What's the Buzz about Standing?

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ABSTRACT

Is the receipt of a single unsolicited, automated text message, sent in violation of a federal statute, a concrete injury in fact that establishes standing to sue in federal court? Judges nationwide have split over that deceptively simple question. The Second, Seventh, and Ninth Circuits consider such intrusions sufficiently concrete to support Article III standing. Yet the Eleventh Circuit recently held that the alleged injury from an unwanted text's "chirp, buzz, or blink" is insufficiently concrete to invoke federal jurisdiction. Surprisingly, given the advent of widespread, unwelcome "robotexts," scholars have yet to analyze this burgeoning divide, the ultimate resolution of which likely will require Supreme Court review. This Essay bridges that gap. Surveying both sides of the split, it contends that a single unsolicited, automated text sent in violation of a federal statute is a concrete injury in fact. In so doing, this Essay exposes the flawed reasoning that led the Eleventh Circuit to deny Article III standing. In response, it proposes three solutions to rectify the Eleventh Circuit's demonstrably erroneous decision.

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INTRODUCTION

In the summer of 2016, John Salcedo was greeted by an unwelcome buzz. He had received a single, unsolicited text message from the law office of his former attorney, Alex Hanna.[1] The automated message was not

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1 *See* Salcedo v. Hanna, 936 F.3d 1162, 1165 (11th Cir. 2019).

personalized, nor did it pertain to a past representation.[2] Rather, it offered a ten percent discount on future legal services.[3]

Hanna's message not only annoyed Salcedo. It also violated federal law. In 1991, Congress passed the Telephone Consumer Protection Act ("TCPA")[4] to proscribe such unconsented-to telemarketing spam.[5] In response, Salcedo did what any red-blooded American might do: he filed a lawsuit. On behalf of himself and a class of Hanna's former clients, Salcedo alleged violations of the TCPA and sought money damages.[6] Though Salcedo's complaint "undisputedly" made a prima facie case under that statute,[7] his suit raised an interesting question: Does receipt of an unwanted, unsolicited text message constitute a sufficiently concrete injury to satisfy the Article III standing requirement?[8]

According to the Eleventh Circuit, the answer was no. In its view, Congress "was concerned with the harm posed by unwanted telephone *calls*, not text messages," when it passed the TCPA.[9] The court distinguished texts from calls, labeling intrusions from the former "more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts."[10] Specifically, the "brief, inconsequential annoyance" Salcedo alleged was insufficiently concrete to constitute an injury in fact.[11]

By contrast, the Second, Ninth, and most recently Seventh Circuits have all seen things differently. In their view, a single unsolicited text message is a sufficiently concrete injury to satisfy Article III.[12] As the Seventh Circuit put it, 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

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2 *See id.*

3 *See id.*

4 Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227 (2012)).

5 *See* 47 U.S.C. § 227(b)(1); Rebecca I. Yergin, Comment, *Consent in the Age of Facebook: Applying the Telephone Consumer Protection Act to Text Messages from Social Media Platforms*, 116 COLUM. L. REV. ONLINE 81, 83 (2016).

6 *Hanna*, 936 F.3d at 1165.

7 *Id.* at 1168 n.6.

8 *See id.* at 1165.

9 Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 n.1 (7th Cir. 2020) (emphasis added) (citing *Hanna*, 936 F.3d at 1172) (explaining and criticizing the Eleventh Circuit's reasoning).

10 *Hanna*, 936 F.3d at 1172.

11 *Id.* at 1172.

12 *See* Gadelhak, 950 F.3d at 463; Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 95 (2d Cir. 2019); Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1042–43 (9th Cir. 2017).

in a realm that is private and personal."[13] As such, it constitutes the "very harm that Congress addressed" when it passed the TCPA.[14]

With the circuits now at loggerheads, this Essay argues that Salcedo and plaintiffs like him, the Eleventh Circuit's analysis notwithstanding, *do* satisfy Article III. Part I briefly describes the relevant text and history of the TCPA. Part II details the present law of Article III standing, focusing on the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*.[15] Part III elaborates on the circuit split over whether receipt of an unsolicited text message is a concrete injury in fact. Part IV dissects the Eleventh Circuit's reasoning and argues that such injuries satisfy current doctrine's Article III concreteness requirement.

