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Reply 'Stop' to Cancel: Whether Receiving One Unwanted Marketing Text Message Confers Standing in Federal Court

Curtis R. Crooke
Boston College Law School, curtis.crooke@bc.edu

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REPLY 'STOP' TO CANCEL: WHETHER RECEIVING ONE UNWANTED MARKETING TEXT MESSAGE CONFERS STANDING IN FEDERAL COURT

Abstract: On August 28, 2019, the United States Court of Appeals for the Eleventh Circuit, in *Salcedo v. Hanna*, created a split regarding whether the receipt of a text message in violation of the Telephone Consumer Protection Act of 1991 (TCPA) confers standing to sue. The TCPA contains prohibitions on the use of telephonic equipment for telemarketing purposes, which the Federal Communications Commission (FCC) has interpreted to include text messaging. The Act also provides a private right of action for citizens to sue for violations if they have standing, meaning, in part, that they have suffered an injury. In *Salcedo*, the Eleventh Circuit held that the recipient of a single text message sent in violation of the TCPA did not suffer an injury and, thus, could not establish standing to sue. This Comment argues that, based on precedent from the Supreme Court of the United States, the Eleventh Circuit correctly concluded that the plaintiff did not have standing. It further argues, however, that the Eleventh Circuit erred in ruling that Congress did not intend for the TCPA prohibitions to apply to text messages.

INTRODUCTION

Ninety-six percent of Americans owned a cellular phone in 2019, making cell phones essentially ubiquitous in the United States.[1] Texting is a highly prevalent form of communication in the modern world.[2] Some businesses, however,

[1] *Mobile Fact Sheet*, PEW RSCH. CTR.: INTERNET & TECH. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/ [https://perma.cc/ZQG5-UGM8]. Hand-held cell phones have existed for less than fifty years, as the first ever call from a cell phone occurred in 1973. Charlee Dyroff, *Here's How Much Cellphones Have Actually Changed Over the Years*, INSIDER (July 25, 2018), https://www.insider.com/the-history-of-the-cellphone-2018-7 [https://perma.cc/G9L3-9SAL]. Cell phones were not commercially available until a decade later in 1983. *Id.* IBM created the first smartphone, which had a touchscreen and included email and fax capabilities, in 1992. Steven Tweedie, *The World's First Smartphone, Simon, Was Created 15 Years Before the iPhone*, BUS. INSIDER (June 14, 2015), https://www.businessinsider.com/worlds-first-smartphone-simon-launched-before-iphone-2015-6 [https://perma.cc/8BJQ-5Z5D]. Americans looked at their cellular devices an average of ninety-six times each day in 2019. *Americans Check Their Phones 96 Times a Day*, ASURION (Nov. 21, 2019), https://www.asurion.com/about/press-releases/americans-check-their-phones-96-times-a-day/ [https://perma.cc/JZL2-R2Z8].

[2] *See Total Number of Text Messages Sent in the United States from 2005 to 2019*, STATISTA (Sept. 2, 2020), https://www.statista.com/statistics/185879/number-of-text-messages-in-the-united-states-since-2005/ [https://perma.cc/ZA2S-H8HX] (graphing fifteen years of text message data in the United States). Text messaging was first possible in 1992, and, by 2007, American cell phone users were sending more text messages than they were making actual phone calls. Christine Erickson, *A*

use this modern and efficient technology for generally disfavored telemarketing purposes.[3]

In 1991, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA) to protect consumers and businesses from the burden associated with telemarketer solicitation.[4] The Federal Communications Commission (FCC), using the authority granted to it in the TCPA, later extended that protection to the realm of telemarketing text messaging.[5] Moreover, the TCPA grants citizens a private right of action to sue telemarketers for violations of the TCPA.[6] To bring suit in federal court, however, a citizen must have standing under Article III of the United States Constitution.[7] One of the elements of standing is that the plaintiff must have suffered a concrete injury in fact.[8] Multiple federal appeals courts have addressed whether a recipient of unsolicited telemarketing text messages meets the injury in fact requirement.[9]

Brief History of Text Messaging, MASHABLE (Sept. 21, 2012), https://mashable.com/2012/09/21/text-messaging-history/ [https://perma.cc/9W27-GQZV]. Wireless phone users in the United States sent over two trillion text messages in 2019 alone. *Total Number of Text Messages Sent in the United States from 2005 to 2019*, *supra*.

[3] *See, e.g.*, Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 88 (2d Cir.) (involving a class action lawsuit against a business for sending unwanted telemarketing text messages to the plaintiffs), *cert. denied*, 140 S. Ct. 677 (2019). The U.S. Bureau of Labor Statistics estimated that 134,800 people were working as telemarketers in May 2018, with an estimated 77,300 of them supporting business sales. *Occupational Employment and Wages, May 2019: 41-9041 Telemarketers*, BUREAU OF LAB. STAT. (July 6, 2020), https://www.bls.gov/oes/current/oes419041.htm# [https://perma.cc/ZT3Z-V32Q]; *see Telemarketing*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/telemarketing [https://perma.cc/88PH-SXAD] (defining "telemarketing" as the promotion and sale of commodities or labor over the phone).

[4] *See* Telephone Consumer Protection Act (TCPA) of 1991, 47 U.S.C. § 227(b) (placing restrictions on the use of telephone equipment for telemarketing purposes, with an emphasis on automated telephone equipment).

[5] *See id.* § 227(b)(2) (conferring control to the FCC to regulate and implement the prohibitions listed in § 227(b) concerning the use of automated telephone equipment); Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14,014, 14,115 (2003) [hereinafter 2003 Order] (interpreting the TCPA prohibitions on telemarketing calls to include both calls and text messages sent to cell phones).

[6] *See* 47 U.S.C. § 227(b)(3) (allowing citizens to bring an action to enjoin a violation, recoup monetary damages for a violation, or both); *Enjoin*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "enjoin" as stopping an action).

[7] *See* U.S. CONST. art. III, § 2 (extending federal court jurisdiction to "Cases" and "Controversies"); Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (stating that the doctrine of standing stems from Article III of the U.S. Constitution and that courts consistently reinforce the doctrine).

[8] *Spokeo*, 136 S. Ct. at 1547, 1548; *see Injury*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "injury in fact" as a definite or impending violation of one's legal right that gives standing to the injured party to sue). Additionally, the injury must stem from the defendant's actions. *Spokeo*, 136 S. Ct. at 1547. Finally, a beneficial legal judgment must be "likely" to rectify the injury. *Id.* The Court noted that the plaintiff has the burden of proving each of these requirements. *Id.*

[9] *See* Gadelhak v. AT&T Servs., 950 F.3d 458, 463 (7th Cir. 2020) (answering whether receipt of telemarketing text messages is a concrete injury in fact); Salcedo v. Hanna, 936 F.3d 1162, 1165 (11th Cir. 2019) (same); Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 88 (2d Cir.) (same), *cert. denied*,

This Comment examines the circuit split resulting from the disagreement over whether recipients of unwanted telemarketing text messages have standing to sue in federal court.[10] Part I of this Comment gives an overview of the relevant legal history of the TCPA, the doctrine of standing, and the procedural history of *Salcedo v. Hanna*.[11] Part II discusses the *Salcedo* court's reasoning and outcome on the issue of standing as compared to that of the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits.[12] Finally, Part III argues that the United States Court of Appeals for the Eleventh Circuit reached the correct conclusion in *Salcedo* but should have altered its approach significantly in assessing congressional intent when addressing the issue of standing.[13]

I. Standing to Sue: The TCPA and Text Messaging

In 2019, in *Salcedo v. Hanna*, the Eleventh Circuit decided that a class representative who received a single unsolicited telemarketing text message had not suffered an injury in fact.[14] The court concluded that any alleged injury suffered from a single text message, even if in violation of the TCPA, was not concrete enough to allow the plaintiff class to proceed with its suit against the senders of the message.[15] Section A of this Part explains the TCPA as it relates to automated text messaging.[16] Section B describes the doctrine of standing and how other circuit courts have applied it to the issue of telemarketing text messages before the Eleventh Circuit.[17] Section C lays out the procedural history of *Salcedo* leading up to the Eleventh Circuit's decision.[18]

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140 S. Ct. 677 (2019); Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1042 (9th Cir. 2017) (same).

