No. 17-14077

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN SALCEDO, individually
and on behalf of others similarly situated,
Plaintiff-Appellee,

v.

ALEX HANNA, an individual, and
THE LAW OFFICES OF ALEX HANNA, P.A.,
a Florida Professional Association,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
No. 0:16-cv-62480-DPG

BRIEF FOR APPELLEE JOHN SALCEDO

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Circuit Rules 26.1-1 through 26.1-3, Plaintiff-Appellee John Salcedo provides the following list of the persons and entities that have or may have an interest in the outcome of this case.

- Blonsky, Daniel F.
- Coffey Curlington, P.L.
- Crotty, Patrick C.
- Edwards Pottinger LLC
- Gayles, The Honorable Darrin P. (U.S.D.J.)
- Hanna, Alex A.
- Holas, Sean M.
- Jaffe, Steven
- Law Offices of Alex A. Hanna, P.A.
- Lehrman, Seth M.
- Nelson, Scott L.
- Owens, Scott D.
- Public Citizen Foundation, Inc.
- Public Citizen, Inc.
- Raffanello, Susan E.

- Salcedo, John
- Scott D. Owens, P.A.
- Smullin, Rebecca
- Turnoff, The Honorable William C. (U.S.M.J.)

Plaintiff-Appellee John Salcedo also certifies that there is no publicly traded company or corporation that has an interest in the outcome of this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-appellee John Salcedo respectfully requests oral argument. This interlocutory appeal centers on a standing question that the district court concluded involves "a controlling question of law as to which there is substantial ground for difference of opinion," App. Tab 43. This appeal is before this Court based on the Court's exercise of discretion under 28 U.S.C. § 1292(b). In light of this Court's decision to accept the appeal, plaintiff-appellee believes that oral argument would assist the Court in resolving the issue presented.

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STATEMENT OF JURISDICTION

Plaintiff-appellee John Salcedo filed this action in the United States District Court for the Southern District of Florida, asserting a claim under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227. *See* App. Tabs 1, 11.[1] The district court had jurisdiction under 28 U.S.C. § 1331.

Before this Court is an interlocutory appeal of the district court's order denying defendants' motion to dismiss and to strike allegations in Mr. Salcedo's amended complaint. The district court denied the motion on April 28, 2017. App. Tab 37. On June 14, 2017, the district court certified its April 28 order for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). App. Tabs 42, 43. On Monday, June 26, 2017, defendants filed a timely application to this Court for permission to appeal. Pet. for Permission for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b), *Hanna v. Salcedo*, No. 17-90016-K (11th Cir. June 26, 2017). On September 13, 2017, this Court granted defendants permission to appeal. *Hanna v. Salcedo*, No. 17-90016-K (11th Cir. Sept. 13, 2017) (order). This Court has jurisdiction under 28 U.S.C. § 1292(b).

[1] In this brief, "App." refers to the Appendix. Materials in the Appendix are cited by tab number (which is also the district court docket number) and page or paragraph number within the item cited. "Doc." refers to docket entries listed in the district court docket found at App. Tab. A.

STATEMENT OF THE ISSUE

Whether plaintiff John Salcedo's amended complaint alleges a concrete injury satisfying the injury-in-fact requirement for standing to pursue his claim that defendants violated the Telephone Consumer Protection Act, 47 U.S.C. § 227.

STATEMENT OF THE CASE

This case concerns text message advertisements that defendants sent to Mr. Salcedo and numerous others without the recipients' consent. Mr. Salcedo alleges that these text messages violated the Telephone Consumer Protection Act (TCPA), which prohibits auto-dialer calls to cell phones, including text messages, without the recipients' consent. Mr. Salcedo alleges that he received such a message and that it invaded his privacy, wasted his time, and prevented him from enjoying the full utility of his phone, especially when he was attending to defendants' message and thus unable to use his phone for other pursuits. On appeal is the district court's order concluding, in relevant part, that Mr. Salcedo alleged at least one harm constituting an injury in fact, as is required for standing.

I. Course of the proceedings and disposition in the court below

Plaintiff John Salcedo initiated this action on October 20, 2016 by filing a class-action complaint alleging that defendants made unconsented-to, auto-dialer text-message calls in violation of the TCPA. App. Tab 1. On December 27, 2016, Mr. Salcedo amended his complaint, App. Tab 11, and the district court denied as

moot a motion to dismiss the original complaint, Doc. 13. As amended, the complaint seeks statutory damages of $500 for each violation, and additional damages for each call placed willfully or knowingly, as permitted by the TCPA, 47 U.S.C. § 227(b)(3). App. Tab 11 at 13. Mr. Salcedo also seeks an injunction against further violations and reasonable attorneys' fees and costs. *Id.*

On January 6, 2017, defendants filed a motion to dismiss the amended complaint and to strike some of its allegations. Defendants argued that the amended complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because Mr. Salcedo lacked an injury in fact and thus standing. App. Tab. 16 at 3. They also argued that Mr. Salcedo failed to state a claim against one defendant and that the court should strike Mr. Salcedo's request for attorneys' fees, a case citation, and allegations regarding Florida Bar rules. App. Tab 16 at 9, 11.

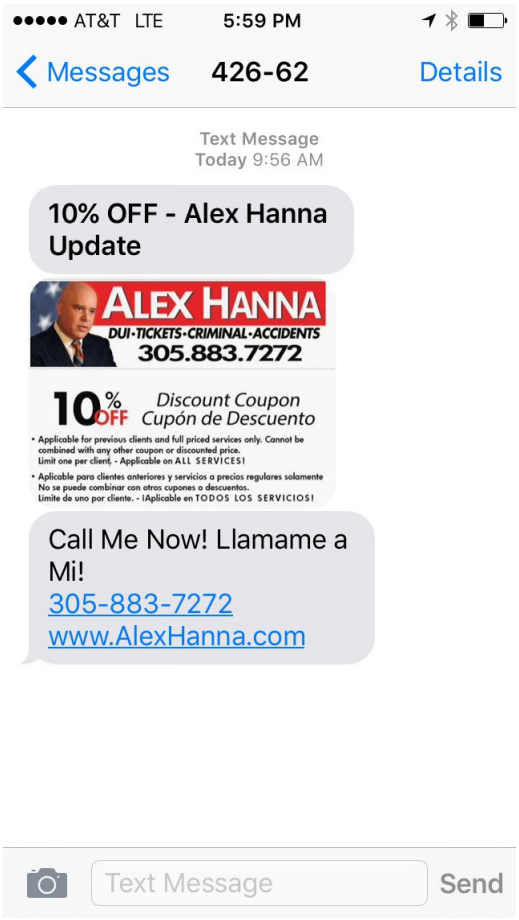
On April 28, 2017, the court denied defendants' motion in full. App. Tab 37. Defendants moved for reconsideration, or, alternatively, for certification of an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). App. Tab. 38. The court did not alter its rulings but granted the request to certify the order for appeal. App. Tabs 42, 43. Focusing on the injury-in-fact requirement, the court concluded that "the issue of standing in this case involves an unsettled and controlling question of law," appellate resolution of which would "materially advance the termination of this litigation." App. Tab 42 at 2. On September 13, 2017, after the district court

denied a motion to reconsider certification, Doc. 52, this Court granted permission to appeal, *Hanna v. Salcedo*, No. 17-90016-K (11th Cir. Sept. 13, 2017) (order).

II. Statement of facts

A. Defendants' unconsented-to text message advertisements

On or about August 12, 2016, Mr. Salcedo received an unsolicited text message from defendants. App. Tab 11, para. 34. Lengthy and impersonal, the message advertised defendants' "DUI•TICKETS•CRIMINAL•ACCIDENTS" services with a photo, bilingual text, and a coupon. *Id.* Divided into three message blocks, it urged: "Call Me Now! Llamame a Mi!" *Id.* It appeared as follows (*id.*):



Mr. Salcedo did not want defendants' message, and he had not consented to it. *Id.* at paras. 34, 35, 41. Mr. Salcedo is a former client of defendants, *id.* at para. 33, not, as defendants suggest, a current client.

Mr. Salcedo's amended complaint alleges that the text injured him in several ways, most of which defendants' statement of the case entirely ignores. Defendants' text message was an unconsented-to, auto-dialer message, which violated Mr. Salcedo's privacy. *Id.* at paras. 39, 41, 55. It also wasted his time, making him unavailable for other activities while he attended to it, and violated his right to enjoy the full utility of his cell phone, including when he addressed defendants' message and was unable to use the phone for other pursuits. *Id.* at paras. 35, 55.

Mr. Salcedo was one of thousands who received defendants' unconsented-to messages. *Id.* at paras. 45, 46. To drum up business, defendants used an automatic dialing system to send text solicitations to all former clients. *Id.* at paras. 37, 39, 40, 43. The message that Mr. Salcedo received came from a number that defendants use to send "promotional alerts." *Id.* at para. 37.