I. THE TEXT AND HISTORY OF THE TCPA

Since the 1980s, "[i]ncreasingly sophisticated digital technologies and rapidly falling costs [have] enabled unsavory marketers to reach out and touch hundreds, thousands, or even more potential customers per hour."[16] These unsolicited communications often interrupt "families . . . sitting down to dinner or watching prime-time television."[17] Aggressive telemarketing practices led many to consider such unwanted messages "a grotesque invasion of . . . privacy."[18] In response, Congress passed the Telephone Consumer Protection Act of 1991,[19] which was "intended to prevent potentially unwanted, automated marketing calls."[20] Though Congress's

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13 *Gadelhak*, 950 F.3d at 462 n.1.

14 *Id*.

15 136 S. Ct. 1540 (2016).

16 Justin (Gus) Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: First Amendment Lessons from the FCC's TCPA Rules*, 84 BROOK. L. REV. 1, 1 (2018).

17 *Id.*

18 *Id.* at 2; *see also* J. Wesley Harned, Note, *Telemarketers Gone Mobile: The Telephone Consumer Protection Act of 1991 and Unsolicited Commercial Text Messages*, 97 KY. L.J. 313, 313 (2008) ("By the early 1990s, a majority of American consumers had grown tired of intrusive and frustrating telemarketing calls, in large part because these unsolicited calls were automated and thus unavoidable.").

19 Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227 (2012)).

20 David Goodfriend & David Nayer, *Fintech Meets the Telephone Consumer Protection Act*, 1 GEO. L. TECH. REV. 446, 446 (2017); *see also* S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968 (describing the purpose of the TCPA as geared toward "protect[ing] the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls"); Spencer Weber Waller, Daniel B. Heidtke & Jessica Stewart, *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 347 (2014) (noting that the law endeavored to preclude abuses by telemarketing companies, which had "beg[u]n aggressively seeking out consumers by the hundreds of thousands").

goal was straightforward, the resulting statute was not. Its provisions remain "a complex and costly web."[21] Chief Justice Roberts himself once labeled the TCPA "the strangest statute [he'd] ever seen."[22] To clarify these intricacies, this Part explains the operative portions of the TCPA that underlie the current circuit split.

The TCPA "prohibits any person or entity from 'using any automatic telephone dialing system' to make a [covered communication] 'to any cellular telephone service . . . for which the called party is charged for the call.'"[23] To qualify as a covered communication under the TCPA, the communication must be transmitted via an automated system. The TCPA does not prohibit unsolicited communications "made by a person manually dialing each phone number."[24] Thus, only automated telemarketing and advertising messages qualify as "covered" under the TCPA.[25]

There was once some debate about whether the TCPA's mention of "calls" should be interpreted to include text messages. But it is now widely accepted that the TCPA covers both. Pursuant to a Congressional delegation, the FCC has long construed the statute as reaching texts,[26] and the Supreme

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21 Stuart L. Pardau, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. ILL. J.L., TECH. & POL'Y 313, 320 (2018).

22 Transcript of Oral Argument at 51, Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368 (2012) (No. 10-1195).

23 Yergin, *supra* note 5, at 83 (quoting 47 U.S.C. § 227(b)(1)(A), (A)(iii)); *see also* 47 U.S.C. § 227; 47 C.F.R. § 64.1200 (2019) (providing additional rules to implement the TCPA). The TCPA makes it unlawful for a person "to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). The Supreme Court recently discussed the TCPA's background in Barr v. Am. Ass'n of Political Consultants, Inc., 140 S. Ct. 2335 (2020). In that case, the Court severed a TCPA provision that impermissibly favored debt-collection speech over political and other speech from the rest of the statute. *See id*. at 2356. As a result of the Court's decision, "plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech." *Id.* at 2344.

24 Caroline Stephens, Note, *Political Robocalls: Let Freedom Ring*, 69 ALA. L. REV. ONLINE 19, 25 (2018).

25 *See* 47 U.S.C. § 227(b)(1)–(2); 47 C.F.R. § 64.1200(a)(1)–(3); *see also* 47 C.F.R. § 64.1200(a)(2) (exempting communications made under emergency circumstances); Pardau, *supra* note 21, at 315 ("If a call to a wireless phone 'introduces an advertisement' or 'constitutes telemarketing,'" then it falls under the TCPA) (quoting 47 C.F.R. § 64.1200(a)(2)). The TCPA and corresponding regulations define an "advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services," 47 U.S.C. § 227(a)(5), and "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." 47 C.F.R. §§ 64.1200(f)(12), (f)(14).

26 The FCC has explained that "[e]xcept where context requires otherwise . . . use of the term 'call' includes text messages." Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 30 FCC Rcd. 7961, 7964 n.3 (July 10, 2015) (declaratory ruling and order).

Court recently confirmed that "[a] text message to a cellular telephone . . . qualifies as a 'call' within the compass of" the TCPA.[27] In light of Congress's original findings about the harm posed by intrusive telemarketing, this interpretation of the TCPA recognizes the growing "risk of receiving cell-phone spam [] in the form of unsolicited text[s]."[28]

To shield consumers from unsolicited communications, the TCPA supplies three enforcement methods to impose liability on violators: "a consumer private right of action, civil lawsuits brought by state attorneys general, and monetary forfeiture penalties assessed by the Federal Communications Commission."[29] Though state attorneys general and the FCC play a role in enforcing the TCPA, the statute was principally designed "to rely on enforcement by private parties."[30] It is thus no surprise that "TCPA claims are most commonly enforced in private actions."[31] Remedies include injunctive relief and uncapped statutory damages, and plaintiffs are entitled to at least $500 per violation under the statute.[32] Additionally, if the TCPA is "willfully or knowingly violated," the statute provides for punitive treble damages.[33]

The heart of the present circuit split does not concern whether Congress intended remedies for unwanted telecommunications. Congress's desire to impose liability on TCPA violators is clear. Indeed, the statute's uncapped damages provision has made it a "recent darling" of the class action plaintiffs' bar.[34] Instead, the question that has split the circuits is whether the harm inflicted by a single, unwanted communication in violation of the

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27 Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663, 667 (2016).

28 Gareth S. Lacy, *Mobile Marketing Derailed: How Curbing Cell-Phone Spam in* Satterfield v. Simon & Schuster *May Have Banned Text-Message Advertising*, 6 WASH. J.L., TECH. & ARTS 33, 33 (2010).

29 Yergin, *supra* note 5, at 83; *see also* Waller, et al., *supra* note 20, at 358 (detailing the three enforcement mechanisms).

30 Waller, et al., *supra* note 20, at 358. The statute "allows a person to bring an action under the TCPA in state or federal court." Harned, *supra* note 18, at 318.

31 Morgan Beirne, Note, *The Injury in Receiving a Text Message*, 43 SETON HALL LEGIS. J. 315, 318 (2019).

32 *Id*.; 47 U.S.C. § 227(b)(3); *see also* Goodfriend & Nayer, *supra* note 20, at 449 (discussing the remedial components of the TCPA).

33 47 U.S.C. § 227(b)(3).

34 Misa K. Bretschneider, *The Evolving Landscape of TCPA Consent Standards and Ways to Minimize Risk*, 10 WASH. J.L., TECH. & ARTS 1, 1 (2014). The prospect of mounting a damage award in a class action suit has encouraged private litigants to pursue relief "primarily through the class action mechanism." Waller, et al., *supra* note 20, at 348. Thus, "[w]hen the recipient of a [covered] communication files a class action and thereby adds claim aggregation to the TCPA's concatenation of statutory damages and vicarious liability, the telemarketer's potential liability can be staggering." J. Gregory Sidak, *Does the Telephone Consumer Protection Act Violate Due Process As Applied?*, 68 FLA. L. REV. 1403, 1404 (2016).

TCPA is sufficiently concrete to open a federal court's doors. That question turns not on the statute itself, but on the Constitution's Article III standing requirement.

II. ARTICLE III STANDING AND THE CONCRETENESS INQUIRY

Though courts historically did not frame the inquiry as one rooted in "standing,"[35] they have long sought to ensure that the "proper parties" were seeking the vindication of their own asserted rights.[36] This longstanding inquiry was historically grounded in the "distinction between public and private rights," whereby some areas of litigation were designated as "being under public control and others as being under private control."[37] Private suits brought to vindicate public rights did not satisfy Article III, while private suits brought to vindicate traditional interests in life, liberty, and property came within the federal courts' purview.[38] In the 1970s, however, the Supreme Court started to frame the inquiry as whether the plaintiff suffered an "injury in fact."[39] The relationship of courts' traditional "proper parties" inquiry and modern injury-in-fact analysis remains subject to scholarly debate.[40] Nevertheless, modern standing doctrine has clearly coalesced around a three-part showing the Court considers "the irreducible constitutional minimum" to satisfy Article III.[41]

The most influential restatement of this requisite showing comes from Justice Scalia's 1992 opinion in *Lujan v. Defenders of Wildlife*.[42] Under the *Lujan* framework, the plaintiff must fulfill three elements to satisfy Article III standing: (1) an injury in fact that is (a) "concrete and particularized" and (b) "actual or imminent;" (2) "fairly traceable to the challenged conduct of the defendant;" and (3) "likely to be redressed by a favorable judicial decision."[43] In the years since, the injury-in-fact requirement has become the

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35 "[E]arly American courts did not use the term 'standing' much, and modern research tools might therefore convince one that the concept did not exist." Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691 (2004).

36 *Id.* at 691.

37 *Id.*

38 *See id.* at 692–94, 700–705.

39 Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 166, 168–69 (1992) (labeling the injury in fact inquiry an "invention" that was "unknown to our law until the 1970s"). *But see* Woolhandler & Nelson, *supra* note 35, at 691 (disagreeing explicitly with Sunstein's characterization and arguing that courts had long engaged in standing-like inquiries).

40 Woolhandler & Nelson, *supra* note 35, at 692.

41 Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

42 504 U.S. 555 (1992).

43 Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547–48 (2016) (quoting *Lujan*, 504 U.S. at 560) (restating the *Lujan* framework).

'"bedrock' Article III prerequisite for a party invoking the power of federal courts."[44]

Most significant for this Essay's purposes is *Lujan*'s admonition that Congress's creation of a statutory cause of action does not guarantee the plaintiff also suffered a constitutionally cognizable injury in fact. In Justice Scalia's words, the "[statutory] broadening [of] the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury."[45] That is to say, bare allegations of procedural injury or statutory violation are, by themselves, insufficient to satisfy standing.[46] Instead, there must be an independent, factual inquiry into whether the plaintiff suffered an injury—even if only a "trifle"[47]—to satisfy Article III. Conversely, there may also be real world injuries that could satisfy this irreducible constitutional minimum but lack any recognized cause of action. In this latter scenario, Congress may create new causes of action that "elevat[e]" these previously non-cognizable harms to the status of cognizable controversies.[48]

In the years after *Lujan*, lower courts applying the framework identified significant ambiguities in its three-prong formulation. One such uncertainty has concerned the showing needed to satisfy the requirement of concreteness. Some courts assumed that any injury particular to a plaintiff was, by default, concrete.[49] Yet the Supreme Court recently refuted that assumption in *Spokeo, Inc. v. Robins*. The question in that case was whether Robins could sue Spokeo—an online search engine platform—under the Fair Credit Reporting Act ("FCRA").[50] Though Spokeo had violated the statute by promulgating false information about Robins online, Robins had failed to allege he suffered any real-world harm independent of the bare statutory

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44 Craig Konnoth & Seth Kreimer, *Spelling out* Spokeo, 265 U. PA. L. REV. ONLINE 47, 47 (2016) (quoting McConnell v. FEC, 540 U.S. 93, 225 (2003)).

45 *Lujan*, 504 U.S. at 578 (alteration in original) (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

46 Nowadays a statute can only "recognize interests and thereby influence judicial evaluation of whether an interest is sufficiently concrete and immediate to justify standing." Mark Seidenfeld & Allie Akre, *Standing in the Wake of Statutes*, 57 ARIZ. L. REV. 745, 748 (2015).

47 United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 689 n.14 (1973) ("The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle . . . .") (quoting Kenneth Culp Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 613 (1968)).

48 *Lujan*, 504 U.S. at 578; Seidenfeld & Akre, *supra* note 46, at 748.

49 *See* Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285, 2298–99 (2018) (discussing the concreteness requirement before *Spokeo, Inc. v. Robins*).

50 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1544 (2016); *Justiciability—Class Action Standing*—Spokeo, Inc. v. Robins, 130 HARV. L. REV. 437, 437–38 (2016).

violation.[51] Writing for the majority, Justice Alito held that the suit could not proceed.[52] His opinion clarified that the particularization and concreteness inquiries are legally distinct.[53] Though Robins's alleged injury was particularized, he had asserted no independent, concrete harm—an insufficient allegation for federal jurisdiction.[54]

As Justice Alito wrote in *Spokeo*, a concrete injury must be "'real', and not 'abstract'"[55] and "must be '*de facto*'; that is, it must actually exist."[56] Though concrete injuries must be more than "bare procedural" harms, the Court also clarified that "concrete" injuries need not be "tangible."[57] Rather, some "intangible" injuries like waste of time or annoyance may also be sufficiently concrete to satisfy Article III.[58] In the attempt to provide guidance to lower courts on how to assess the concreteness of intangible harms, the Court instructed lower courts to analyze two factors: (1) the history of analogous actions at common law, and (2) the judgment of Congress to elevate a harm previously inadequate in law through the creation of a new statutory cause of action.[59] In the *Spokeo* Court's view, these two inquiries are probative, though not necessarily dispositive, of whether an alleged injury is sufficiently concrete to constitute an injury in fact.[60]

On the history front, *Spokeo* directs courts to inquire into "whether an 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."[61] This instruction to examine common law history was relatively straightforward: "compare the injury in the present case to one which would have been actionable when Article III's case or controversy requirement came into effect."[62] If the asserted harm or something closely analogous to it was actionable at common law, that historical evidence is probative of the harm's concreteness. As to the "judgment of Congress" inquiry, the Court stated that Congress's "judgment" that an injury should be

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51 *See Spokeo*, 136 S. Ct. at 1550 ("Robins cannot satisfy the demands of Article III by alleging a bare procedural violation.").

52 *See id.*

53 *See id.* at 1548.

54 *See id.* at 1550.

55 *Id.* at 1548 (quoting Webster's Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 (1967)).

56 *Id.* at 1548 (citing Black's Law Dictionary 479 (9th ed. 2009)).

57 *Id.* at 1549.

58 *See id.*

59 *See id.*

60 *Id.*

61 *Id.*

62 Joshua Scott Olin, Note, *Rethinking Article III Standing in Class Action Consumer Protection Cases Following* Spokeo v. Robins, 26 U. MIAMI BUS. L. REV. 69, 74 (2017).

cognizable "is also instructive and important."[63] Because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," its decision to "elevate" such harms with causes of action is probative of the harms' concreteness.[64]

Despite the apparent simplicity of this framework, *Spokeo* left to the lower courts "the task of filling in the details" in case-by-case adjudication.[65] Though its two-step inquiry established a modicum of structure, that framework has significant "play in the joints, leaving future courts and litigants substantial room for maneuver."[66] In the words of two commentators, *Spokeo* tells courts that history is "instructive," but provides them with "little guidance on how to find it."[67]

Spokeo's sparse guidance has left a number of questions unresolved. One of those questions is whether receiving a text in violation of the TCPA is a sufficiently concrete harm to satisfy the Article III standing requirement. Part III, in turn, surveys the deepening divide among the circuits on that issue.

III. CONCRETE OR "FIGMENTARY"?: THE BUZZ THAT SPLIT THE CIRCUITS

The Ninth Circuit was the first to apply the *Spokeo* framework to an unsolicited text message. In *Van Patten v. Vertical Fitness Group*,[68] the plaintiff alleged that Gold's Gym had sent unsolicited text messages to his and class members' cellphones in violation of the TCPA.[69] In addressing the threshold standing question, the court cited *Spokeo* to note that both common law history and the judgment of Congress are probative in determining whether an alleged harm is sufficiently concrete to satisfy Article III.[70]

Under *Spokeo*'s historical inquiry, the Ninth Circuit asserted that the common law was plush with an extensive history of "[a]ctions to remedy . . . invasions of privacy, intrusion upon seclusion, and nuisance."[71] The focus of its opinion, however, was on the judgment of Congress. The court reasoned that Congress enacted the TCPA to expand common law actions.[72] Congress had "made specific findings that 'unrestricted telemarketing can be an

63 *Spokeo*, 136 S. Ct. at 1549.

64 *Id.*

65 Bayefsky, *supra* note 49, at 2303.

66 Konnoth & Kreimer, *supra* note 44, at 48.

67 *Id.* at 55.

68 847 F.3d 1037 (9th Cir. 2017).

69 *See id.* at 1040–41.

70 *See id.* at 1042–43.

71 *Id.* at 1043.

72 *See id.*

intrusive invasion of privacy' and are a 'nuisance.'"[73] In the court's view, texts, no less than calls, "infringe the same privacy interests Congress sought to protect in enacting the TCPA."[74] "[B]y their nature," unwanted texts "invade the privacy and disturb the solitude of their recipients."[75] Asserting that litigants "need not allege any *additional* harm beyond the one Congress has identified,"[76] the Ninth Circuit held that "the receipt of an unsolicited advertisement via telephone, fax machine, computer, or cellphone is intrinsically injurious; no further harm or risk of harm need be shown."[77]

Like the Ninth Circuit, the Second Circuit also held that unsolicited text messages constitute sufficiently concrete harms. In *Melito v. Experian Marketing Solutions, Inc*.,[78] the plaintiff brought suit under the TCPA on behalf of a class claiming the receipt of unsolicited spam texts.[79] The Second Circuit made clear that "text messages, while different in some respects from the receipt of calls or faxes specifically mentioned in the TCPA, present the same 'nuisance and privacy invasion' envisioned by Congress when it enacted" the statute.[80] The court echoed the Ninth Circuit's judgment-of-Congress analysis, concluding that the plaintiff's allegations were "the very injury [the TCPA] is intended to prevent."[81]

The Second Circuit also briefly mentioned the common law history component of the *Spokeo* framework. It stated that "the harms Congress sought to alleviate through passage of the TCPA closely relate to traditional claims, including claims for 'invasions of privacy, intrusion upon seclusion, and nuisance.'"[82] Because the plaintiffs' allegations satisfied the concreteness inquiry under this analysis, the court held that they "need not allege any *additional* harm beyond the one Congress has identified,"[83] because "the receipt of unwanted advertisements *is itself* the harm."[84]

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73 *Id.* (quoting TCPA, