 State could, if it chose, say we're only going to award
9 actual damages, not the \$500 statutory --

10 MR. GARRE: No, I don't think the State
11 could actually alter what Congress said. It can -- it
12 can alter, as Congress said, the ability to bring a
13 right of action.

14 Now, I do think this Court could affirm --

15 JUSTICE SOTOMAYOR: But it can. It could
16 choose not to enforce that Federal right of action.

17 MR. GARRE: And in that case, a private
18 citizen would go to a State attorney general and say
19 bring this action on behalf, or go to the FCC and bring
20 an enforcement action. There are public rights --
21 public ways to enforce that.

22 Just to be clear, we think this Court could
23 affirm on the alternative ground of 12(b)(6), that there
24 is Federal question jurisdiction, but this private right
25 of action doesn't confer a right to go into -- into

1 Federal court. My friend has said that that position
2 has been waived. Under 12(h) of the Federal Rules of
3 Civil Procedure, we haven't waived 12(b)(6); we just
4 haven't asserted yet.

5 It's clear that Federal courts can convert
6 12(b)(1) motions into 12(b)(6) motions, and there'd be
7 no reason for this Court to remand simply for us to
8 assert a 12(b)(6) -- put a 12(b)(6) label on the same
9 position that we would be back before the courts
10 arguing, transforming judicial review into something
11 close to a ping-pong game.

12 JUSTICE ALITO: Wouldn't that be the oddest
13 creature that's ever been seen, a cause of action
14 created by Congress that is not a claim arising under
15 Federal law? That's what you'd be saying.

16 MR. GARRE: No, it would be a claim arising
17 under Federal law without a private right to bring it in
18 Federal court. And it would be odd, Your Honor, and our
19 position -- we agree with our friends -- that this is an
20 odd statutory provision. We ask this Court to give
21 effect to its language, which both sides agree is odd
22 but, we think, points to the conclusion that Congress
23 meant for these claims to be brought in State court and
24 not in Federal court under Federal question
25 jurisdiction.

1 JUSTICE KAGAN: But I guess that's the
2 question, Mr. Garre. If both sides agree it's odd, and
3 all nine Justices agree it's odd, I mean, I think we can
4 say this statute is odd. And the question is, where do
5 we go from there? And where -- you know, what's the
6 default position? If it's odd and we can't figure it
7 out, the default position seems to be Federal courts
8 have jurisdiction over Federal questions.

9 MR. GARRE: But I think that that
10 deprives -- yes, it's odd, but it's odd in a way that
11 one must presume that Congress actually meant what --
12 what it was doing in several different ways here. I
13 think it gets to a point where you just can't presume
14 that Congress didn't mean the impact of its words here.
15 So, we would urge this Court to give effect to them.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MR. GARRE: Thank you, Your Honor.

18 CHIEF JUSTICE ROBERTS: Mr. Nelson, you have
19 4 minutes remaining.

20 REBUTTAL ARGUMENT OF SCOTT L. NELSON

21 ON BEHALF OF THE PETITIONER

22 MR. NELSON: I want to start where Justice
23 Kagan left off, which is the presumption of the
24 existence of Federal jurisdiction unless Congress
25 affirmatively displaces it.

1 My friend suggested that that may not apply
2 or may not apply as strongly when we're talking about
3 Federal statutory jurisdiction and specifically 1331.
4 But this Court's decision in Colorado River, cited in
5 our reply brief, says exactly the opposite: that a
6 subsequent more specific Federal statute does not
7 displace the general grant of Federal jurisdiction under
8 1331, absent -- absent some clearer indication than the
9 mere existence of an optional State court jurisdiction
10 over the claim.

11 As to the oddness of the statute, a point on
12 which we all seem to now agree, the point I would make
13 there is I think that Respondent's position makes this
14 statute even odder, because it suggests that somehow
15 "may" means it may only be brought in Federal court, yet
16 it doesn't mean it may only be brought in Federal court
17 if there's diversity or 1367.

18 But as Judge Easterbrook said in Brill, if
19 "may" really means "may" only, then it wipes out
20 diversity and 1367 as well.

21 CHIEF JUSTICE ROBERTS: Are you arguing only
22 about "arising under" jurisdiction or are you arguing
23 also about a Federal cause of action that can be brought
24 in Federal court? In other words, I am trying to figure
25 out what we're being asked to decide in this odd case.

1 I understand the idea -- and I'm sorry to take up your
2 time -- I understand the idea that this is a Federal
3 question because it's created by a Federal law.

4 Can you go -- get into Federal court, and
5 then we'll have another case about whether you can bring
6 a cause of action there?

7 MR. NELSON: Well, I certainly hope not,
8 Your Honor. I mean, I think if you look at what the
9 question presented is and what the judgment below is,
10 it's a question of subject matter jurisdiction, a
11 12(b)(1) dismissal, and a question presented as to the
12 existence of 1331. But, you know, our point is not to
13 get people into Federal court so that they can be told
14 that they have no right of action. And the answer to
15 that point is that the -- the reference to State courts
16 in the provision is not a limitation on the right to
17 recovery.

18 Congress often actually creates rights of
19 action that refer to a particular court. It's -- it's
20 the Federal court in -- in every case but this one. But
21 as in RICO, as in the Carmack Amendment that was the
22 subject of the 1912 case of Galveston, Harrisburg, and
23 San Antonio Railway cited in our briefs, where the
24 Carmack Amendment said that persons damaged might make
25 complaint in any circuit or district court of the United

1 States. And the Communications Act provisions that we
2 cite on page 10 of our reply say people have certain
3 rights to recover, and they may bring them in Federal
4 court.

5 But those references to the courts have
6 never been considered to be a limit on the right of
7 action. Creating the ability to go into a court and
8 obtain a recovery creates a right of action, and it's
9 transitory; it can be brought in any court of competent
10 jurisdiction. And the reference in the statute to a
11 court that has jurisdiction over it does not mean that
12 the -- that the cause of action somehow does not exist
13 outside of that court.

14 The cause of action exists, and the question
15 is, is whether there's a jurisdictional basis. And
16 that's practically at this point, I think, been
17 conceded, that this statute arises under Federal law.
18 And there's really no indication whatsoever that merely
19 by saying "may" be brought in State court, that Congress
20 intended to displace Federal jurisdiction or to create a
21 right of action that, uniquely among Federal rights of
22 action, is only available in the State court.

23 Now, it's true, "may" -- or "if otherwise
24 permitted," as my friend said, modifies "may," but it
25 doesn't just modify "may" in isolation. It's "may"

1 what? May if otherwise permitted bring an action in
2 State court. So, the "if otherwise permitted" modifies
3 the conditions on which the action may be brought in
4 State court. But it really makes no sense whatsoever to
5 import State court rules into whether the action is
6 available in a Federal court.

7 Now --

8 JUSTICE SCALIA: Except that that's the only
9 section that creates a private right of action.

10 MR. NELSON: That's right. The private
11 right of action is created, but the private right of
12 action is not contingent on that "if." It's the ability
13 to bring it in State court.

14 CHIEF JUSTICE ROBERTS: Thank you, counsel,
15 counsel.

16 The case is submitted.

17 (Whereupon, at 12:04 p.m., the case in the
18 above-entitled matter was submitted.)

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