No. 21-10199

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUSAN DRAZEN, *ET AL.*, ON BEHALF OF HERSELF AND OTHER PERSONS SIMILARLY SITUATED,

Plaintiffs-Appellees,

GODADDY.COM, LLC, A DELAWARE LIMITED LIABILITY COMPANY,

Defendant-Appellee,

v.

JUAN ENRIQUE PINTO,

Movant-Appellant.

On Appeal from a Final Judgment of the United States District Court for the Southern District of Alabama (No. 1:19-cv-00564-KD-B)

EN BANC BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

May 15, 2023

No. 21-10199, *Drazen v. Pinto*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

A. Pursuant to 11th Circuit Rules 26.1-1 through 26.1-3, Amicus Curiae Public Citizen provides the following list of the persons and entities that have or may have an interest in the outcome of this case:

Bandas, Christopher Andres, Counsel for Objector-Appellant

Bandas Law Firm, P.C., Law firm for Objector-Appellant

Bivins, Hon. Sonja F., U.S. Magistrate Judge, S.D. Ala.

Bock, Phillip A., Counsel for Plaintiffs-Appellees

Bock Hatch & Oppenheim, Law firm for Plaintiffs-Appellees

Clore, Robert, Counsel for Objector-Appellant

Cox, John R., Counsel for Plaintiffs-Appellees

Cozen O'Connor, Law firm for Defendant-Appellee

Criscuolo, Matthew B., Counsel for Defendant-Appellee

Deen, Thomas Jefferson III, Counsel for Objector-Appellant

Desert Newco, LLC, Indirect parent company of Defendant-Appellee

Drazen, Susan, Plaintiff-Appellee

DuBose, Hon. Kristi K., Chief District Court Judge, S.D. Ala.

Florida Justice Reform Institute, Inc., Prospective Amicus Curiae

Go Daddy Operating Company, LLC, Immediate parent company of Defendant-Appellee

GoDaddy Inc., Ultimate corporate parent of Defendant-Appellee

GoDaddy.com, LLC, a Delaware Limited Liability Company, Defendant-Appellee

Gonzales, Jason, Counsel for prospective Amicus Curiae FJRI

Hatch, Robert M., Counsel for Plaintiffs-Appellees

Helfand, Steven F., Objector below, not party to this appeal

Herrick, John, Plaintiff

Kent, Trinette G., Counsel for Plaintiffs-Appellees

Kent Law Offices, Law firm for Plaintiffs-Appellees

Law Offices of John R. Cox, Law firm for Plaintiffs-Appellees

Lawson Huck Gonzales, PLLC, Law firm for prospective Amicus Curiae FJRI

McGuire, Miles, Counsel for Plaintiffs-Appellees

McGuire Law, P.C., Law firm for Plaintiffs-Appelleees

McMorrow, Michael J., Counsel for Plaintiffs-Appellees

McMorrow Law, P.C., Law firm for Plaintiffs-Appellees

Meyers, Evan M., Counsel for Plaintiffs-Appellees

Monhait, Jeffrey M, Counsel for Defendant-Appellee

Nelson, Scott L., Counsel for Amicus Public Citizen

Nunnally, Amber Stoner, Counsel for prospective Amicus Curiae FJRI

Pinto, Juan Enrique, Objector-Appellant

Public Citizen Foundation, Inc., Employer of counsel for Amicus Curiae Public Citizen

Public Citizen, Inc., Amicus Curiae

Riemer, Kenneth J., Counsel for Plaintiffs-Appellees

Turin, Yevgeniy Y., Counsel for Plaintiffs-Appellees

Underwood, Earl Price, Jr., Counsel for Plaintiffs-Appellees

Underwood & Riemer, P.C., Law firm for Plaintiffs-Appellees

Wasvary, Mark K., Counsel for Plaintiffs-Appellees

Zecchini, Paula L., Counsel for Defendant-Appellee-

Zieve, Allison M., Counsel for Amicus Public Citizen

B. Amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporation has an ownership interest in it of any kind.

Respectfully submitted,

/s/ Scott L. Nelson
Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

May 15, 2023

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Pages**

Statutes

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer-advocacy organization with a longstanding interest in maintaining the protections that the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, provides consumers against unwanted intrusions from telemarketers who use robocalling technology to besiege cell phones and home phones. Public Citizen has submitted comments to the Federal Communications Commission (FCC) on proposals and petitions under consideration by the FCC concerning the TCPA, and it has requested that the FCC issue clarifications and rules addressing consent requirements for receiving prerecorded calls and automated texts under the TCPA and the 2019 Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act. In addition, Public Citizen submitted an amicus brief defending the TCPA's constitutionality and arguing in the alternative for the severance remedy ultimately adopted by the Supreme Court in *Barr v. American Ass'n of Political Consultants*, 140 S. Ct. 2335 (2020).

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[1] Public Citizen has moved for leave to file this brief, with the parties' consent. No party's counsel authored this brief in whole or part, and no party or party's counsel made a monetary contribution to fund the brief's preparation or submission. No person or entity other than amicus made a monetary contribution to preparation or submission of this brief.

Public Citizen also has a longstanding interest in issues of federal court jurisdiction, including Article III standing, and has submitted numerous briefs as amicus curiae addressing standing issues, including in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). In this case, Public Citizen's interests in the TCPA and in standing issues go hand in hand, and it submits this brief because it believes the brief may be helpful to this Court in considering whether to overrule its decision in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019).

STATEMENT OF THE ISSUES

1. Whether this Court should overrule its decision in *Salcedo v. Hanna*.

2. Whether the receipt of a single unconsented-to text or voice call on a mobile phone is an injury sufficient to create Article III standing to seek damages for a violation of the Telephone Consumer Protection Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since its 2019 decision in *Salcedo v. Hanna*, this Court has stood alone among the circuits in holding that a "single unsolicited text message, sent in violation of a federal statute," is not "a concrete injury in fact that establishes standing to sue in federal court." 936 F.3d at 1165. Decisions of other circuits before *Salcedo* had consistently recognized standing to sue for texts and voice calls to mobile phones alleged to be in violation of the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, regardless of the number of texts or voice calls. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042–43 (9th Cir. 2017). *Salcedo*'s reasoning has subsequently been rejected by every other federal court of appeals that has considered it. *See Ward v. NPAS, Inc.*, 63 F.4th 576, 580–81 (6th Cir. 2023); *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 690–93 (5th Cir. 2021); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461–63 (7th Cir. 2020) (Barrett, J.). District courts in the Fourth and Eighth Circuits have likewise held that *Salcedo* is inconsistent with those circuits' approach to Article III standing. *See Davis v. Safe Streets USA*

LLC, 497 F. Supp. 3d 47, 53–54 (E.D.N.C. 2020); *Cross v. State Farm Mut. Auto. Ins. Co.*, 2022 WL 193016 (W.D. Ark. Jan. 20, 2022).

This Court should bring its precedent regarding TCPA standing in line with that of other circuits—and the principles established by governing Supreme Court precedent—by overruling *Salcedo*. A single unwanted call to a mobile phone—whether a text or voice call—is a concrete injury that is sufficient to give a plaintiff Article III standing to seek damages for a violation of the TCPA, and to support an award of damages if the claim is meritorious. *Salcedo*'s contrary holding is erroneous for three principal reasons.

First, although the panel in *Salcedo* correctly stated that the degree of injury suffered by a plaintiff is irrelevant under Article III and that a concrete injury in any amount is sufficient to support standing, statements contrary to that principle pervade *Salcedo*'s analysis. The opinion's reasoning, together with its holding that a *single* text is not sufficient, makes clear that, despite the panel's disclaimer, the result turned on the view that the plaintiff had not suffered *enough* injury.

Second, and relatedly, *Salcedo* rested heavily on the Court's repeated statements that the harms inflicted by TCPA violations would

not rise to the level of injuries traditionally actionable at common law. *See* 936 F.3d at 1171. *Salcedo's* emphasis on this point reflects a misperception of the inquiry that, under the Supreme Court's decisions in *Spokeo* and *TransUnion*, properly informs the Article III standing determination: whether the nature of an intangible harm made actionable by Congress "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo*, 578 U.S. at 341; *see also TransUnion*, 141 S. Ct. at 2204 (same). To satisfy that criterion, a harm that serves as the basis for a statutory right of action need not be an "exact duplicate" of a traditional injury. *TransUnion*, 141 S. Ct. at 2204, 2209. After all, a key teaching of *Spokeo* and *TransUnion* is that "Congress may 'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.' " *Id*. at 2204–05 (quoting *Spokeo*, 578 U.S. at 341). *Salcedo's* focus on whether the harms inflicted by spam texts and calls would be sufficient under previously existing causes of action misses this key point.

Third, *Salcedo* emphasized that, in the panel's view, *Congress* had never made the judgment that texts, as opposed to voice calls, inflict the

injury that the subsection setting forth the relevant TCPA prohibitions and the associated right of action, 47 U.S.C. § 227(b), seeks to redress. Congress, however, has now made clear that the "calls" that are the subject of section 227(b) include, and have always included, both texts and voice calls. *See* 47 U.S.C. § 227(i)(1)(A). *Salcedo*'s view that Congress made no judgment about the harms of text messages, as distinct from voice calls, is mistaken.

ARGUMENT

The TCPA prohibits unconsented-to "calls" to mobile phones, emergency telephone lines, patient and guest rooms in health care facilities and elderly homes, and residential telephone lines, under circumstances defined in various statutory subdivisions. *See* 47 U.S.C. § 227(b)(1)(A) & (B). And the statute provides a right of action for actual or statutory damages for "a violation"—that is, a single call that violates any of the subdivisions of section 227(b). *See id.* § 227(b)(3).

That right of action reflects Congress's judgment that each call in violation of section 227(b) inflicts an actionable, remediable injury on the recipient. Under the Supreme Court's analysis in *Spokeo*, Congress has authority to make such a judgment if the injury it identifies is real and

concrete. *See* 578 U.S. at 341. Harms that are similar in nature to injuries cognizable at common law meet that requirement. *See id*. Every federal appellate decision to address the issue, other than *Salcedo* and decisions of this Court applying *Salcedo*, has recognized that the injury identified by Congress in the TCPA—whether inflicted by a text or a voice call—is concrete enough to satisfy Article III because it has a close relationship to other harms recognized at common law, including intrusion upon privacy or seclusion, trespass to chattels, and nuisance. *See Cranor*, 998 F.3d at 691–93 (nuisance and trespass to chattels); *Gadelhak*, 950 F.3d at 462 (intrusion upon seclusion); *Melito*, 923 F.3d at 93 (invasion of privacy, intrusion upon seclusion, and nuisance); *Susinno*, 862 F.3d at 351–52 (intrusion upon seclusion). Those common-sense holdings reflect the reality that Americans perceive junk texts and calls to be, in then-Judge Barrett's words, "an intrusion into peace and quiet in a realm that is private and personal." *Gadelhak*, 950 F.3d at 462 n.1. This Court's contrary holding in *Salcedo* was erroneous in several key respects.

I. *Salcedo* turned significantly on the view that the plaintiff did not suffer *enough* injury, even though the Court recognized that the amount of injury is irrelevant to Article III standing.

To satisfy Article III's requirement of "concrete" injury, an injury need only "actually exist." *Spokeo*, 578 U.S. at 340. It does not have to meet any minimum quantitative threshold. As *Salcedo* itself acknowledged, "[a] concrete injury need be only an 'identifiable trifle.' " 936 F.3d at 1167 (quoting *United States v. Students Challenging Regul. Agency Procs.*, 412 U.S. 669, 689 n.14 (1973)). "There is no minimum quantitative limit; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be." *Id.* at 1172–73 (quoting *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)). Thus, *Salcedo* insisted that its assessment of injury was—as the Court conceded it *had* to be—"qualitative, not quantitative." *Id.* at 1173.

Nonetheless, *Salcedo*'s reasoning contradicted the very principle it acknowledged. Virtually in the same breath as its admission that *how much* a plaintiff was injured cannot matter for Article III purposes, *Salcedo* held that the waste of time associated with unwanted junk texts was not large enough to be an injury. *Salcedo* acknowledged that "wasted time" is a "concrete harm," *id.*, but then adopted a quantitative test to

determine how much wasted time constitutes an Article III injury: "[C]oncrete harm from wasted time requires, at the very least, more than a few seconds." *Id*.

Similarly, in discussing the relationship between the harm attributable to intrusive, unwanted texts and the injury addressed by the tort of intrusion upon seclusion, *Salcedo* stressed that the latter generally required more than three unwanted phone calls and that the intrusiveness of a single unlawful text "fall[s] short of this *degree* of harm." *Id*. at 1171 (emphasis added). With respect to trespass to chattels, *Salcedo* reasoned that, although an unwanted text both briefly ties up a mobile phone and inserts content onto it without the owner's consent, these harms, though resembling those addressed by trespass to chattels, "differ … significantly in *degree*" from the harms required at common law, which generally required deprivation of use of the chattel "for a substantial time." *Id*. at 1172 (emphasis added). And as for nuisance and invasion of privacy, the panel reasoned that while unwanted texts are "annoying," they are not *as annoying* as "enjoying dinner at home and having the domestic peace shattered by the ringing of the telephone." *Id*.

Salcedo's disclaimers of assessing the degree of injury are at odds with its own analysis.

More broadly, the stated holding of *Salcedo* and the course of this Court's subsequent decisions leave no doubt that the decision has turned TCPA standing into a game of *how much* a plaintiff has been injured, not *whether* she has been injured. The holding of the case—that a "single" unlawful text message is not an injury, *id.* at 1165—strongly suggests that more texts, and hence a greater amount of injury, might make a difference. That suggestion is explicit in the concurring opinion, which states that the holding was "driven" by the fact that the case involved "only one text message" and that "a plaintiff who alleged that he had received multiple unwanted and unsolicited text messages may have standing to sue under the TCPA." *Id.* at 1174 (Pryor, J., concurring).

This Court's later decisions in *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1270 (11th Cir. 2019), and *Glasser v. Hilton Grand Vacations Co. LLC*, 948 F.3d 1301, 1306 (11th Cir. 2020), that a plaintiff who receives "more than one" voice call in violation of the TCPA's provisions has suffered a concrete injury for Article III purposes similarly suggest a quantitative approach to standing. As a result, the panel in this case

understandably concluded that the number of texts determined whether a class member had suffered an injury that may be judicially redressed under Article III, so that class members who had received only one text could not receive damages, but those who had received more than one could. *See Drazen v. Pinto*, 41 F.4th 1354, 1362 (11th Cir. 2022), *vacated*, 61 F.4th 1297 (11th Cir. 2023). The panel further would have required the district court to address whether class members who had received only one voice call must likewise be excluded, because *Cordoba* and *Glasser* do not decide whether one telephone call, as compared to two, inflicts enough of an injury to satisfy Article III standing requirements. *See id.* at 1362–63.

This Court's focus on the significance of *how many* calls or texts a plaintiff has received is a telling indication that *Salcedo* has taken the Court down the wrong path. The number of calls or texts could not matter in a qualitative rather than quantitative analysis. If a plaintiff who receives one illegal robocall or spam text has truly suffered not even a particle of injury, a plaintiff who has received a hundred, or a thousand, has not been injured either: A thousand times zero is zero. If, as common sense suggests, a plaintiff besieged by illegal junk calls and texts has

suffered a real injury for which Congress is permitted by Article III to provide a federal judicial remedy, the reason can only be that each of those intrusions inflicts *at least* a trifling concrete injury.

II. *Salcedo* required too tight a relationship between the harm addressed by a statute and an injury traditionally actionable at law.

Salcedo erred not only by focusing on whether a person who received an unlawful text has been injured *enough*, but also by requiring too close a relationship between that injury and an injury that would be actionable at common law. In comparing the harms addressed by the TCPA with similar harms cognizable in traditional torts, *Salcedo* did not look at whether "[t]he harm posed by unwanted text messages is analogous" to those harms, *Gadelhak*, 950 F.3d at 458; it looked instead at whether the injuries attributable to receiving a single unlawful text rise to the level that would be actionable at common law. Repeatedly, *Salcedo* stated that the common-law analogs generally require more sustained, severe, or outrageous injuries. *See* 936 F.3d at 1171–72.

As the Fifth Circuit pointed out in *Cranor*, *Salcedo*'s analysis overstated the requirements of the common-law torts in a number of instances. *See Cranor*, 998 F.3d at 693 (discussing trespass to chattels).

More fundamentally, *Salcedo*'s approach overlooks that the point of *Spokeo* is to "focus[ ] on types of harms protected at common law, not the precise point at which those harms become actionable." *Id.* (quoting *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 654 (4th Cir. 2019)).

Salcedo thus missed the forest for the trees: It failed to recognize that the "irritating intrusions" that the TCPA addresses are "a modern relative of a harm with long common law roots." *Gadelhak*, 950 F.3d at 462. While "[a] few unwanted automated text messages may be too minor an annoyance to be actionable at common law[,] … such texts nonetheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable." *Id.* at 463.

The Supreme Court's decision in *TransUnion* illustrates the proper approach. There, the Court held that members of the plaintiff class whose credit reports, which contained false or misleading information linking them to terrorism, had been disclosed to third parties had suffered a concrete injury closely related to the reputational injury that is the basis for the tort of defamation. 141 S. Ct. at 2208–09. The Court rejected the credit reporting bureau's argument that the harm those class members

suffered was not related closely enough to the injury in a defamation case because the information disclosed was "only misleading and not literally false" and would not constitute actionable defamation. *Id*. at 2209. The Court explained that whether the harm would have been actionable at common law was not the issue: An "exact duplicate" of "harm traditionally recognized as providing a basis for a lawsuit in American courts" is not required. *Id*. Indeed, such a requirement would defeat the teaching of *Spokeo*, which is that Congress may elevate harms *not* previously actionable into legally cognizable and remediable injuries. *See id*. at 2204–05.

TransUnion's general approach thus differs markedly from that of *Salcedo*. But *TransUnion*'s relevance to the proper outcome in this case does not end there. In discussing Congress's power to provide rights of action to redress injuries related to those that are traditionally cognizable in American courts, *TransUnion* approvingly cited a string of prior Supreme Court decisions and a single decision of a federal court of appeals: then-Judge Barrett's opinion in *Gadelhak* recognizing that "intrusion upon seclusion" is a harm that may serve as the basis for a statutory right of action. *See* 141 S. Ct. at 2204. The Supreme Court's

pointed approval of the exact passage in *Gadelhak* that takes issue with this Court's decision in *Salcedo* is a telling indication that *Salcedo* is out of step with a proper understanding of Article III.

III. Congress has made clear that the TCPA is aimed at the harms associated with texts, as well as voice calls.

Critical to *Salcedo*'s holding was the Court's view that Congress had never recognized that texts to mobile phones inflict the injury that the TCPA right of action is aimed at redressing. This element of *Salcedo*'s reasoning comprised two distinct strands. First, the Court suggested, based on the legislative history and the wording of some of the congressional findings incorporated in the TCPA, that the nuisances and intrusions on privacy that Congress targeted in the TCPA were limited to calls made to residential telephones and were not implicated by calls of any kind to cell phones. *See* 936 F.3d at 1170. Second, *Salcedo* observed that text messages were merely a nascent technology at the time the TCPA was enacted, and that the statute's application to text messages was "only" a matter of administrative construction that Congress had never explicitly endorsed. *Id.* at 1169. Thus, the Court reasoned, treating a text message that violates the TCPA as an injury does not reflect "the judgment of *Congress*." *Id.*

As the Fifth Circuit has pointed out, the first point ignores that, of the two subparagraphs of section 227(b) that define violations involving calls to telephones, only one, section 227(b)(1)(B), mentions residential phones. The other, section 227(b)(1)(A), prohibits automated calls to emergency lines, rooms in health- and elder-care facilities, and cell phones and other mobile devices. "If the statute only prohibited nuisances *in the home*, then it would make little sense to prohibit telemarketing to mobile devices designed for use *outside the home*." *Cranor*, 998 F.3d at 691.

Salcedo's second line of reasoning also fails to account for the statutory text and design. *Salcedo*'s suggestion that the provision prohibiting automated calls to mobile devices was never intended by Congress to be aimed at calls that transmit only text overlooks that the relevant provision applies not only to calls to cell phones, but also to calls to pagers—which typically transmit alphanumeric *text*. *See* 47 U.S.C. § 227(b)(1)(A)(iii). The statute's express application to pagers contradicts any contention that its references to "calls" are limited to voice calls, or that the harms it was intended to address are limited to voice calls.

In any event, Congress has now dispelled any doubt that the TCPA makes texts sent to mobile phones in violation of section 228(b)(1)(A)(iii) actionable. In the Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act of 2019, Pub. L. No. 116-105, 133 Stat. 3274, as part of a package of reforms aimed at enhancing the enforcement of the TCPA against robocalls and texts, Congress amended the TCPA to add section 227(i)(1)(A), which requires the FCC to prescribe regulations to promote sharing of information between private entities and the FCC regarding "a call made or a text message sent in violation of subsection (b)." The provision makes clear that text messages can violate section 227(b), which contains both the prohibition on automatically dialed calls to mobile devices and the right of action at issue here. Moreover, the phrasing of the provision reflects Congress's clear acknowledgment that text messages *already* fell within the scope of section 227(b), the language of which was not amended by the TRACED Act. In light of that express congressional confirmation that section 227(b) applies to text messages, *Salcedo's* assertion that the creation of a right of action to redress the injury inflicted by unlawful text messages does not reflect *Congress's* judgment that such messages are harmful is untenable.

* * *

"Americans passionately disagree about many things. But they are largely united in their disdain for robocalls." *Barr*, 140 S. Ct. at 2343. The same is true of the junk texts that flood their mobile phones. "The undesired buzzing of a cell phone from a text message, like the unwanted ringing of a phone from a call, is an intrusion into peace and quiet in a realm that is private and personal." *Gadelhak*, 950 F.3d at 462 n.1. *Salcedo's* holding that the adverse effect of unwanted spam texts on the well-being of Americans is not a real injury that Congress is empowered to address is contrary to the shared intuition of laypersons and judges alike. The time has come for this Court to overrule *Salcedo*.

CONCLUSION

For the foregoing reasons, the Court should overrule *Salcedo* and affirm the district court's ruling that Article III does not bar the relief provided in this case.

Respectfully submitted,

/s/ Scott L. Nelson

Scott L. Nelson
Allison M. Zieve
Public Citizen Litigation Group
1600 20th Street NW
Washington, DC 20009
(202) 588-1000

Attorneys for Amicus Curiae

May 15, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionately-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 3,664 words. The electronic version of the foregoing brief has been scanned for viruses and is virus-free according to the anti-virus program used (Windows Defender).

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on May 15, 2023.

/s/ Scott L. Nelson
Scott L. Nelson