B. The TCPA's substantive prescriptions to protect privacy

The TCPA "bans certain practices invasive of privacy." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012). Passed in 1991 in response to

"[v]oluminous consumer complaints about abuses of telephone technology," *id.* at 370-71, the statute "principally outlaws four practices," *id.* at 373.

Most importantly for this case, the TCPA outlaws unconsented-to, auto-dialer calls to cell phones. More specifically, with certain exceptions, the TCPA prohibits "mak[ing] any call (other than a call made for emergency purposes or made with the prior consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice," 47 U.S.C. § 227(b)(1)(A), to enumerated types of telephone lines and numbers, including numbers "assigned to a … cellular telephone service," *id.* § 227(b)(1)(A)(iii); *see also* 47 C.F.R. § 64.1200(a)(1). Text messages are calls within the meaning of this TCPA prohibition. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d 1302, 1305 (11th Cir. 2015). Mr. Salcedo's claim rests on this TCPA prohibition. App. Tab 11 at 12.

The TCPA also outlaws three other principal "practices invasive of privacy." *Mims*, 565 U.S. at 373. With certain exceptions, the statute bans calls to a "residential telephone line using an artificial or prerecorded voice to deliver a message," 47 U.S.C. § 227(b)(1)(B), sending unsolicited advertisements to fax machines, *id.* § 227(b)(1)(C), and using an auto-dialer to tie up a business's multiple lines, *id.* § 227(b)(1)(D).

With these four bans, the TCPA sets out "detailed, uniform, federal substantive prescriptions." *Mims*, 565 U.S. at 383. Congress framed these prescriptions with fifteen findings describing its concerns. Among other things, Congress found that "[u]nrestricted telemarketing … can be an intrusive invasion of privacy and, when an emergency or medical assistance line is seized, a risk to public safety." 47 U.S.C. § 227 note (Congressional Statement of Findings) (setting out TCPA, Pub. L. No. 102-243, § 2, 105 Stat. 2394, 2394-95 (1991)). To provide consumers with redress for the injuries associated with such invasions of privacy, Congress provided a right of action allowing a "person or entity" to bring suit for "a violation" of any of the statute's four principal bans or related regulations. 47 U.S.C. § 227(b)(3); *see also Mims*, 565 U.S. at 376-87.

C. The district court's determination that Mr. Salcedo has standing

The district court rejected defendants' argument that Mr. Salcedo lacks an injury in fact. Nonetheless, the court concluded that an interlocutory appeal was appropriate in light of the recent opinions regarding the injury-in-fact requirement in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), and *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016), and the opinion respecting the denial of rehearing en banc in *Nicklaw*, 855 F.3d 1265, 1266 (11th Cir. 2017) (Pryor, J., respecting the denial of rehearing en banc). App Tab. 42 at 1. The district court recognized that it was bound by *Palm Beach Golf Center-Boca, Inc. v. John G.*

Sarris, D.D.S., P.A., 781 F.3d 1245 (11th Cir. 2015), a case in which this Court "held that the unsolicited receipt of a one-page fax advertisement was a cognizable, particularized, and personal injury under the [TCPA] sufficient to confer Article III standing." App. Tab 42 at 1-2 (citing 781 F.3d at 1253). And days before the district court's certification order, this Court again concluded that a TCPA plaintiff had standing to sue. *Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017). The *Florence Endocrine* decision was reached after the completion of briefing on defendants' motion for certification, however, *see* App. Tab A, and the certification order did not reference it.

III. Standard of review

This Court reviews de novo the district court's denial of defendants' motion to dismiss the amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). *McElmurray v. Consol. Gov't of Augusta-Richmond Cty*, 501 F.3d 1244, 1250 (11th Cir. 2007).

Defendants' motion to dismiss was a facial jurisdictional challenge, based solely on the amended complaint, as opposed to a factual challenge involving outside evidence. *See McElmurray*, 501 F.3d at 1251; App. Tab 16 at 2 (relying only on the amended complaint); App. Tab 43 (not addressing any factual disputes). Therefore, this Court must provide Mr. Salcedo "safeguards similar to those provided in opposing a Rule 12(b)(6) motion—the court must consider the

allegations of the [amended] complaint to be true." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (per curiam). Further, the Court must construe the amended complaint in Mr. Salcedo's favor. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

For these reasons, the Court should ignore not only defendants' assertion that certain allegations are disputed, Appellants' Br. 6-7, but also factual assertions in defendants' brief that are not in the amended complaint and any arguments based on such assertions.

SUMMARY OF ARGUMENT

Mr. Salcedo's TCPA claim centers on defendants' junk text: the three-part advertisement that defendants sent to Mr. Salcedo using an auto-dialer and without Mr. Salcedo's consent. The message violated a central and substantive provision of the TCPA, a statute Congress enacted to protect individuals' privacy.

In attempting to dismiss Mr. Salcedo's amended complaint, defendants dispute only the concreteness of Mr. Salcedo's alleged injuries. As the Supreme Court has recently confirmed, however, concrete injuries may be tangible or intangible, and the smallest such injury suffices as long it is real. Mr. Salcedo alleges multiple injuries that satisfy this standard and thus establish his standing.

Mr. Salcedo alleges injury first from defendants' text message, which violated his privacy. Legal history and legislative intent confirm that this harm is

real; Congress found that receiving an unconsented-to, auto-dialer call banned by the TCPA is a privacy harm. Mr. Salcedo alleges additional injuries suffered when he attended to defendants' message. That action wasted Mr. Salcedo's time and also violated Mr. Salcedo's right to fully enjoy the utility of his cell phone, which he could not use for other purposes when he was dealing with defendants' message.

Defendants muster little to dispute that Mr. Salcedo alleges a concrete injury. Although the Supreme Court recently emphasized that history and the judgment of Congress can show that harms are concrete, defendants barely acknowledge the history and legislative analysis showing Mr. Salcedo's injuries to be concrete. Instead, they devote most of their brief to discussing the extent to which a statutory violation can, in itself, be a concrete harm. At best for defendants, these arguments state an undisputed proposition: that statutory violations are sometimes, if not always, concrete injuries. At worst, defendants misconstrue the clear law of this Circuit by suggesting that TCPA violations are never sufficient to establish injury.

ARGUMENT

To have standing to sue, Mr. Salcedo must allege an injury in fact. This requirement means that Mr. Salcedo must point to an "'invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not

conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

Here, defendants do not dispute that Mr. Salcedo has alleged a "particularized" injury. He received defendants' message on his own phone, and consequently, both the message and its effects were personal and individual. *See* Appellants' Br. 8; App. Tab 11, paras. 34, 42; *Palm Beach Golf*, 781 F.3d at 1251 & n.5, 1252. Moreover, there is no dispute that Mr. Salcedo alleges injuries that have already occurred, not ones that might be viewed as "conjectural" or insufficiently "imminent."

Defendants contest only the correctness of the district court's holding that Mr. Salcedo's injuries were concrete. Here, history and congressional judgment, combined with this Court's precedent, show that each of the injuries Mr. Salcedo alleges is concrete.

I. *Spokeo* confirms that a wide range of injuries can establish standing by showing that a person has a "direct stake" in litigation.

The injury-in-fact requirement "serves to distinguish a person with a direct stake in the outcome of litigation—even though small—from a person with a mere interest in the problem." *ACLU of Ga. v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (per curiam) (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973)). This "direct stake" can take many forms. Certainly, economic or

tangible injuries are concrete. Intangible harms can also be concrete, even when they are "difficult to prove or measure." *Spokeo*, 136 S. Ct. at 1549. Further, the concreteness requirement can be satisfied by a risk of real harm. *Id.*

Whatever the type of injury, the operative question is whether it is "real," or "*de facto*"; in other words, a concrete injury "must actually exist." *Id*. at 1548. In identifying an injury in fact, the size of the harm is irrelevant. Even "an identifiable trifle" is sufficient. *SCRAP*, 412 U.S. at 689 n.14; *see also id.* at 689 (requiring an allegation only of "perceptibl[e] harm"). The concreteness requirement stems from the constitutional requirement of a case or controversy, *Spokeo*, 136 S. Ct. at 1547, and thus serves to ensure that a dispute is "in a form traditionally capable of judicial resolution," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974), not to measure its significance, *SCRAP*, 412 U.S. at 689 n.14.

A. History or Congress's judgment can show that a harm is concrete.

Spokeo recognized two wellsprings that the Supreme Court has used to determine whether an intangible harm is concrete: "history and the judgment of Congress." 136 S. Ct. at 1549. An inquiry into history asks whether a plaintiff's "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.*; *see, e.g.*, *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279-80 (11th Cir. 2017). An inquiry into congressional judgment recognizes that "Congress is well positioned

to identify intangible harms that meet minimum Article III requirements." *Spokeo,* 136 S. Ct. at 1549; *see, e.g.*, *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340 (11th Cir. 2017). Congress can "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." 136 S. Ct. at 1549 (alteration in original) (quoting *Lujan*, 504 U.S. at 578). "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

Spokeo's recognition that Congress's judgment is "instructive and important," *id.*, reaffirms long-established doctrine. The Supreme Court has repeatedly recognized that the "injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Lujan*, 504 U.S. at 578 (quoting *Warth*, 422 U.S. at 500 (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617, n.3 (1973))); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982).

In practice, this doctrine means that the "structure and purpose" of a statute can show that an injury to an interest protected by that statute is concrete. *Perry*, 854 F.3d at 1340. The judgment of Congress is particularly persuasive when Congress has created a right, a statute provides the ability to enforce that right, and a plaintiff alleges an "injury in precisely the form the statute was intended to guard

against." *See Havens*, 455 U.S. at 373; *see also Hardin v. Ky. Utils. Co.*, 390 U.S. 1, 6 (1968) ("[W]hen the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision."); *Houston v. Marod Supermarkets, Inc.*, 733 F.3d 1323, 1332-34 (11th Cir. 2013) (in holding that a statutory violation can constitute an injury in fact, identifying a statutory "right to be free from discrimination on the basis of disability" and concluding that when a plaintiff "encounters" certain barriers, he "has suffered injury in precisely the form the statute was intended to guard against" (quoting and citing *Havens*, 455 U.S. at 373-74)).

The Supreme Court's opinion in *Havens Realty Corp. v. Coleman* is an instructive example of how Congress's judgment can show that an injury is concrete. *Havens* concerned a claim that a realty company lied to African-Americans about the availability of apartments and thus violated the Fair Housing Act's prohibition on race-based misrepresentations about the availability of housing. 455 U.S. at 366-68 & n.2, 373. One individual plaintiff had received incorrect information about housing options while acting a "tester"—that is, while posing as someone looking for housing, rather than while conducting an actual housing search. 455 U.S. at 368, 373-74. Although she had not suffered any harm other than the inaccurate information, the Court held that she had standing, after

first concluding that the Fair Housing Act created "an enforceable right to truthful information," *id.* at 373, and then recognizing that if the plaintiff alleged that this right was violated, then she had "suffered injury in precisely the form the statute was intended to guard against," *id.* at 373-74. As Justice Thomas's *Spokeo* concurrence explains, the reasoning of *Havens* is fully consistent with *Spokeo*'s conception of concrete injury. *See* 136 S. Ct. at 1554 (Thomas, J., concurring).

This Court has twice applied similar logic to conclude that TCPA plaintiffs have standing. The first TCPA standing case, *Palm Beach Golf*, centered on a fax advertisement alleged to violate the TCPA. The plaintiff argued that it had standing because it suffered a concrete and particularized injury: "the [defendant's] sending of the fax and resulting occupation of [the plaintiff's] telephone line and fax machine." 781 F.3d at 1250. This Court agreed. *Id.* Similarly to the Supreme Court in *Havens*, this Court in *Palm Beach Golf* first recognized that the TCPA implied a cognizable right for citizens to be protected "from the loss of use of their fax machines during the transmission of fax data." *Id.* at 1252. Then, this Court noted that "Congress created a private right of action for enforcement of violations of the statute … and provided statutory damages for a 'junk' fax recipient." *Id.* (footnote omitted). With this context, this Court concluded that the plaintiff suffered an injury in fact because the disputed fax was transmitted and occupied the plaintiff's

fax machine and telephone line, and "occupation of Plaintiff's fax machine [was] among the injuries intended to be prevented by the statute." *Id*. at 1253.

Following *Spokeo*, this Court again held in *Florence Endocrine* that a plaintiff had standing to sue for a violation of the TCPA's fax provisions. In reaching this conclusion, *Florence Endocrine* reaffirmed *Palm Beach Golf*'s holdings that the TCPA created a "cognizable right," 858 F.3d at 1366 (quoting *Palm Beach Golf*, 781 F.3d at 1252), and that "concrete injury" occurs when a "fax machine is occupied while [an] unsolicited fax is being sent," *id.* (also recognizing injury associated with the cost of printing). The Court then held that the assertion in the complaint that the plaintiff had received unsolicited faxes was sufficient to allege this concrete fax-machine injury. *Id*.

Since *Spokeo*, this Court has also recognized the continuing importance of *Havens* in other opinions. *See Perry*, 854 F.3d at 1339 (11th Cir. 2017) (citing *Havens* to support the proposition that a plaintiff might not need to allege harm "beyond the one Congress has identified" (quoting *Spokeo*, 136 S. Ct. at 1549)); *Church v. Accretive Health, Inc.*, 654 F. App'x 990, 994 (11th Cir. 2016) (per curiam) (holding that "[j]ust as the tester-plaintiff had alleged injury to her statutorily-created right to truthful housing information, so too has Church alleged injury to her statutorily-created right to information pursuant to the FDCPA").

B. Injuries in fact include statutory violations that are themselves concrete harms and concrete injuries that result from those violations.

Spokeo confirmed that an injury that creates standing can be either a violation of a plaintiff's statutory rights or some other harm caused by the defendant's unlawful conduct, as long as the relevant injury is concrete (as well as particularized). 136 S. Ct. at 1548-49. *Spokeo* concerned claimed procedural violations, and in remanding the case to the Ninth Circuit to reconsider whether the plaintiff had standing, *id.* at 1550, the Supreme Court recognized that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," *id*. at 1549. "In other words, a plaintiff … need not allege any *additional* harm beyond the one Congress has identified." *Id*. (citing, as examples, *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20-25 (1998) and *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 449 (1989)). More generally, Justice Thomas explained that when private rights are at issue, the Supreme Court's "contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement." *Id*. at 1552 (Thomas, J., concurring).

Consistent with *Spokeo*, this Court has recognized that standing analysis "does not end" merely because a plaintiff "does not allege any additional harm beyond the statutory violation." *Perry*, 854 F.3d at 1340. To the contrary, this

Court concluded in *Perry* that a plaintiff satisfied the injury-in-fact requirement with allegation of a statutory violation: a breach of the Video Privacy Protection Act, which prohibits disclosures by video tape service providers of rental or sales records. *Id*. at 1340-41.

To be sure, *Spokeo* also indicates that not every statutory violation necessarily constitutes a concrete injury. 136 S. Ct. at 1549; *see also Nicklaw*, 839 F.3d at 1002-03. This principle also is not new. In *Spokeo*, the Supreme Court cited its earlier holding in *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009) when cautioning that a "bare procedural violation, divorced from any concrete harm" would not "satisfy the injury-in-fact requirement of Article III." 136 S. Ct. at 1549. The Court's observation reflects the general doctrine that Congress cannot by statute allow plaintiffs to evade Article III requirements. *See*, *e.g.*, *Raines v. Byrd*, 521 U.S. 811, 820 n.3, 821, 829 (1997) (holding that Congress cannot by statute allow plaintiffs to sue without injury), *cited in* Appellants' Br. 8; *Linda R.S.*, 410 U.S. at 617 n.3 (noting that Congress cannot give courts authority to issue advisory opinions).

Despite *Spokeo* and *Perry*, defendants broadly challenge the notion that a statutory violation can suffice to establish standing. In particular, they argue that *Palm Beach Golf* and *Florence Endocrine* eliminate the possibility that TCPA violations can be concrete injuries. Appellants' Br. 12, 19. They are wrong. With

regard to the fax provisions of the TCPA, neither *Palm Beach Golf* nor *Florence Endocrine* states that a statutory violation is not, without more, a concrete injury. To the contrary, they support the opposite proposition: that a TCPA violation without more can constitute concrete injury.

In *Palm Beach Golf*, the Court viewed the temporary occupation of a fax machine as a concrete injury to rights protected by the statute. *See* 781 F.3d at 1251-52 (recognizing a right inferred in the statute). *Florence Endocrine* emphasized that the fax machine injury is inherent in the statutory violation. As explained by the district court in that case, the relevant allegation was that the plaintiff received several prohibited faxes. *See Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC*, No. 16-1289, 2016 WL 9444356, at *2 (N.D. Ala. Nov. 30, 2016) (citing complaint); *see also* 858 F.3d at 1366 (quoting complaint). The defendant argued that the plaintiff lacked standing because it alleged only "a bare violation of the statute." 2016 WL 9444356, at *2 (quoting motion papers). The district court rejected this argument and concluded that the plaintiff had suffered a concrete injury because the alleged transmission of prohibited faxes necessarily entailed the injury identified in *Palm Beach Golf*: occupation of a telephone line and fax machine. *Id*. In other words, the court found that the plaintiff had standing based on an allegation of a statutory violation alone. The district court's holding rested on *Spokeo*'s recognition of Congress's authority to make injuries cognizable

even if they "were previously inadequate at law." *Id.* (quoting *Spokeo*, 136 S. Ct at 1549). This Court, in affirming, similarly stated: "[W]here a statute confers new legal rights on a person, that person will have Article III standing to sue where the facts establish a concrete, particularized, and personal injury to that person as a result of the violation of the newly created legal rights." 858 F.3d at 1366 (quoting *Palm Beach Golf*, 781 F.3d at 1251); *see also id.* (citing the district court's reasoning).

To the extent that defendants argue that a statutory violation without more never constitutes concrete injury, Appellants' Br. 21, they misstate the law. This Court squarely rejected defendants' view in *Perry*, when it held that a plaintiff may have standing even if he "does not allege any additional harm beyond the statutory violation." 854 F.3d at 1340; *see also Havens*, 455 U.S. at 373-74; *Church*, 654 F. App'x at 993-94. Defendants' rule would also be unworkable. It would mean that if Congress passed a law expressly outlawing injurious conduct, such as stealing someone's money, the existence of a direct prohibition would make it harder rather than easier for a victim to show standing, as the plaintiff would have to prove that he had been hurt in some way other than suffering the wrong identified by the statute.

Although defendants discuss *Nicklaw* at length, the panel opinion in that case does not suggest that statutory violations never constitute concrete injury.

Nicklaw considered whether a specific statutory violation, the failure to timely record satisfaction of a mortgage, constituted concrete harm and concluded that it was a procedural violation unaccompanied by an actual injury. In addition to reviewing potential concrete harms (or risks of harm) that might flow from such a violation and recognizing that the complaint did not allege any of them, this Court observed that the common law did not recognize a late-recorded discharge as a harm in itself. 839 F.3d at 1002-03. *Nicklaw* recognizes, however, that other statutory violations can constitute concrete harm. The opinion states, for example, that "a plaintiff who alleges a violation of a statutory right to receive information alleges concrete injury," *id.* at 1002, and it quotes *Spokeo*'s holding regarding Congress's elevation of injuries "to the status of legally cognizable injuries," *id.* (quoting *Spokeo*, 136 S. Ct. at 1549). Moreover, when this Court later decided *Perry*, the Court saw no conflict between its conclusion in that case, that a statutory violation was concrete injury, and its earlier holding in *Nicklaw*. *Perry*, 854 F.3d at 1340-41. *Nicklaw* thus serves only as an example of a statutory violation that does not constitute concrete harm. The opinion respecting the denial of rehearing en banc in *Nicklaw*, 855 F.3d at 1266, did not (and could not) change the relevant aspects of the panel opinion. *See Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991) ("attaching precedential weight to a denial of rehearing en banc would be unmanageable").

Because the law is clear in this Circuit, it does not matter if the out-of-circuit cases that defendants describe as consistent with *Nicklaw*, Appellants' Br. 11 n.4, 18 n.10, conflict with this Court's doctrine. In any event, none of the cited cases forecloses the possibility that statutory violations can be concrete harms. Additionally, like this Court in *Perry*, most of the courts whose decisions defendants cite—as well other courts of appeal—have expressly recognized, post-*Spokeo*, that statutory violations can suffice to establish standing. *See Coulter-Owens v. Time Inc.*, 695 F. App'x 117, 121 (6th Cir. 2017); *Demarais v. Gurstel Chargo, P.A.*, 869 F.3d 685, 692, 693 (8th Cir. 2017); *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 455 (5th Cir.), *reh'g and reh'g en banc denied*, 867 F.3d 699 (5th Cir. 2017) (per curiam); *see also In re Horizon Healthcare Svcs., Inc. Data Breach Litigation*, 846 F.3d 625, 635 (3rd Cir. 2017); *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 983-84 (9th Cir. 2017); *Strubel v. Comenity Bank*, 842 F.3d 181, 189 (2d Cir. 2016).

II. Mr. Salcedo suffered concrete harm from defendants' unconsented-to, auto-dialer message.

Mr. Salcedo alleges that defendants sent him an unconsented-to, auto-dialer text message. Congress determined that these calls invade individuals' privacy, *Mims*, 565 U.S. at 371, 373, and Mr. Salcedo's amended complaint confirms that effect, App. Tab 11, para. 55. These allegations alone should resolve this appeal. Mr. Salcedo has standing because defendants' message violated the TCPA and

thus the privacy interests that the law recognizes and protects. For that reason, the message was a concrete injury.

History and the judgment of Congress confirm the concreteness of Mr. Salcedo's injury. History shows a long common-law and statutory tradition of protecting personal privacy. The decisive congressional judgment lies in the TCPA's identification and protection of a particular privacy interest, the freedom from unwanted robocalls. The district court thus correctly relied on *Mohamed v. Off Lease Only, Inc.*, No. 15-23352, 2017 WL 1080342 (S.D. Fla. Mar. 22, 2017), an opinion recognizing that "the common law and legislative pronouncements" support the finding that unwanted text messages constitute concrete harm, 2017 WL 1080342, at *2. *See* App. Tab 43. Indeed, the two other courts of appeals that have considered similar questions post-*Spokeo* have also concluded that history and the judgment of Congress establish TCPA-prohibited calls as concrete injuries. *See Susinno v. Work Out World Inc.*, 862 F.3d 346, 347, 351-52 (3rd Cir. 2017); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *see also Manuel v. NRA Group LLC*, No. 17-1124, 2018 WL 388622, at *3-4 (3rd Cir. Jan. 12, 2018) (applying *Susinno*).

The Supreme Court's opinion in *Campbell-Ewald*, decided in the same term as *Spokeo*, provides an important backdrop to this Court's review of the relevant history and judgment of Congress. In *Campbell-Ewald*, the Court addressed

subject-matter jurisdiction over a plaintiff's claim that he received text messages in violation of the TCPA. 136 S. Ct. at 666-69. The Court's opinion focused on whether the claim was moot, not whether the plaintiff adequately alleged standing. *Id.* at 669. But the Court's analysis centered on the Article III requirement that a plaintiff have a personal stake in the litigation, *id.*, and importantly, in concluding that the case was not moot, the Court observed that "the District Court retained jurisdiction to adjudicate," *id.* at 672. Even more tellingly, the dissenting Justices recognized that "[a]ll agree that at the time Gomez filed suit, he had a personal stake in the litigation" because "[i]n his complaint, Gomez alleged that he suffered an injury in fact when he received unauthorized text messages." *Id.* at 679 (Roberts, C.J., dissenting). The Justices' shared acknowledgment that allegations essentially identical to those in this case are sufficient to establish standing at the pleading stage underscores that the injuries asserted here have strong roots in history as well as congressional endorsement.

A. History shows that Mr. Salcedo suffered concrete injury from defendants' message.

Long before the TCPA became law, the Supreme Court recognized the harmful nature of unwanted communications like defendants' text message. "The unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in [Supreme Court] cases." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Nearly a century ago, the "right to be let alone" was described as "the

most comprehensive of rights and the right most valued by civilized men." *Id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). Concluding that "no one has a right to press even 'good' ideas on an unwilling recipient," *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970), the Supreme Court has recognized individuals' right to avoid unwelcome mail, *id.* at 736-37, as well as offensive communications that interrupt their "passage without obstruction as the streets afford," *Am. Steel Foundries v. TriCity Central Trades Council*, 257 U.S. 184, 204 (1921). *See Hill*, 530 U.S. at 717-18.

More recently, courts have expressly recognized that telephone calls are among the types of unwanted communications that are injurious. The Seventh Circuit explained: "Every call uses some of the phone owner's time and mental energy, both of which are precious. Most members of the public want to limit calls, especially cell-phone calls, to family and acquaintances, and to get their political information (not to mention their advertisements) in other ways." *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303, 305-06 (7th Cir.), *cert. denied sub nom. Patriotic Veterans, Inc. v. Hill*, 137 S. Ct. 2321 (2017). The Fourth Circuit concluded that "[i]f consumers are constitutionally permitted to opt out of receiving mail which can be discarded or ignored, then surely they are permitted to opt out of receiving phone calls that are more likely to disturb their peace." *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331 (4th Cir. 2005).

American tort law reflects this established interest in avoiding unwanted telephone calls and other communications. As defendants concede, "invasion of privacy is a recognized tort." Appellants' Br. 20. Since the early 1900s, four privacy-related torts "have clearly become crystallized" in American common law. Restatement (Second) of Torts § 652A, cmts. a, c (Am. Law Inst. 1977) (Oct. 2017 update). Unwanted telephone calls are a type of "intrusion upon seclusion," one of these four privacy torts. *Id.* at cmts. b, c; *id.* at § 652B, cmt. b, illus. 5. Under tort law, as under the TCPA, 47 U.S.C. § 227(b)(3), "[t]he intrusion itself makes the defendant subject to liability." Restatement (Second) of Torts, § 652B, cmt b; *see also id.* at § 652H; *Eichenberger*, 876 F.3d at 983 (noting that it is "[t]elling[]" that "privacy torts do not always require additional consequences to be actionable").

The history of state statutory law also shows that calls like defendants' constitute real injuries. Though defendants do not even mention this history, the TCPA itself recognizes that restrictions on telephone marketing were common in state law before Congress passed the federal statute. 47 U.S.C. § 227 note (Congressional Statement of Findings). In fact, one goal of the TCPA was to build upon state restrictions that had proved inadequate against interstate callers. *Id.*; *Mims*, 565 U.S. at 372-73; *cf.* 47 U.S.C. § 227(f)(1) (preserving state law).

History thus establishes that defendants' unconsented-to, auto-dialer text message was itself a real injury to Mr. Salcedo. Particularly because Mr. Salcedo

expressly alleges that his privacy was violated, he has claimed a form of harm that bears a "close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in … American courts," *Spokeo*, 136 S. Ct. at 1549. The close relationship between TCPA violations and tort law has been recognized both by courts considering claims like Mr. Salcedo's, *Susinno*, 862 F.3d at 351-52, *Van Patten*, 847 F.3d at 1043, *Mohamed*, 2017 WL 1080342, at *2, and in the insurance context, where courts are called upon to determine whether TCPA litigation falls within the scope of liability insurance policies whose coverage depends on whether a TCPA claim is privacy-related. *See, e.g.*, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Papa John's Int'l, Inc.*, 29 F. Supp. 3d 961, 968 (W.D. Ky. 2014); *see also Owners Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 821 (8th Cir. 2012); *LAC Basketball Club Inc. v. Fed. Ins. Co*., No. 14-00113, 2014 WL 1623704, at *5 (C.D. Cal. Feb. 14, 2014); *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1006 (Fla. 2010).

This inquiry into history establishes Mr. Salcedo's injury as concrete even though, as defendants point out, Mr. Salcedo might need more to state a privacy violation claim under Florida law. *See* Appellants' Br. 20; *see also* Restatement (Second) of Torts, § 652B & cmt. d. Under *Spokeo*, a "close relationship" to traditionally actionable harm is enough to establish an injury as concrete. 136 S. Ct. at 1549; *see Pedro*, 868 F.3d at 1279-80 (concluding that an injury is concrete

because it bears a close relationship to a tort, without discussing whether the plaintiff would actually have a claim for this tort); *see also Susinno*, 862 F. 3d at 351; *Van Patten*, 847 F.3d at 1043. Further, the TCPA's protection against intrusive, unwanted calls is much more closely related to the interests protected by the common-law tort than is another statutory provision that this Court analogized to intrusion upon seclusion: the Video Privacy Protection Act's disclosure prohibition. In *Perry*, this Court examined whether a violation of that prohibition constituted concrete harm. Although intrusion upon seclusion is a tort based on intrusion, not disclosure, the Court cited the relationship between this tort and the alleged disclosure violation in concluding that the violation established standing. *See* 854 F.3d at 1340-41.

The contrary rule that defendants imply—that a plaintiff must state a common-law cause of action to have standing for a federal statutory violation in federal court—would be severely limiting and inconsistent with both this Court's approach and *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), which *Spokeo* cites as an example of the relevant historical analysis. In *Vermont Agency*, the Supreme Court reviewed legal history to establish that a *qui tam* relator had standing. The Court did not, however, inquire whether the plaintiff could actually have stated a claim under older legal doctrines, which dated back to the 13th century and, for that reason alone, likely included

elements that the modern plaintiff did not satisfy. *See* 529 U.S. at 774-77. Defendants' argument also runs squarely up against *Spokeo*'s express acknowledgment that a federal statute may elevate a "*de facto* injur[y]" that was "previously inadequate at law" into a "legally cognizable" one, sufficient to support standing. 136 S. Ct. at 1549.

B. The judgment of Congress confirms that Mr. Salcedo's injury is concrete.

The judgment of Congress also forcefully establishes that Mr. Salcedo suffered concrete harm from defendants' message, which violated his privacy. This case involves a statute whose "structure and purpose … supports the conclusion that it provides actionable rights," *Perry*, 854 F.3d at 1340. Moreover, because Congress left no doubt about its privacy-protective intent in passing the TCPA, Mr. Salcedo's injury unquestionably is "among the injuries intended to be prevented by the statute," *Palm Beach Golf*, 781 F.3d at 1252.

Defendants' message to Mr. Salcedo violated an express statutory ban. It was neither a mere technical violation, as defendants suggest, *see* Appellants' Br. 8, nor a procedural problem like the one that concerned the Supreme Court in *Spokeo*, 136 S. Ct. at 1549. C*ompare* 47 U.S.C. § 227(b)(1)(A)(iii) (prohibition) *with id.* § 227(d) (technical and procedural requirements). Instead, the message struck at the heart of the TCPA's substantive prescriptions. *See Mims*, 565 U.S. at 373, 383. These substantive prescriptions reflect Congress's judgment that

consumers have "the substantive right to be free from certain types of phone calls and texts absent [their] consent." *Van Patten*, 847 F.3d at 1043. Congress used every tool available to recognize and protect this right. Congress reinforced the TCPA's substantive bans with a cause of action, as well as statutory damages and injunctive relief. 47 U.S.C. § 227(b)(3); *Palm Beach Golf*, 781 F.3d at 1252; *see generally Havens*, 455 U.S. at 373; *Perry*, 854 F.3d at 1340.

Congress also "squarely identified" the injury that Mr. Salcedo alleges: an unconsented-to, auto-dialer call to his cell phone. *See Susinno*, 862 F.3d at 351. Congress stated, with unusual clarity, its finding that such calls are inherently harmful to privacy. The TCPA itself describes its prohibition on unconsented-to, auto-dialer calls as "intended to protect" "privacy rights." 47 U.S.C. § 227(b)(2)(C). In its statutory findings, Congress described its privacy concerns at even greater length.

> "Unrestricted telemarketing," Congress determined, "can be an intrusive invasion of privacy." TCPA, 105 Stat. 2394, note following 47 U.S.C. § 227 (Congressional Findings) (internal quotation marks omitted). In particular, Congress reported, "[m]any consumers are outraged over the proliferation of intrusive, nuisance [telemarketing] calls to their homes." *Ibid*. (internal quotation marks omitted).

Mims, 565 U.S. at 372. Senate and House reports further describe Congress's conclusion that unconsented-to, auto-dialer calls are harmful privacy violations. *See* S. Rep. No. 102-178, at 1-5, *as reprinted in* 1991 U.S.C.C.A.N. 1968, 1969-1972 (1991); H.R. Rep. No. 102-317, at 5-10 (1991). Additionally, in the

legislative record, "Senator Hollings, the TCPA's sponsor, described [computerized] calls as 'the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall.'" *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1255-56 (11th Cir. 2014) (quoting 137 Cong. Rec. 30,821 (1991)).

In recognizing the privacy harms inherent in unconsented-to, auto-dialer calls and establishing a substantive right not to receive such calls, Congress left no doubt that even a single prohibited call constitutes real harm. The TCPA ban on such calls applies to "any" covered call, 47 U.S.C. § 227(b)(1)(A), and the cause of action is "based on *a* violation," *id.* § 227(b)(3) (emphasis added). Further, Congress allowed plaintiffs to recover statutory damages for calls to cell phones even if they have suffered no monetary loss, suggesting that Congress viewed each prohibited call as involving a significant, though non-pecuniary, injury. 47 U.S.C. § 227(b)(3)(B); *Palm Beach Golf*, 781 F.3d at 1252; *Osorio*, 746 F.3d at 1257-58.

The TCPA therefore reflects, in clear terms, Congress's "instructive and important judgment" that a violation of 47 U.S.C. § 227(b)(1)(A)(iii) involves an "intangible harm[] that meet[s] minimum Article III requirements." *Spokeo*, 136 S. Ct. at 1549. As *Spokeo* recognizes, Congress is "well positioned" to make such judgments and has considerable power to "define injuries … that will give rise to a

case or controversy where none existed before." *Id.* at 1549 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)).

The conclusiveness of Congress's judgment is not altered by the historical fact that text messages did not exist when the TCPA was passed. *See* Appellants' Br. 17, 25. Text messages are undisputedly a form of call covered by the TCPA. *Campbell-Ewald*, 136 S. Ct. at 667; *Murphy*, 797 F.3d at 1305. And this Court has made clear that *Spokeo* requires respect for the judgment of Congress when a plaintiff alleges a modern-day version of a harm that initially motivated Congress. In *Perry*, for example, this Court considered a plaintiff's claim that a defendant violated the Video Privacy Protection Act through use of a technology—a mobile app—that did not exist when the statute was enacted. Although the dispute focused on this new technology, the Court held that Congress's historical concern about video stores' disclosures established that the alleged violation constituted concrete injury. 854 F.3d at 1338, 1340.

Mr. Salcedo thus has standing because he alleges the exact injury that Congress confirmed "actually exist[s]," *Spokeo*, 136 S. Ct. at 1548: an unconsented-to, auto-dialer call to his cell phone. In other words, like the plaintiffs in *Havens*, *Palm Beach Golf*, and *Florence Endocrine*, Mr. Salcedo has invoked a statutory right of action by alleging an injury that is "among the injuries intended to be prevented by the statute." *Palm Beach Golf*, 781 F.3d at 1252; *see Havens*,

455 U.S. at 373; *Florence Endocrine*, 858 F.3d at 1366; *see generally Susinno*, 862 F.3d at 351; *Van Patten*, 847 F.3d at 1043.

Because the judgment of Congress shows that any call violating the TCPA auto-dial ban harms the recipient by infringing privacy interests, Mr. Salcedo's allegation of the violation alone establishes his concrete injury. *See Florence Endocrine Clinic*, 2016 WL 9444356, at *2 (concluding that a plaintiff has standing based on an allegation of a TCPA fax violation, because that violation necessarily entails the congressionally recognized injury of occupation of a fax machine); *cf. Eichenberger*, *Inc.*, 876 F.3d at 983-84 (concluding, based on history and the judgment of Congress, that every violation of the Video Privacy Protection Act constitutes a concrete privacy injury). Mr. Salcedo's additional allegation that defendants' text message violated his privacy, while unnecessary, underscores that he alleges a violation involving the concrete harm that Congress identified.

C. Defendants do not refute that their text message constitutes concrete injury.

Defendants offer no compelling basis for dismissing the legal history and legislative intent showing that Mr. Salcedo suffered a concrete privacy injury from defendants' message. Aside from noting the novelty of text-message technology, defendants' primary defense is that the controlling opinions from this Court and persuasive ones from others should not apply to Mr. Salcedo's claims. They also suggest Mr. Salcedo's situation is similar to circumstances that courts have found

insufficient to establish standing. Defendants are wrong on both fronts. This Court's case law and opinions of other courts confirm the conclusion that the *Spokeo* inquiry into history and congressional judgment requires: Mr. Salcedo suffered concrete harm through defendants' message. Mr. Salcedo's circumstances are entirely unlike those of the plaintiffs in the cases defendants suggest are similar.

In addition to this Court's own precedents, discussed above, three decisions from other courts are particularly instructive: the Third Circuit's decision in *Susinno*, 862 F.3d 346; the Ninth Circuit's opinion in *Van Patten*, 847 F.3d 1037; and the district court decision in *Mohamed*, 2017 WL 1080342, on which the district court in this case relied. All three concluded that a TCPA plaintiff alleging unsolicited calls or messages to a cell phone has standing. *See also Manuel*, 2018 WL 388622, at *3-4 (applying *Susinno* to conclude that allegations of unconsented-to, autodialer calls to a cell phone establish standing). No federal appellate court has held otherwise.

Van Patten is particularly relevant because, similarly to this case, it concerned text messages to a cell phone. 847 F.3d at 1041. The court reviewed the TCPA legislative history and the common law of torts and concluded that "a violation of the TCPA is a concrete, *de facto* injury." *Id.* at 1043. *Susinno*, which involved a single call to a cell phone, likewise emphasized Congress's intent to

protect against intrusive calls and the common-law tradition recognizing such intrusions as injurious, and held that the plaintiff's allegations that the call invaded the privacy interests Congress intended to protect "alleged a concrete, albeit intangible harm." 862 F.3d at 352.

Defendants acknowledge *Susinno* only in footnotes and attempt to distinguish it because it involved a voice call rather than a text message. *See* Appellants' Br. at 18 n.10, 24 n.13. However, the court's reasoning, that the statutory violation involved "the very harm that Congress sought to prevent, arising from prototypical conduct proscribed by the TCPA," 862 F.3d at 351 (internal quotation marks omitted), would apply to any auto-dialer call prohibited by the TCPA. Indeed, *Susinno* underscored the point by approvingly citing *Van Patten* and explicitly noting that that case involved "unwanted text messages." *Id*.

Further, defendants are wrong in asserting that *Van Patten* and *Mohamed* misstate the Supreme Court's holding in *Spokeo*. *See* Appellants' Br. 14-17. Both opinions are consistent with *Spokeo* and the law of this Circuit because they correctly recognize that a TCPA violation must involve concrete harm to be actionable, and they devote substantial analysis to explaining how plaintiffs who allege a violation of 47 U.S.C. § 227(b)(1)(A)(iii) satisfy that standard. *Van Patten*, 847 F.3d at 1042-43; *Mohamed*, 2017 WL 1080342, at *2. Defendants further mischaracterize *Mohamed* as resting on the specific details of the plaintiff's

privacy claim. *See* Appellants' Br. 16 n.9. Rather, consistent with *Spokeo*, *Mohamed* concluded that a TCPA plaintiff had standing because his "alleged injuries" bore a "'close relationship' to traditionally recognized and adjudicated harms," and because the "[p]laintiff's case directly involve[d] the substantive privacy rights the TCPA was enacted to protect." 2017 WL 1080342, at *2.

Mohamed, *Van Patten*, and *Susinno* are not alone in concluding that TCPA plaintiffs have standing based on TCPA violations and other injuries like those that Mr. Salcedo alleges. Other district court opinions persuasively explain that plaintiffs have standing to sue for violations of 47 U.S.C. § 227(b)(1)(A)(iii), while rejecting arguments similar to defendants' arguments here. *See, e.g.*, *Tillman v. Ally Fin. Inc.*, No. 16-313, 2017 WL 1957014, at *6 (M.D. Fla. May 11, 2017); *Etzel v. Hooters of Am., LLC*, 223 F. Supp. 3d 1306, 1312-13 (N.D. Ga. 2016); *Rogers v. Capital One Bank (USA), N.A.*, 190 F. Supp. 3d 1144, 1147 (N.D. Ga. 2016); *see also Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 643-49 (N.D.W. Va. 2016). The unpublished opinions on which defendants rely, *see* Appellants' Br. 22-24, are outlier opinions that have been superseded in their own circuits. For example, the Central District of California and District of New Jersey opinions that defendants cite were decided before the Ninth and Third Circuits determined that TCPA violations constitute concrete harm that can establish standing. *See Susinno*, 862 F.3d at 351-52; *Van Patten*, 847 F.3d at 1043. Defendants also cite an

unpublished decision from the Eastern District of Louisiana, but fail to note that after the plaintiff amended his complaint, the district court in that case later concluded that the plaintiff had standing. *See Sartin v. EKF Diagnostics, Inc.*, No. 16-1816, 2016 WL 7450471, at *4-5 (E.D. La. Dec. 28, 2016).[2]

This Court's opinions in *Perry* and *Church* also support the conclusion that Mr. Salcedo suffered concrete injury from defendants' message. As explained above, both of these decisions confirm the importance of Congress's judgment in showing that alleged statutory violations can be concrete harms. *See Perry*, 854 F.3d at 1340-41; *Church*, 654 F. App'x at 993-94. Defendants misinterpret *Perry* and *Church* by arguing that Mr. Salcedo's suit cannot proceed because he is not asserting an informational injury (*i.e.*, a denial of a statutory right to receive information). *See* Appellants' Br. 18-19 & n.11. This Court has never suggested that it observes special rules for cases where standing is based on an informational injury. Further, *Perry* did not address an informational injury; *Perry* held that a plaintiff had standing to sue when a company disclosed too much information in

[2] Further, the Fifth Circuit has since expressly recognized that statutory violations can establish standing if they are concrete. *Planned Parenthood of Gulf Coast, Inc.*, 862 F.3d at 455.

violation of a statute that, like the TCPA, recognizes a right to individual privacy. 854 F.3d at 1339-41.[3]

Defendants also err in emphasizing differences between the fax-machine injuries at issue in *Palm Beach Golf* and *Florence Endocrine* and the injuries that Mr. Salcedo alleges. *See* Appellants' Br. 13, 21-22. It is understandable that the *Palm Beach Golf* and *Florence Endocrine* opinions focus on fax-machine injuries, given the identity of the plaintiffs, which were business entities, the available evidence, and the TCPA fax provision's legislative history. But those opinions do not foreclose TCPA standing based on injuries other than the fax-occupation one that they recognize, and they do not contradict what history and the judgment of Congress show: that the injuries that Mr. Salcedo alleges are concrete. Nor do the differences between those cases and Mr. Salcedo's allegations affect the applicability here of a fundamental teaching of *Palm Beach Golf*, *Florence Endocrine*, and related cases, such as *Havens*: A plaintiff has standing to sue when he suffers a violation of a statutory right that necessarily entails the concrete injury Congress recognized and sought to remedy in enacting the statute.

Defendants argue that Mr. Salcedo was not harmed because he was not charged for the unlawful text. *See* Appellants' Br. 5, 6, 13. *Palm Beach Golf* and

[3] Defendants also mischaracterize *Gesten v. Burger King Corp.*, No. 17-22541, 2017 WL 4326101 (S.D. Fla. Sept. 27, 2017). That case did not describe *Perry* as an informational injury case. *Id.* at *4.

Florence Endocrine do not require that a plaintiff allege financial injury to establish standing. Although both opinions acknowledge that Congress was concerned about the cost of printing junk faxes, both rested their standing determinations on the occupation of a plaintiff's fax machine, not printing costs. *Florence Endocrine*, 858 F.3d at 1366; *Palm Beach Golf*, 781 F.3d at 1252. In *Palm Beach Golf,* the Court found, on summary judgment, that there was no evidence the disputed fax had been printed. 781 F.3d at 1252.[4] Further, history and the judgment of Congress confirm that unconsented-to, auto-dialer calls to cell phones are injurious even without financial harm. Congress prohibited such calls and allowed recipients to recover damages even for calls that incur no charge to them. *Id.*; *Osorio*, 746 F.3d at 1257-58. That judgment is fully consistent with historical tradition: Privacy violations are actionable under common law without financial injury. *See* Restatement (Second) of Torts, at § 652B, cmt. b, 652H.

Defendants also fail in their attempts to analogize this case to others in which courts have found that plaintiffs did not have standing. *Nicklaw*, for example, centers on a plaintiff's assertion that he was concretely injured by a mortgage company's failure, under New York real property law, to record the

[4] To the extent defendants affirmatively assert as a factual matter that Mr. Salcedo's cell phone was not "occupied" while processing defendants' message or that Mr. Salcedo was not charged for the text and suffered no financial harm, these assertions go beyond those in the amended complaint and cannot be credited at this stage in the proceedings.

satisfaction of his mortgage on time. 839 F.3d at 1000-01. The claimed timeliness injury bears no relationship to Mr. Salcedo's text-message injuries. New York real property law is also entirely different from the TCPA. These differences matter. Whether a harm is concrete depends on the nature of the harm. Similarly, the historical and legislative inquiries that *Spokeo* suggests are statute-specific. This Court's holding in *Nicklaw* rested heavily on a real estate-specific analysis of the common law and the panel's recognition that the plaintiff had not alleged any of a number of potential harms that could be tied to the claimed procedural violation; the Court also recognized that the plaintiff had not even alleged he or anyone else knew of the violation, which obviated any possibility of harm from the temporary cloud on title. *See id.* at 1002-03.

For these reasons, the view that a New York real property statute does not define a timeliness violation as a concrete injury does not suggest that the TCPA was not a proper exercise of Congress's authority to recognize that an unconsented-to, auto-dialer call inflicts a privacy injury. Thus, the district court in this case correctly concluded that reliance on a case like *Nicklaw*, which "involved a claim under a different statutory scheme—New York real property law"—is "misplaced," App. Tab 43 (discussing *Zia v. CitiMortgage, Inc.*, 210 F. Supp. 3d 1334 (S.D. Fl. 2016) (considering a standing claim based on the same New York law at issue in *Nicklaw* and concluding, at 1343, that *Palm Beach Golf* does not

control the analysis of that standing claim because *Palm Beach Golf* "focused on the tangible injury … under a completely different statutory scheme")).

Similarly, Mr. Salcedo's circumstances are not analogous to those of the plaintiffs in *Shoots v. iQor Holdings US Inc.*, No. 15-563, 2016 WL 6090723 (D. Minn. Oct. 18, 2016), and *Gesten*, 2017 WL 4326101. *See* Appellants' Br. 25-26. Although both of these unpublished opinions discuss privacy-protective statutes, the judges in those cases concluded that the statutory violations claimed by the plaintiffs were procedural and insufficient to establish standing because they did not implicate the privacy concerns motivating the relevant statutes. In other words, the courts concluded, the plaintiffs suffered only "bare procedural violation[s], divorced from any concrete harm," *Spokeo*, 136 S. Ct. at 1549. *See Gesten*, 2017 WL 4326101, at *5; *Shoots*, 2016 WL 6090723, at *3-5.[5] In contrast, as alleged by Mr. Salcedo here, defendants' message violated a principal, substantive prohibition in the TCPA and struck at the heart of the privacy concerns motivating the statute. In addition, Mr. Salcedo alleges other concrete injuries: lost time and interference with use of his phone.

[5] Even on the questions they address, *Shoots* and *Gesten* may not be correctly decided. *See, e.g.*, *Guarisma v. Microsoft Corp.*, 209 F. Supp. 3d 1261, 1265-67 (S.D. Fla. 2016) (reaching a conclusion that conflicts with *Gesten*). Whatever the proper outcomes regarding the statutes at issue in these two cases, they have no bearing on this case.

III. Mr. Salcedo's lost time and interference with the use of his cell phone are additional concrete injuries that establish standing.

Mr. Salcedo alleges two other concrete injuries, each of which independently confers standing: (1) the loss of his time, and (2) interference with use of his cell phone. App. Tab 11, paras. 35, 55. The recent law of this Court, as well as history and the judgment of Congress, confirm that these injuries are concrete. Defendants have not meaningfully contested these points. With only passing references to Mr. Salcedo's allegations, they failed to address the legal merits of either injury in their motion to the district court, and they likewise do not do so in their opening brief in this appeal. Although they attempt to dispute the relevant allegations factually, *see* Appellants' Br. 5, 13 n.6, those attempts are improper at this stage of litigation and should be ignored.

To begin with, *Palm Beach Golf* strongly suggests that both injuries are concrete. If the harm that a person suffers from a busy fax machine is "real," then certainly it is real harm when the individual's own time is taken, or when the need to deal with a three-part text message prevents him from using his cell phone for other purposes. *See Palm Beach Golf*, 781 F.3d at 1252.

In addition, this Court's 2017 opinion in *Pedro v. Equifax, Inc*. establishes that lost time is concrete injury. In that case, this Court concluded that a plaintiff suffered a concrete injury when "she lost time … attempting to resolve the credit inaccuracies" resulting from credit reporting companies' actions (or inactions). 868

F.3d at 1280 (ellipsis in original); *see also Wells v. Willow Lake Estates, Inc.*, 390 F. App'x 956, 959 (11th Cir. 2010) (per curiam) (holding that plaintiffs suffered an injury in fact when they were "forced to spend time and money complying with regulations"). Mr. Salcedo's injury is comparable. He lost time responding to an unlawful action: defendants' text message. *See also Demarais*, 869 F.3d at 693 ("He also alleges spending time defending against the meritless suit, itself an injury."); *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 692, 696 (7th Cir. 2015) (holding that the concreteness requirement is satisfied by "the aggravation and loss of value of the time needed to set things straight" following fraudulent credit-card charges); *Am. Copper & Brass, Inc. v. Lake City Indus. Prods., Inc.*, 757 F.3d 540, 544 (6th Cir. 2014) (recognizing that "unsolicited fax advertisements impose costs on all recipients … because such advertisements waste the recipients' time and impede the free flow of commerce"); *cf. Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (holding that organizations have injuries in fact because they "reasonably anticipate that they will have to divert personnel and time to" certain activities).

As to history, the common law has long recognized that individuals are harmed when someone interferes with their possessions or their ability to use those possessions. The torts of trespass and nuisance protect a person's right to enjoy and use his land, without interference. *See* Restatement (Second) of Torts § 158 (1965)

(Oct. 2017 update); *id.* § 821D (1979) (Oct. 2017 update). At common law, "when one man placed his foot on another's property," nothing more was needed "to establish a traditional case or controversy." *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring). The torts of trespass to chattels and conversion protect a person against interference with his right to enjoy and use his other belongings. *See* Restatement (Second) of Torts §§ 217, 222A (1965) (Oct. 2017 update). Mr. Salcedo's injury, the unavailability of his phone caused by defendant's message, bears an especially "close relationship," *Spokeo*, 136 S. Ct. at 1549, to trespass to chattels, a tort which establishes liability for the use or intermeddling with someone's belongings, as well as even brief dispossession of those items. *See* Restatement (Second) of Torts §§ 217(a), 218(a), 218 cmt. d. In the modern age, this tort has been extended to telephonic and electronic interference with telephones and other electronic devices. *See, e.g.*, *Microsoft Corp. v. Does*, No. 13-139, 2014 WL 1338677, at *9-10 (E.D. Va. Apr. 2, 2014); *Amos Fin., LLC v. H & B & T Corp.*, 20 N.Y.S.3d 291 (table), 2015 WL 3953325, at *9 (N.Y. Sup. Ct. June 29, 2015); *see also* Marjorie A. Shields, Annotation, *Applicability of Common-Law Trespass Actions to Electronic Communications*, 107 A.L.R.5th 549 (2003) (as updated 2018).

Congress's judgment also supports the concreteness of Mr. Salcedo's injuries. Congress repeatedly identified the calls prohibited by the TCPA as

"nuisance[s]," not simply invasions of privacy. 47 U.S.C. § 227 note (Congressional Statement of Findings); S. Rep. No. 102-178, at 2, 4, 9, *as reprinted in* 1991 U.S.C.C.A.N. at 1969, 1972, 1976. Among other things, Congress recognized, the calls "interrupt" people's lives. *Osorio*, 746 F.3d at 1255-56 (quoting 137 Cong. Rec. 30,821 (1991)); *see also* H.R. Rep. No. 102-317, at 18.

Moreover, in passing the TCPA, Congress aimed not only "to protect citizens from the loss of the use of their fax machines during the transmission of fax data," *Palm Beach Golf*, 781 F.3d at 1252, but also to protect individuals against the impact of auto-dialer calls on telephone equipment. Congress was concerned, for example, that these calls could fill answering machine tapes, would not disconnect in response to human voice orders, would prevent outgoing calls by tying up lines, S. Rep. No. 102-178, at 2, 4, *as reprinted in* 1991 U.S.C.C.A.N. at 1969, 1972, and would "'seize' a recipient's telephone line" and delay release, H.R. Rep. No. 102-317, at 10. Congress responded to these concerns with the TCPA's substantive prohibitions, 47 U.S.C. § 227(b)(1)(A), (B), (D), as well as a procedural protection against "seized" lines, *id.* § 227(d)(3)(B). The interference with Mr. Salcedo's use of his phone—a direct result of defendants' message—is a modern version of the telephone equipment problems that Congress identified based on earlier technology. *Cf. Perry*, 854 F.3d at 1338, 1340 (citing Congress's

concern about video rental stores as support for the conclusion that plaintiff's injury from a more modern entity—a mobile phone app—is concrete).

For these reasons, similarly to defendants' text message itself, Mr. Salcedo's lost-time and cell-phone injuries are "among [those] intended to be prevented by the statute," *Palm Beach Golf*, 781 F.3d at 1252, and should be considered concrete.

IV. Defendants' assertions about the extent of Mr. Salcedo's injuries and other factual matters are irrelevant.

In the absence of persuasive or binding case law to support their arguments, defendants attempt to bolster them by discussing the extent of Mr. Salcedo's injuries and sprinkling their brief with miscellaneous factual assertions about themselves, Mr. Salcedo, his phone, and the parties' motives. All are irrelevant to the issue before this Court: whether Mr. Salcedo's amended complaint alleges a concrete injury. Defendants' factual assertions also cannot properly be considered by the Court to the extent they go beyond the amended complaint.

Defendants imply that Mr. Salcedo's injuries are too small for standing. Firmly established law forecloses any such argument, however. "The Supreme Court has rejected the argument that an injury must be 'significant.'" *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009); *see also Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017); *SCRAP*, 412 U.S. at 689 n.14; *ACLU of Ga.*, 698 F.2d at 1108. Similarly, "[t]here is no minimum quantitative

limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be." *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987); *cf. Palm Beach Golf*, 781 F.3d at 1248-49, 1252 (concluding that a plaintiff suffered concrete harm from a single, one-page fax that occupied a fax machine for one minute). Defendants seek to limit this principle to constitutional claims. *See* Appellants' Br. 23 n.12. Yet *SCRAP*, *Czyzewski*, and *Palm Beach Golf* address statutory claims. *Czyzewski,* 137 S. Ct. at 978; *SCRAP*, 412 U.S. at 679-80. Any minimum size requirement would also be at odds with *Spokeo*'s holding that concrete injuries include both those that can be measured and those that cannot, *see* 136 S. Ct. at 1549, as well as the Supreme Court's repeated citation of *SCRAP*'s statement that "perceptible harm" is all that is required. *Lujan*, 504 U.S. at 566; *see also SCRAP*, 412 U.S. at 689.

Defendants' prior relationship with Mr. Salcedo, *see* Appellants' Br. 5, 22, 27, likewise does not affect whether Mr. Salcedo has standing. As Congress made clear, a TCPA-prohibited auto-dialer call injures an individual's privacy "regardless of the content or the initiator of the message." 47 U.S.C. § 227 note (Congressional Statement of Findings); *see also id.* § 227(b)(1)(A)(iii) (applying to "any" covered call by "any person within the United States").[6]

[6] For this same reason, defendants misconstrue the TCPA in suggesting that only calls from telemarketers constitute concrete injury. *See* Appellants' Br. 15 n.7. In any event, unlike the unpublished district court opinion that defendants cite, this

It similarly makes no difference that Mr. Salcedo's claim is based on a text message to his cell phone rather than a voice call to his "home phone." *See* Appellants' Br. 4-5, 26-27. The amended complaint does not specify whether Mr. Salcedo considers his cell phone his "home phone." And a review of Congress's judgment makes clear that the injurious nature of an unconsented-to, auto-dialer call does not turn on such technicalities. Although Congress enacted a separate set of protections for calls to "residential telephone line[s]," 47 U.S.C. § 227(b)(1)(B), the auto-dialer provision applies to calls to all types of cell phone numbers, *id.* § 227(b)(1)(A)(iii). *See generally* 47 U.S.C. § 227 note (noting that "the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call"). Additionally, if defendants intended "home phone" to mean "landline," in today's world, cell-phone privacy is at least as compelling an interest as landline privacy. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876-77 (9th Cir. 2014), *aff'd on other grounds*, 136 S. Ct. 663 (2016).

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case involves marketing messages, not debt collection calls, and thus unquestionably falls within the bounds of the problem that Congress was trying to address: "businesses [that] actively telemarket goods and services to business and residential customers," 47 U.S.C. § 227 note. *Cf.* 47 C.F.R. § 64.1200(f)(12) (defining "telemarketing" as the "initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person").

Also irrelevant are the identity and intentions of the parties. In particular, the Court should ignore defendants' criticisms of Mr. Salcedo, his lawsuit, and the TCPA. *See* Appellants' Br. 6, 27. Mr. Salcedo's motives are not part of the amended complaint and do not affect standing, which is a question only of whether Mr. Salcedo has a direct stake in the litigation. *See SCRAP*, 412 U.S. at 689 n.14; *cf. Havens*, 455 U.S. at 373-74. It is also not the courts' role to weigh in on Congress's policy decision to allow TCPA plaintiffs to recover statutory damages. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) ("Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has denied, it cannot limit a cause of action that Congress has created merely because 'prudence' dictates." (citation omitted)).

V. If this Court reverses the decision below, it should allow Mr. Salcedo to seek leave to amend.

Mr. Salcedo has standing to pursue his claim because his amended complaint alleges multiple concrete injuries. If, however, this Court deems Mr. Salcedo's allegations insufficient to establish standing, it should instruct the district court to permit him to seek leave to amend his complaint on remand. Defendants' request that this Court direct dismissal with prejudice is baseless: A jurisdictional dismissal, by definition, cannot be with prejudice. Fed. R. Civ. P. 41(b); *Zelaya v. Sec'y, Fla. Dep't of Corrs.*, 798 F.3d 1360, 1373 (11th Cir. 2015); *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th

Cir. 2008) (per curiam). Moreover, the Federal Rules of Civil Procedure require leave to amend to be "freely give[n] … when justice so requires." Fed. R. Civ. P. 15(a)(2). This requirement "severely restrict[s]" a "district court's discretion to dismiss a complaint without leave to amend." *Bryant v. Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) (per curiam) (quoting *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988)). Here, this Court should not foreclose Mr. Salcedo from alleging additional injuries if it were to determine that the ones he has already alleged are insufficient to establish standing.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order.

Dated: February 9, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because excluding the material referenced in Federal Rule of Appellate Procedure 32(f) and 11th Circuit Rule 32-4, it contains 11,633 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman.

ADDENDUM: STATUTES

STATUTES

47 U.S.C. § 227. Restrictions on use of telephone equipment
(in pertinent part)

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i) of this section, shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

[1] So in original. The second closing parenthesis probably should not appear.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through-—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

…

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

…

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

…

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

…

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

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

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

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

…

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20,

1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

…

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

…

(h) Junk Fax Enforcement report

…

47 U.S.C. § 227 note (Congressional Statement of Findings)

Section 2 of Pub. L. 102-243 provided: "The Congress finds that:

"(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

"(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

"(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

"(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

"(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

"(6) Many customers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.

"(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operation; therefore, Federal law is needed to control residential telemarketing practices.

"(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

"(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

"(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.

"(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

"(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.

"(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds

are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

"(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls are a nuisance, are an invasion of privacy, and interfere with interstate commerce.

"(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech."

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will cause it to be served on appellants through their counsel as follows:

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/s/ Rebecca Smullin
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