[10] *See infra* notes 14–107 and accompanying text.

[11] *See infra* notes 14–53 and accompanying text.

[12] *See infra* notes 54–81 and accompanying text.

[13] *See infra* notes 82–107 and accompanying text.

[14] Salcedo v. Hanna, 936 F.3d 1162, 1165 (11th Cir. 2019); *see Representative*, Black's Law Dictionary, *supra* note 6 (defining a "class representative" as a person who appears in the place of the plaintiffs during a class action lawsuit); *see also supra* note 8 and accompanying text (explaining standing requirements). Because the plaintiffs had not suffered an injury in fact, the Eleventh Circuit ruled that the plaintiff lacked standing to sue for monetary damages in federal court. *Salcedo*, 936 F.3d at 1165.

[15] *Salcedo*, 936 F.3d at 1166, 1173; *see infra* note 31 and accompanying text (defining what makes an injury "concrete").

[16] *See infra* notes 19–26 and accompanying text.

[17] *See infra* notes 27–44 and accompanying text.

[18] *See infra* notes 45–53 and accompanying text.

A. Congress and the FCC Ban Automated Calls and Texts

Congress passed the TCPA in 1991, imposing prohibitions on the use of automated telephonic equipment for telemarketing purposes.[19] As the basis of this legislation, Congress relied on a series of statistics and findings that focused largely on the negative impact of telemarketing on American consumers.[20] Finding no alternatives, Congress enacted the TCPA to prevent the use of telephonic equipment for unwanted solicitation practices, with specific exceptions.[21] When violations occur, the TCPA provides for a private right of action that allows individuals to seek an injunction or recover damages.[22]

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[19] Telephone Consumer Protection Act (TCPA) of 1991, 47 U.S.C. § 227(b)(1); Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5), 105 Stat. 2394, 2394 (1991); *see* 47 U.S.C. § 227(a)(1) (defining "automatic telephone dialing system" as any device capable of holding and unsystematically or serially generating and dialing phone numbers); *supra* note 3 and accompanying text (describing "telemarketing" as conducting sales over the phone). These prohibitions apply to persons both inside and outside the United States engaging in unsolicited telemarketing on the behalf of a business by contacting other businesses and individuals located in the United States. *See* 47 U.S.C. § 227(b)(1) (extending liability both inside and outside the United States). The TCPA lists exceptions to the prohibition on automated equipment allowing calls made for emergencies or with the recipient's prior explicit permission. *Id.* § 227(b)(1)(A). The Act also grants the FCC discretion to create additional exceptions. *Id.* § 227(b)(2)(B). Congress later created an exception for government debt collection calls. *See* Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a), 129 Stat. 584, 588 (adding a provision permitting automated calling for the limited purpose of collecting outstanding debts to the federal government). *But see* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2356 (2020) (invalidating the debt-collection exception as unconstitutional).

[20] *See* § 2, 105 Stat. at 2394–95 (listing Congress's findings about the prevalence of automated telemarketing schemes in the United States and the negative effects they have on consumers and other businesses and also suggesting the best course of action to counteract those effects). At the time of Congress's findings, over eighteen million Americans received telemarketing calls each day from over three hundred thousand solicitors on behalf of more than thirty thousand businesses. *Id.* § 2(2)–(3), 105 Stat. at 2394–95; *see Solicitor*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "solicitor" as a person who requests work or money from other people). Congress repeatedly referred to these calls as "intrusive" and a "nuisance" to consumers. *See* § 2(5)–(6), (10), (14), 105 Stat. at 2394 (discussing how the calls interfered with privacy, emergencies, and business). Congress also noted business grievances over interferences with commerce and stated that enacting restrictions on unsolicited telemarketing schemes would not violate the U.S. Constitution. *Id.* § 2(8), (14), 105 Stat. at 2394–95.

[21] *See* § 2(12), 105 Stat. at 2394–95 (finding that banning telemarketing calls to the home, except in situations of consent or emergency, was the only method to guard consumers from the "nuisance and invasion of privacy" that accompany those calls); *see also Nuisance*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "nuisance" as an action or circumstance that interferes with one's ability to use or benefit from property); *Invasion of Privacy*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "invasion of privacy" as an indefensible use of a person's character or violation of a person's private happenings). Congress also noted that technologies capable of blocking automated calls are costly and not widely available to consumers. § 2(11), 105 Stat. at 2394.

[22] 47 U.S.C. § 227(b)(3); *see Injunction*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "injunction" as a judicial mandate forcing or stopping an activity). The TCPA does, however, state that the court rules and laws of the state in which the action is brought must separately permit a private action brought under this section. *Id.* § 227(b)(3). The TCPA allows recovery for the greater amount of actual monetary loss or $500 per violation. *Id.* § 227(b)(3)(B).

Additionally, the TCPA provides considerable power and deference to the FCC to implement and regulate the Act's prohibitions.[23] These prohibitions focus on calls and advertisements sent to fax machines.[24] Because texting did not exist at the time Congress drafted and passed the TCPA, Congress did not incorporate mobile phone text messages.[25] Almost twelve years after the TCPA's passage, however, the FCC used its discretionary power to interpret text messages as phone calls for purposes of prohibited telemarketing.[26]

B. Only the Injured May Sue

The United States Constitution limits federal courts' power to overseeing "Cases" and "Controversies."[27] The Constitution does not define those terms, but, in 2016, in *Spokeo, Inc. v. Robins*, the Supreme Court of the United States stated that standing is an essential requirement of a judicial case or controversy.[28] As

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[23] *See id.* § 227(b)(2), (c) (providing guidelines and rules for the FCC to use in implementing regulations to enforce the prohibitions and protect the privacy rights of residential telephone subscribers); *see also* § 2(15), 105 Stat. at 2395 (suggesting that the FCC contemplate creating limitations on "automated or prerecorded calls" to consumers in line with free speech protections).

[24] 47 U.S.C. § 227(b)(1). The statute defines "telephone facsimile machine" as any machine capable of either sending words or pictures that it transcribed from paper over a phone line or receiving signals over a phone line and transmitting them into words or pictures on paper. *Id.* § 227(a)(3).

[25] *See generally id.* § 227 (making no mention of text messages). Congress passed the TCPA in 1991, but the very first text message was not sent until December of 1992. Heather Kelly, *OMG, the Text Message Turns 20. But Has SMS Peaked?*, CNN (Dec. 3, 2012), https://www.cnn.com/2012/12/03/tech/mobile/sms-text-message-20/index.html [https://perma.cc/B632-FUNY]; *see also* 105 Stat. at 2402 (noting the approval date of the TCPA as December 20, 1991).

[26] *See* 2003 Order, 18 FCC Rcd. at 14,115 (ordering that the TCPA's ban on telemarketing calls to wireless phones extends to voice and text calls); *see also* Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7965 (2015) [hereinafter 2015 Order] (stating that "[t]ext messages are 'calls'" under the TCPA based on prior FCC determination). The FCC has noted that the TCPA prohibitions on calls and text messages can extend to texts or calls made using phone applications, or "apps." *See* 2015 Order, 30 FCC Rcd. at 7978–80 (discussing whether liability extends to app developers when people use their apps to send calls and texts in violation of the TCPA); *see also Mobile Application (Mobile App)*, TECHNOPEDIA, https://www.techopedia.com/definition/2953/mobile-application-mobile-app [https://perma.cc/T6BT-ENQB] (defining "mobile application" as any software created for use on a cell phone).

[27] U.S. CONST. art. III, § 2, cl. 1.

[28] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (noting that the doctrine of standing is a long-established element of a justiciable case); *see also* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (holding that standing is an immutable and vital requirement of an Article III case or controversy); *Standing*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "standing" as the ability to either bring forth a legal assertion or request that a court compel an obligation or privilege, with that ability belonging only to those who show real harm to a legally-assured right). The Court has developed three required elements for a plaintiff to have standing: that the plaintiff (1) suffered an injury in fact (2) relatively connected to the defendant's actions that (3) a successful judicial outcome can remedy. *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan*, 504 U.S. at 560–61); *see also* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (same).

emphasized in *Spokeo*, Congress has no power to nullify or supersede the standing requirement because it is based in the Constitution.[29]

To have standing, an injury in fact must be both "concrete and particularized."[30] In *Spokeo*, the Court emphasized that "concrete" and "particularized" are distinct, defining "concrete" as actual and existing, though not necessarily perceptible.[31] The Court focused on the concreteness requirement and held that Congress's judgment is valuable in determining whether an alleged intangible harm meets the necessary injury in fact threshold.[32] The Court further ruled that the existence of a relationship between the intangible harm and a harm that English and American common law historically recognized is also relevant and informative when assessing standing.[33]

Following the Supreme Court's *Spokeo* decision, multiple federal circuit courts have applied the framework to alleged violations of the TCPA.[34] In 2017, in *Van Patten v. Vertical Fitness Group, LLC*, the U.S. Court of Appeals for the Ninth Circuit was the first circuit to address whether receipt of text messages that violated the TCPA constituted an injury in fact.[35] The Ninth Circuit cited congres-

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[29] *Spokeo*, 136 S. Ct. at 1547–48. The Court explained that Article III of the Constitution requires a showing of real harm, and Congress may never eliminate that requirement through statutory mandate. *Id.* (quoting Raines v. Byrd, 521 U.S. 811, 820 n.3 (1997)). The Supreme Court noted in *Raines v. Byrd*, in 1997, that this restriction on congressional authority is based in the doctrine of separation of powers. *See* 521 U.S. at 820 (noting that, constitutionally, a determination of whether a party has standing to sue falls under the purview of the judicial branch).

[30] *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). An injury must also be real or impending rather than merely speculative. *Id.*

[31] *Id.* at 1548, 1549. The Court defined "particularized" as distinctively impacting the plaintiff. *Id.* at 1548.

[32] *Id.* at 1549. The Court, in *Spokeo*, referred to statutes to delineate congressional judgment. *See id.* (describing congressional identification of intangible harms in statutes). Applying the distinction between particularization and concreteness to the case at hand, the Court vacated the Ninth Circuit's decision and remanded it because the circuit court only addressed particularized harm. *Id.* at 1550.

[33] *Id.* at 1549. In his concurring opinion, Justice Thomas stated that, in common law, courts have had broader jurisdiction over cases involving violations of individual rights than public rights. *Id.* at 1551 (Thomas, J., concurring); *see Right*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "private right" as belonging to an individual and "public right" as one belonging to everyone that a government office typically oversees). Justice Thomas stated that the plaintiff lacked standing to sue for the defendant's violation of public rights. *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring). Because the plaintiff also claimed a violation of a private right, however, Justice Thomas agreed with the majority that remand was appropriate to allow the Ninth Circuit to properly reassess the plaintiff's alleged private injury. *Id.* at 1553–54.

[34] *See, e.g.*, Salcedo v. Hanna, 936 F.3d 1162, 1167, 1169–72 (11th Cir. 2019) (discussing the *Spokeo* holding and applying it to alleged violations of telemarketing prohibitions in the TCPA); Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (same).

[35] *See Van Patten*, 847 F.3d at 1043 (discussing whether the plaintiff had standing to sue for the alleged TCPA violation); *see also Case*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "case of first impression" as a case with a legal question not previously answered by an authoritative legal source in that court's jurisdiction). In *Van Patten*, the named plaintiff had provided his cell phone number on a gym application form. 847 F.3d at 1041. The gym sent him two telemarketing texts after the plaintiff had cancelled his membership, causing him to sue the gym. *Id.* at 1041–42.

sional intent and reasoned that the receipt of two text messages was a concrete injury to the plaintiff's privacy.[36] Then, in 2019, in *Melito v. Experian Marketing Solutions, Inc.*, the U.S. Court of Appeals for the Second Circuit followed the Ninth Circuit's holding that receipt of unwanted telemarketing text messages constitutes a concrete injury.[37] The Second Circuit reasoned that although text messages were not the same as phone calls or faxes, they nonetheless exhibited the same harm that Congress intended the TCPA to prevent.[38] Continuing with the *Spokeo* framework, the Second Circuit shifted its analysis to traditional bases for lawsuits in English and American courts.[39] The Second Circuit agreed with the Ninth Circuit that the receipt of unwanted text messages matched long-established injuries of nuisance, invasion of privacy, and intrusion upon seclusion.[40] Concluding that the plaintiff successfully met the *Spokeo* standard, the Second Circuit held that the recipient of several unwanted text messages did not need to show further injury.[41]

In 2020, after the Eleventh Circuit's *Salcedo* decision, the Seventh Circuit, in *Gadelhak v. AT&T Services, Inc.*, followed both the Second and Ninth Circuits, ruling that the recipient of five unwanted text messages had standing to sue.[42] The

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[36] *Van Patten*, 847 F.3d at 1043. The Ninth Circuit ruled that unsolicited telemarking calls and texts infringe upon the recipient's privacy. *Id.* (citing *Spokeo*, 136 S. Ct. at 1549). Therefore, according to the Ninth Circuit, a person suing under the TCPA need only show violation of that law and not any additional injury. *Id. Contra Spokeo*, 136 S. Ct. at 1549 (stating that only "in *some* circumstances" involving procedural violations, a plaintiff does not need to allege any additional harm other than the one Congress recognized (emphasis added)). In *Van Patten*, the Ninth Circuit nonetheless affirmed the lower court's decision to grant summary judgment to the defendants based on other grounds. 847 F.3d at 1048. Specifically, the court ruled that the plaintiff had failed to revoke consent to receive texts from the defendant. *Id.*

[37] *See* Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 93 (2d Cir.) (holding that receiving unsolicited telemarketing text messages gave plaintiffs standing to sue), *cert. denied*, 140 S. Ct. 677 (2019). The Second Circuit did not state how many unwanted text messages were sent, only referring to them in the plural. *See id.* at 89 (referring to the alleged violation as receipt of "spam text messages").

[38] *Id.* at 93. The Second Circuit did not explain how texts differ from calls or faxes but still produce the same injury. *See id.* (stating only that texts are "different in some respects" from calls and faxes).

[39] *Id.* (citing *Spokeo*, 136 S. Ct. at 1549).

[40] *Id.* (citing *Van Patten*, 847 F.3d at 1043); *see* RESTATEMENT (SECOND) OF TORTS § 652 (AM. L. INST. 1977) (defining "intrusion upon seclusion" as a purposeful and extremely displeasing invasion of another's body or personal matters); *see also supra* note 21 (discussing "nuisance" and "invasion of privacy"). The Second Circuit also mentioned and cited a U.S. Court of Appeals for the Third Circuit decision concerning standing to sue under the TCPA. *Melito*, 923 F.3d at 93 (citing Susinno v. Work Out World Inc., 862 F.3d 346, 351–52 (3d Cir. 2017)). That case, however, involved a single prerecorded phone call to a cellular phone rather than a text message. *See Susinno*, 862 F.3d at 348 (noting that the plaintiff received a prerecorded voicemail after not answering the initial telemarketing call to her cell phone).

[41] *See Melito*, 923 F.3d at 93 (holding that the plaintiff sufficiently showed concrete injury from the receipt of unwanted text messages (citing *Spokeo*, 136 S. Ct. at 1549)).

[42] Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 460, 463 (7th Cir. 2020). The defendant did not argue that the plaintiffs lacked standing, but the court addressed the issue *sua sponte*. *Id.* at 461; *see*

Seventh Circuit decided that the alleged harm related to the traditional claim of intrusion upon seclusion.[43] Paralleling the Second and Ninth Circuits, the Seventh Circuit ruled that Congress intended to prevent the harm that unwanted texts cause, thus conferring standing on the plaintiff.[44]

C. The Salcedo *District Court's Request for Guidance from the Eleventh Circuit*

The *Salcedo* class action lawsuit commenced as a result of the defendant and his law firm allegedly sending unsolicited text messages to the plaintiffs over the previous four years.[45] The plaintiffs requested five hundred dollars in statutory damages per message and an additional fifteen hundred dollars in treble damages for texts transmitted willfully or knowingly in violation of the TCPA.[46] The plaintiff claimed that his concrete injuries in fact included wasted time, invasion of his right to privacy, and invasion of his right to use his cell phone unhindered.[47]

The *Salcedo* defendants sought dismissal of the case, arguing, in part, a lack of standing.[48] The United States District Court for the Southern District of Florida first denied the defendants' motion for dismissal, leading the defendants to re-

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Sua Sponte, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "sua sponte" as unaccompanied by any inducement or proposal).

[43] *Gadelhak*, 950 F.3d at 462. The Seventh Circuit interpreted the *Spokeo* decision to require that the alleged harm be related "in kind, not degree," to a traditional claim. *Id.* As such, the Seventh Circuit did not find it necessary to consider whether the harm of receiving multiple unwanted text messages was as severe as the harm that intrusion upon seclusion historically caused. *See id.* at 463 (disregarding the relative triviality of receiving text messages in comparison to common law harms because Congress elected to make receipt of text messages a concrete injury). The court also held that the number of unwanted text messages that a plaintiff receives is irrelevant. *Id.* at 463 n.2.

[44] *Id.* at 462–63.

[45] Salcedo v. Hanna, 936 F.3d 1162, 1165 (11th Cir. 2019). The class representative, John Salcedo, received a single text message offering a 10% price reduction for legal services. *Id.* Salcedo was a past client of the defendants, lawyer Alex Hanna and his Florida firm. *Id.*

[46] *Id.*; *see* 47 U.S.C. § 227(b)(3) (granting the court discretion to award three times the actual damages in the case of willful or knowing violation of the prohibitions in § 227(b)); *see also Damages*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "treble damages" as statutory damages amounting to triple the real damages owed to a party).

[47] *Salcedo*, 936 F.3d at 1167. The plaintiff analogized his situation to that in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, a 2015 case in which the Eleventh Circuit recognized receipt of an unwanted one-page fax as an injury meeting the standing requirement. *Id.* at 1167–68 (citing Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1252 (11th Cir. 2015)). In *Palm Beach Golf*, the defendant sent a fax advertising dental services to the plaintiff. 781 F.3d at 1248–49. The Eleventh Circuit ruled that the plaintiff suffered an injury for standing purposes because the defendant occupied the plaintiff's fax machine, thus making the plaintiff's property unusable while receiving and printing the advertisement. *Id.* at 1252 (citing H.R. REP. NO. 102-317, at 10 (1991)).

[48] *Salcedo*, 936 F.3d at 1165. The individual defendant, Hanna, also argued that the complaint did not present a proper claim regarding him and that the court should eliminate portions of the complaint concerning him. *Id.*

quest that the court reconsider its decision or allow for an interlocutory appeal.[49] Finding the Eleventh Circuit's ruling in 2015, in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, binding, the district court ruled that the plaintiff had standing to sue.[50] The court questioned, however, if *Palm Beach Golf* was still applicable to the *Salcedo* case.[51] The court found that the unresolved standing question was central to the case. [52] To resolve the question, the district court ordered an interlocutory appeal to the Eleventh Circuit.[53]

II. The Eleventh Circuit Creates a Split on the Issue of Standing to Sue for Unwanted Text Messages

Similar to the United States Courts of Appeals for the Second, Seventh, and Ninth Circuits, the United States Court of Appeals for the Eleventh Circuit relied upon the guidelines for establishing federal standing that the Supreme Court of the United States laid out in 2016, in *Spokeo, Inc. v. Robins*.[54] The Eleventh Circuit, however, came to the opposite conclusion as the Second, Seventh, and Ninth Circuits.[55] The Eleventh Circuit ruled that the plaintiff lacked Article III stand-

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[49] Salcedo v. Hanna, No. 16-cv-62480, 2017 WL 4226635, at *1 (S.D. Fla. June 14, 2017), *rev'd*, 936 F.3d 1162 (11th Cir. 2019); *see Appeal*, Black's Law Dictionary, *supra* note 6 (defining "interlocutory appeal" as an appeal that transpires in the middle of the trial court case).

[50] *Salcedo*, 2017 WL 4226635, at *1 (citing *Palm Beach Golf*, 781 F.3d at 1253).

[51] *Id.*; *see Palm Beach Golf*, 781 F.3d at 1253 (ruling that the recipient of an unwanted fax had standing to sue). The district court pointed to other precedential decisions, including *Spokeo*, and an influential 2016 Eleventh Circuit opinion, *Nicklaw v. Citimortgage*, concerning a similar question of standing. *Salcedo*, 2017 WL 4226635, at *1 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (noting that the *Palm Beach Golf* decision was binding on the district court but questioning that ruling in light of the subsequent decisions on the Article III requirement for a concrete injury in fact from *Spokeo* and *Nicklaw*).

[52] *Salcedo*, 2017 WL 4226635, at *1. Courts have differed on how to decide when a question is controlling. *See* 16 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3930 (3d ed. 2002) (noting different approaches taken in judicial decisions approaching controlling questions of law). Courts often consider a question to be controlling if its incorrect answer would necessitate a reversal on final judgment or, alternatively, if an interlocutory reversal would save time and money for the court and parties involved. *Id.* The *Salcedo* district court took the latter position, deciding that an interlocutory appeal could potentially prevent costly future litigation centered around a single text message. *Salcedo*, 2017 WL 4226635, at *1. The district court noted that it sometimes orders an interlocutory appeal in situations that involve a determinative legal question with considerable basis for differing stances. *Id.* (citing 28 U.S.C. § 1292(b)).

[53] *Salcedo*, 2017 WL 4226635, at *1–2.

[54] *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020) (applying the *Spokeo* framework to assess the concreteness of any injury that unsolicited text messaging can cause); Salcedo v. Hanna, 936 F.3d 1162, 1168 (11th Cir. 2019) (same); Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 93 (2d Cir.) (same), *cert. denied*, 140 S. Ct. 677 (2019); Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (same); *see also* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (stating the indicia courts should seek when ruling whether an intangible harm is concrete).

[55] *Compare Salcedo*, 936 F.3d at 1172 (holding that the recipient of a telemarketing text message did not suffer an injury in fact and lacked standing to sue), *with Gadelhak*, 950 F.3d at 463 (holding that the recipient of unwanted telemarking text messages suffered a concrete injury in fact and there-

ing.[56] Section A of this Part discusses the Eleventh Circuit's approach in analyzing the issue of standing through the *Spokeo* framework.[57] Section B briefly discusses the Second, Seventh, and Ninth Circuits' differing approaches and outcomes using the *Spokeo* framework.[58]

A. The Eleventh Circuit Discerns No Congressional Intent or Traditional Harm Related to Receiving Unwanted Text Messages

In 2019, in *Salcedo v. Hanna*, the Eleventh Circuit held that, at the time of the ruling, Congress had displayed no intent to make receipt of unsolicited text messages a concrete injury in fact under the TCPA.[59] Notably, the FCC has included text messages as calls that the TCPA prohibits when using automated equipment for telemarketing purposes.[60] Yet, the Eleventh Circuit stated that it did not need to address whether it owed the FCC's regulations deference because the *Spokeo* framework directed courts specifically to Congress, not federal agencies.[61]

Focusing only on Congress's direct actions, the court concluded that any harm attendant to an unwanted telemarketing text message did not match the con-

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fore had standing in federal court), *and Melito*, 923 F.3d at 93 (same), *and Van Patten*, 847 F.3d at 1043 (same).

[56] *Salcedo*, 936 F.3d at 1172 (holding that receiving a telemarketing text message did not create an injury in fact and the plaintiff lacked standing to sue).

[57] *See infra* notes 59–70 and accompanying text.

[58] *See infra* notes 71–81 and accompanying text.

[59] *Salcedo*, 936 F.3d at 1168–69. The court emphasized that Congress had not yet addressed or even mentioned text messages in the relevant sections of the TCPA prohibiting automated telemarketing. *See id.* (stating that Congress had said "*nothing*" in the TCPA about any harms suffered when receiving a telemarketing text message). The court did acknowledge that the ability to send modern text messages was nonexistent at the time of the TCPA's enactment. *Id.* at 1169. The court noted, however, that Congress had not subsequently included text messages in the class of statutorily regulated telemarketing techniques in amendments to the TCPA. *Id.*

[60] *Id.* at 1169; *see* 2003 Order, 18 FCC Rcd. at 14,115 (2003) (extending TCPA prohibitions on telemarketing calls to text messages).

[61] *Salcedo*, 936 F.3d at 1169 & n.8 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)). In 1984, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court addressed the steps that courts should take when reviewing an authorized government agency's statutory construction. 467 U.S. at 842–43. According to the Court's decision, congressional intent on the matter in question is controlling when it is explicit. *Id.* If, on the other hand, the statute does not address the disputed issue, courts should examine the permissibility of the agency's interpretation. *Id.* at 843. The Court held that agencies draft mandates out of necessity to supplement voids in the statute that Congress left unaddressed. *Id.* (citing Morton v. Ruiz, 415 U.S. 199, 231 (1974)). The Court ruled that when Congress clearly entrusts an agency to answer those omissions, Congress transfers control to that agency. *Id*. at 843–44. The agency's regulations are therefore governing unless unjustified or overtly incompatible with the statute itself. *Id.* at 844. Even in cases of unexpressed delegation, the court must follow the agency's interpretation unless it is unreasonable. *Id.*

cerns that Congress cited when drafting the TCPA.[62] As a consequence of Congress's silence regarding texting, the court did not create a new harm for purposes of the standing requirement.[63] Previously, in 2015, in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, the Eleventh Circuit held that receipt of a single unsolicited fax established standing under the TCPA.[64] The *Salcedo* court distinguished text messages from faxes because, unlike faxes, text messages do not preoccupy the phone from performing other duties and may not cost the recipient any money.[65]

As the Supreme Court advised in *Spokeo*, the Eleventh Circuit then turned to legal history, examining whether the plaintiff's alleged harm was closely related to any harm that traditionally conferred standing to sue in English or American courts.[66] Beginning with the invasion of privacy allegation, the court concluded that the plaintiff did not suffer a considerable disturbance which the traditional tort of intrusion upon seclusion requires.[67] Next, the court analyzed the nuisance argument, similarly finding no relation to the traditional trespass and private nuisance torts due to no infringement on the plaintiff's real property.[68] Finally, regarding the plaintiff's claims of conversion and trespass to chattel, the Eleventh Circuit found no relation because any interference the text message caused was not sufficiently serious and did not result in complete control over the cell phone.[69] Concluding that the plaintiff's alleged harm did not meet the *Spokeo*

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[62] *See Salcedo*, 936 F.3d at 1169 (reviewing Congress's actions regarding the TCPA since the invention of text messaging); *see also* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(5)–(6), (10), 105 Stat. 2394, 2394 (1991) (citing telephone users' claims of privacy invasion and nuisance due to automated and prerecorded telemarketing schemes).

[63] *Salcedo*, 936 F.3d at 1169 (describing Congress as the political branch most suited to identify and address new technological advancements that may cause harm and emphasizing Congress's silence on the issue of telemarketing text messages). The Eleventh Circuit concluded that creating a new harm would be akin to guessing congressional intent. *Id.* at 1170.

[64] Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1252 (11th Cir. 2015).

[65] *Salcedo*, 936 F.3d at 1168, 1170. The court noted that receiving faxes fully occupies the machine and requires paper, ink, and toner, which cost the recipient money. *Id.* at 1168. In comparison, the court pointed out that the plaintiff in *Salcedo* did not allege that he incurred any costs from receiving the defendant's marketing text message. *Id.*

[66] *Id.* at 1170–71 (citing Spokeo, Inc. v. Robins, 136 S. Ct., 1540, 1549 (2016)). The plaintiff alleged invasion of privacy, nuisance, conversion, and trespass to chattel. *Id.* at 1171.

[67] *Id.* at 1171 (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)). Rather, the court found receipt of the one text message to be solitary, quick, and transient. *Id.* The Eleventh Circuit also noted that the traditional claim of intrusion upon seclusion must further involve an invasion of the privacy of a person's body or personal matters of a category distinct from any alleged intrusion that the plaintiff suffered in *Salcedo*. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. b).

[68] *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 158(a), 821D). The court noted that Congress was seeking to prevent residential encroachments when passing the TCPA but did not analyze this concern because the plaintiff failed to allege any real property invasion. *Id.*

[69] *Id.*; *see Conversion*, BLACK'S LAW DICTIONARY, *supra* note 6 (defining "conversion" as the proscribed custody of another person's property); *Trespass*, BLACK'S LAW DICTIONARY, *supra* note 6

requirements, the Eleventh Circuit reversed and remanded the case to the district court with instructions to dismiss the complaint.[70]

B. The Second, Seventh, and Ninth Circuits Apply Spokeo *with an Opposing Conclusion to the Eleventh Circuit*

The Second and Ninth Circuits previously faced cases similar to *Salcedo*, but the plaintiffs in those cases received multiple text messages.[71] In 2017, in *Van Patten v. Vertical Fitness Group, LLC*, the Ninth Circuit held that Congress, under the TCPA, recognized "unsolicited contact" as a concrete injury in fact.[72] Without breaking down the elements of each traditional tort, the court found a relationship between the plaintiff's harm from receiving telemarketing text messages and the torts of invasion of privacy, intrusion upon seclusion, and nuisance.[73] The court concluded that unsolicited text messages inherently intrude on one's privacy and solitude; therefore, they provide sufficient grounds for standing to sue.[74]

Then, in 2019, in *Melito v. Experian Marketing Solutions, Inc.*, the Second Circuit also focused on the harm.[75] The court noted that although text messages

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(defining "trespass to chattels" as the action of illegally constraining a person's property, causing precise forcible harm). The court held that receipt of the text message was far from absolute control over the phone, which a conversion claim requires. *Salcedo*, 936 F.3d at 1171 (citing RESTATEMENT (SECOND) OF TORTS § 222A). The court similarly found that the plaintiff's allegation was far less severe than necessary for a trespass to chattel claim. *Id.* at 1171–72 (citing RESTATEMENT (SECOND) OF TORTS §§ 217(b), 218(c) & cmt. e.).

[70] *See Salcedo*, 936 F.3d at 1172–73 (concluding that neither tradition nor congressional intent favored a grant of standing to sue). The decision included a single concurring opinion focused on the fact that the plaintiff had only received one telemarketing text message from the defendant. *Id.* at 1173–74 (Pryor, J., concurring). The concurring opinion stated that the majority's decision should be read narrowly and leave open the question of whether standing exists in a similar situation involving multiple text messages. *Id.* at 1174.

[71] *See* Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 88 (2d Cir.) (addressing whether telemarking text messages concretely injure the recipient for standing purposes), *cert. denied*, 140 S. Ct. 677 (2019); Van Patten v. Vertical Fitness Grp., Inc., 847 F.3d 1037, 1040 (9th Cir. 2017) (same); *see also Salcedo*, 936 F.3d at 1165 (majority opinion) (determining if receipt of one text message was enough to confer standing). The Eleventh Circuit did not discuss or cite the Second Circuit's decision despite the Second Circuit issuing its decision almost four months prior to *Salcedo*. *See generally Salcedo*, 936 F.3d 1162 (failing to discuss the Second Circuit's analysis of standing with respect to unwanted text messages).

[72] *Van Patten*, 847 F.3d at 1043. *Contra generally* Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2394–2402 (1991) (discussing unsolicited telephone calls and fax advertisements but never mentioning "unsolicited contact" generally).

[73] *See Van Patten*, 847 F.3d at 1043 (pointing to traditional harms related to privacy concerns (citing RESTATEMENT (SECOND) OF TORTS § 652B)). The court did not address the absence of text messages from the relevant language of the TCPA or the FCC's later inclusion of them in TCPA regulations. *See id.* (stating simply that the TCPA creates consumer protections from some calls and texts).

[74] *Id.* Rather than focusing on the TCPA's applicability to text messages themselves, the Ninth Circuit ruled that the unwanted contact from text messages presents the same type of harm that Congress meant to prevent with the TCPA. *Id.*

[75] *See Melito*, 923 F.3d at 93 (assessing the effects of unsolicited text messaging rather than the action itself).

are different than calls and faxes, the plaintiff's injuries, namely nuisance and invasion of privacy, were the same injuries that the TCPA protected.[76] The Second Circuit further held that the harm suffered from receipt of unsolicited texts was related to the traditional torts of nuisance, invasion of privacy, and intrusion upon seclusion.[77] Finding no additional harm necessary, the court ruled that the plaintiff had standing to sue.[78]

In 2020, in *Gadelhak v. AT&T Services, Inc.*, the Seventh Circuit also addressed the same standing issue.[79] In response to the *Salcedo* court's holding that a text message is less severe than traditionally required for an intrusion upon seclusion claim, the Seventh Circuit held that *Spokeo* requires a correlation in type rather than magnitude.[80] The court followed the Second and Ninth Circuits, deciding that the receipt of unwanted text messages is a concrete injury in fact that grants standing to sue.[81]

III. The Eleventh Circuit's Correct Conclusion Using Flawed Reasoning

The United States Courts of Appeals for the Second, Seventh, Ninth, and Eleventh Circuits all applied the framework that the Supreme Court of the United States laid out in 2016 in *Spokeo, Inc. v. Robins*, but the Eleventh Circuit did so more thoroughly than the other circuits.[82] Section A of this Part examines the

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[76] *See id.* (noting that the plaintiff's allegations of harm aligned with the harms that Congress pointed out when drafting and passing the TCPA).

[77] *Id.* (citing *Van Patten*, 847 F.3d at 1043). The court also noted that the defendants did not dispute this requirement of close relation to traditional claims. *Id.*

[78] *Id.* at 93, 95 (citing Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)). The defendants argued that the plaintiff needed to show further injury. *Id.* at 93. The Second Circuit disagreed, however, stating that the defendant's argument would only apply if the plaintiff had alleged a mere risk of injury. *Id*. at 93–94.

[79] Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 461–63 (7th Cir. 2020). The *Gadelhak* court concentrated on the traditional intrusion upon seclusion tort, finding that the plaintiff's harm was akin to that tort. *Id.* at 462 (citing Restatement (Second) of Torts § 652B (Am. L. Inst. 1977)).

[80] *Id.* at 462 (citing *Spokeo*, 136 S. Ct. at 1549); *see* Salcedo v. Hanna, 936 F.3d 1162, 1171 (holding that one unwanted text message does not rise to the level of offense needed to qualify as an offensive violation of one's solitude). The Seventh Circuit then ruled that Congress was resolved to protect consumers from the harm that the plaintiff suffered. *Gadelhak*, 950 F.3d at 462. The court did not address the fact that Congress did not include text messaging in the TCPA. *See id.* (focusing on the harm, rather than the cause of the harm, that the plaintiff endured).

[81] *Gadelhak*, 950 F.3d at 463.

[82] *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) (holding that courts should examine Congress's judgment and traditional legal standards to determine when an intangible alleged harm is concrete). *Compare* Salcedo v. Hanna, 936 F.3d 1162, 1168–72 (11th Cir. 2019) (applying the *Spokeo* framework, including individually analyzing the plaintiff's alleged harm to each possibly related traditional harm), *with* Gadelhak v. AT&T Servs., 950 F.3d 458, 461–63 (7th Cir. 2020) (applying the *Spokeo* framework briefly, focusing only on the kind of harm, not the degree nor the cause of it), *and* Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 92–94 (2d Cir.) (applying the *Spokeo* framework briefly and summarily), *cert. denied*, 140 S. Ct. 677 (2019), *and* Van Patten v. Vertical Fitness Grp.,

courts' applications of the first *Spokeo* prong: congressional judgment.[83] Section B analyzes the courts' applications of the second *Spokeo* prong: traditional harms based in common law history.[84]

A. The Eleventh Circuit Should Have Deferred to the FCC's Regulations

In 2019, in *Salcedo v. Hanna*, the Eleventh Circuit properly focused on the applicability of the TCPA to text messages and any accompanying harm from receiving them.[85] The Second, Seventh, and Ninth Circuits incorrectly focused merely on the general type of harm that Congress intended to protect against.[86] The *Salcedo* court accurately showed that Congress had not directly included text messages in the relevant provisions of the TCPA, noting that they only appear in FCC regulations.[87] The court then declared that there was no reason to decide what level of deference to give the FCC because *Spokeo* points only to the judgment of Congress.[88]

Yet, in 1984, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court held that, when Congress explicitly leaves issues un-

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LLC, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (applying the *Spokeo* framework briefly as one combined test rather than two separate prongs).

[83] *See infra* notes 85–94 and accompanying text.

[84] *See infra* notes 95–107 and accompanying text.

[85] *See Salcedo*, 936 F.3d at 1169, 1170 (holding that the TCPA does not mention text messages and that unwanted telephone calls to home landlines have different effects on the recipient than unwanted text messages). The Supreme Court, in *Spokeo*, likely intended that a plaintiff show some relationship between the statute in question and the cause of the harm, not just the type of harm itself, thus preventing a plaintiff from meeting the injury in fact requirement solely by capitalizing on a statute that identifies a similar harm. *See* 136 S. Ct. at 1549 (stating that Congress may communicate new *causes* of harm that can prompt a case or controversy, which is helpful for courts when analyzing an intangible harm (citing Lujan v. Defs. of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment))). As such, a recipient of unwanted text messages should not be able to simply point to any statute related to privacy concerns. *See Melito*, 923 F.3d at 93 (ruling that the plaintiff suffered the same type of harm as Congress meant to protect in the TCPA even though the cause—unwanted text messages—was different than the cause of harms identified in the Act—phone calls and faxes).

[86] *See Gadelhak*, 950 F.3d at 462 (deciding that Congress addressed the harm from unsolicited telemarketing, generally, in passing the TCPA); *Melito*, 923 F.3d at 93 (ruling that unwanted text messages are the same type of nuisance and invasion of privacy as unwanted calls and faxes); *Van Patten*, 847 F.3d at 1043 (ruling that receipt of unwanted text messages was an injury in fact related to traditional claims because Congress enumerated it in the statute). The Second Circuit did note the similarity between text messages and phone calls and faxes, though it did so summarily without explicitly addressing the fact that the TCPA does not reference text messages. *See Melito*, 923 F.3d at 93 (noting briefly that text messages are distinct from calls and faxes but exhibit the same broad harms of nuisance and invasion of privacy).

[87] *See Salcedo*, 936 F.3d at 1169 (stating that the TCPA says "*nothing*" about text messages and noting that they fall under the TCPA only through FCC interpretation). The Eleventh Circuit gave considerable weight to the fact that Congress had not yet endorsed the FCC's discretionary inclusion of text messages through any amendments to the TCPA. *See id.* (refusing to formulate a new harm without Congress's explicit approval).

[88] *Id.* at 1169 & n.8.

addressed in a statute for an agency to address, Congress delegates its authority to the agency.[89] As such, the agency's regulatory constructions are controlling for areas within that delegation.[90] The TCPA explicitly delegates authority to the FCC to implement and regulate the restrictions and prohibitions in the statute.[91] Therefore, the Eleventh Circuit should not have stopped its analysis after finding no congressional dialogue on text messages in the TCPA.[92] Rather, the Eleventh Circuit should have followed *Chevron*, giving the requisite controlling weight to the FCC's decision to include text messages in the relevant TCPA prohibitions.[93]

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[89] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

[90] *Id.* at 844. When congressional delegation is explicit, Courts can only ignore an agency's constructions if it is unreasoned or clearly conflicts with the statute at issue. *Id.*

[91] *See* Telephone Consumer Protection Act (TCPA) of 1991, 47 U.S.C. § 227(b)(2) (providing the metes and bounds of the FCC's regulatory power over the TCPA's restrictions and prohibitions on the use of automated telephone equipment); Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(15), 105 Stat. 2394, 2395 (finding that the FCC should implement reasonable regulatory steps to restrict automated calls to homes and businesses). In 1999, in *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court ruled that the FCC has the power to implement and execute the terms of the Communications Act of 1934 and its amendments. 525 U.S. 366, 378 (1999); *see* 105 Stat. at 2394 (stating that the TCPA amends the Communications Act of 1934).

[92] *See Salcedo*, 936 F.3d at 1169 (ruling that Congress did not intend to include text messages in the TCPA and giving no weight to the FCC's choice to make such an inclusion in the statute).

[93] *See Chevron*, 467 U.S. at 843–44 (requiring courts to defer to an agency's decisions about a statute when Congress expressly provided that agency with the authority to make those decisions); 2003 Order, 18 FCC Rcd. at 14,115 (ordering that calls and texts to wireless phones fall within the purview of the TCPA's restrictions and prohibitions on the use of automated telephone equipment). *But see Salcedo*, 936 F.3d at 1169 (deciding that courts only owe deference to Congress, not the FCC). Even if Congress's delegation of authority was not explicit concerning text messages, due to their non-existence at the time, a court should consider that the FCC's authority to regulate telemarketing in light of new technologies is implicit. *See* 47 U.S.C. § 227(b)(2) (giving no explicit delegation to the FCC to regulate new technologies but giving the FCC broad regulatory power over the implementation of prohibitions on the use of automated calling); *Chevron*, 467 U.S. at 844 (noting that congressional delegation of authority to another agency is sometimes implied). There is no restrictive language on how the FCC may carry out its regulatory power that would negate a conclusion of an implicit delegation of authority to regulate emerging technologies. *See* 47 U.S.C. § 227(b)(2) (stating what the FCC "shall" and "may" do, not what it shall not or may not do, to regulate the use of automated telephone equipment); § 2(15), 105 Stat. at 2395 (stating only what the FCC should consider). In this case, the same result would occur as with an explicit delegation because the inclusion of text messages in the definition of phone calls in the TCPA is certainly reasonable and, thus, still controlling over the courts. *See Chevron*, 467 U.S. at 844 (holding that a court cannot replace an agency's reasonable reading of a statute with its own reading when Congress implicitly delegated authority to the agency); *Salcedo*, 936 F.3d at 1169 (acknowledging that the FCC has discretionary rulemaking authority with respect to the TCPA). In adding text messaging to the prohibitions on the use of automated telephone equipment, the FCC likely met the three aspects of reasonableness that the Supreme Court stated in *Chevron*. *See* 467 U.S. at 865 (ruling that an agency's interpretation was reasonable due to (1) the intricate and specialized nature of the regulations at issue, (2) the agency's logical and comprehensive examinations, and (3) the resolution of contradictory positions at hand in the agency's adjudication); 2015 Order, 30 FCC Rcd. at 7969–71, 8016–22 (noting the prevalence of new calling technologies and responding to related complaints and lawsuits requesting clarification for consumers on the restrictions and prohibitions of the TCPA and the inclusion of text messages under the telemarketing prohibitions); 2003 Order, 18 FCC Rcd. at 14,017–18 (acknowledging the friction between of consumer complaints about disturbances and telemarketing as a valuable commercial activity for some

As such, the Eleventh Circuit should have ruled that Congress, through the FCC, intended for the harm suffered from receiving a telemarketing text message to be a concrete injury that establishes standing.[94]

B. The Eleventh Circuit Correctly Found No "Close" Relationship to Traditional Claims in the Case of Only a Single Text Message

The Supreme Court, in *Spokeo*, importantly stated that Congress's declaration of a new intangible harm does not necessarily make the injury concrete for Article III standing purposes.[95] The Court held that the alleged harm must also have its roots in traditional common law injuries.[96] The Eleventh Circuit, therefore, analyzed each traditional basis that the plaintiff alleged the TCPA covered.[97] Given the circumstances, the court correctly found no "close" correlation.[98]

Conversely, the Ninth Circuit's 2017 analysis in *Van Patten v. Vertical Fitness Group, Inc.* on this part of the *Spokeo* framework was flawed in one key respect.[99] The court incorrectly combined the two *Spokeo* tests in deciding that a

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businesses). The *Salcedo* court seemed to reason, however, that regardless of Congress's delegation to the FCC, whether explicit or implicit, an assessment of reasonableness was unnecessary because Congress was silent on the applicability of the prohibitions on the use of automated equipment to text messages. 936 F.3d at 1169. The Eleventh Circuit emphasized the fact that Congress had included text messaging in a different subsection of 47 U.S.C. § 227 through amendment. *Id*. at 1169 n.7. In *Chevron*, however, the Supreme Court cited a lack of congressional criticism as support for the conclusion that Congress implicitly delegated authority over the contested issue to the agency in question. 467 U.S. at 864.

[94] *See Chevron*, 467 U.S. at 843–44 (requiring courts to defer to an agency's decisions about a statute when Congress expressly provided that agency with the authority to make those decisions). *But see Salcedo*, 936 F.3d at 1169 (observing no congressional intent despite FCC orders because the FCC is distinct from Congress).

[95] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

[96] *See id.* (noting that a relation to historical legal practice is important because the constitutional requirement that a federal court only hear a case or controversy is similarly rooted in historical common law).

[97] *See Salcedo*, 936 F.3d at 1171–72 (referencing different sections of the Restatement (Second) of Torts and analyzing the elements of those sections with respect to the defendant's alleged tort). The Eleventh Circuit's analysis of traditional bases for suits in English and American courts was properly thorough. *See id.* (addressing the specific aspects of each traditional harm the plaintiff claimed and ruling that none of them were substantially related to the harm that the plaintiff allegedly suffered); *see also supra* notes 66–69 and accompanying text (discussing the Eleventh Circuit's analysis of traditional harms).

[98] *See Salcedo*, 936 F.3d at 1172 (finding substantial differences, in both type and intensity, between traditional torts and the plaintiff's alleged harm); *see also Spokeo*, 136 S. Ct. at 1549 (mandating that courts look for a thorough and strong connection between an alleged intangible injury and a traditional common law harm when analyzing questions of standing to sue).

[99] *See Spokeo*, 136 S. Ct. at 1549 (directing courts to look for a correlation between an alleged harm and customary common law harms when ruling on whether an injury is concrete); Van Patten v. Vertical Fitness Grp., Inc., 847 F.3d 1037, 1043 (9th Cir. 2017) (ruling that the receipt of unwanted text messages is the same privacy harm that Congress endeavored to prevent by enacting the TCPA, without addressing if that congressionally-identified privacy harm traced back to traditional standards of privacy invasions).

close relationship to traditional claims existed.[100] The Ninth Circuit did not discuss the actual elements of any traditional claims, relying instead on Congress's intent and a conclusory statement.[101]

In 2019, in *Melito v. Experian Marketing Solutions, Inc.*, the Second Circuit focused its brief analysis on intrusion upon seclusion, finding a close relationship.[102] Similar to the Ninth Circuit, the Second Circuit intermingled the *Spokeo* framework and relied on congressional intent to conclude that the harm was related to the traditional meaning of intrusion upon seclusion.[103]

In 2020, in *Gadelhak v. AT&T Services, Inc.*, the Seventh Circuit also concluded that the alleged harm from receiving five telemarketing texts was highly analogous to the traditional intrusion upon seclusion tort.[104] The Seventh Circuit faltered, however, when it concluded, without any stated rationale, that the Supreme Court in *Spokeo* advised courts to assess the quality, rather than the magnitude, of the correlation between the alleged intangible harm and a traditional claim for standing purposes.[105] Because the Court did not address this distinction in *Spokeo*, courts should look for a relationship in both quality and intensity, not one or the other as the Seventh Circuit did.[106] As the test for a concrete injury for standing purposes currently exists under *Spokeo*, a court should treat the two prongs of history and congressional judgment as separate requirements that are jointly necessary.[107]

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[100] *See Spokeo*, 136 S. Ct. at 1549 (stating that both congressional decisions and common law history are valuable tools in addressing a standing issue); *Van Patten*, 847 F.3d at 1042–43 (stating that Congress identified the presence of a privacy invasion and disturbance of solitude in telemarketing situations but not ruling on whether that identification was closely related to the elements of any traditional claims).

[101] *See Van Patten*, 847 F.3d at 1042 (holding that a close relationship existed to invasion of privacy and disturbance of solitude simply because of the "nature" of unwanted calls and text messages).

[102] *See* Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 93 (2d Cir.) (holding that the plaintiff showed a harm both that Congress clearly recognized and that matches traditional legal harms in character), *cert. denied*, 140 S. Ct. 677 (2019). In 2017, in *Susinno v. Work Out World Inc.*, the United States Court of Appeals for the Third Circuit noted, however, that only a few unsolicited contacts may not rise to the severity traditionally required for the tort of intrusion upon seclusion. 862 F.3d 346, 351–52 (3d Cir. 2017) (citing RESTATEMENT (SECOND) OF TORTS § 652B cmt. d (AM. L. INST. 1977)).

[103] *See Melito*, 923 F.3d at 93 (ruling that the plaintiff's harm, which Congress emphasized in the TCPA, conformed, in essence, with traditional common law injuries).

[104] Gadelhak v. AT&T Servs., 950 F.3d 458, 462 (7th Cir. 2020).

[105] *See id.* (stating that the *Spokeo* decision directs courts to seek out a strong correlation between the claimed injury and claims in common law measured in character, not magnitude (citing *Spokeo*, 136 S. Ct. at 1549).

[106] *Compare Spokeo*, 136 S. Ct. at 1549 (instructing courts to ask if a "close relationship" exists but not describing how to assess that relationship), *with Gadelhak*, 950 F.3d at 462 (ruling that courts should value the relationship between the harm at issue and traditional harms in type, not in intensity).

[107] *See Spokeo*, 136 S. Ct. at 1549 (pointing to both history and congressional judgment as key factors). The Court likely intended for lower courts to independently require both aspects, as the Court evidenced in its conclusion that Congress clearly intended to prevent the harm the plaintiff alleged in the case but that the alleged statutory violation did not necessarily harm the plaintiff. *See id.* at 1550

CONCLUSION

In 2019, in *Salcedo v. Hanna*, the United States Court of Appeals for the Eleventh Circuit created a circuit split when it held that the recipient of a text message that violated the TCPA did not suffer a concrete injury and thus did not have standing to sue in a federal court. The United States Courts of Appeals for the Second, Seventh, and Ninth Circuits held the opposite for recipients of similar text messages, ruling that plaintiffs receiving texts sent in violation of the TCPA were concretely injured and had standing. The Eleventh Circuit decision had a properly thorough analysis, but it incorrectly applied the congressional judgment prong of the framework that the Supreme Court of the United States dictated in 2016, in *Spokeo Inc. v. Robins*. The Eleventh Circuit should have found sufficient congressional intent by deferring to the FCC's statutorily-granted authority. Nonetheless, because the plaintiff did not actually suffer an injury closely related to a traditional legal harm, the Eleventh Circuit correctly remanded the case for dismissal. A future federal court deciding the standing of a recipient of any number of telemarketing text messages should follow the *Spokeo* framework as the Eleventh Circuit did in *Salcedo*. The future court should break with the *Salcedo* analysis, however, and employ the Supreme Court's reasoning in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, in 1984. Doing so will allow the court to properly address the level of deference owed to the FCC's regulatory decisions about the TCPA.

CURTIS R. CROOKE

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(remanding the case to allow the Ninth Circuit to determine whether the alleged procedural violation resulted in a sufficiently concrete injury in fact); *see also* Peter C. Ormerod, *A Private Enforcement Remedy for Information Misuse*, 60 B.C. L. REV. 1893, 1922–23 (2019) (stating that the *Spokeo* decision failed to clarify Congress's ability to identify new harms for standing purposes).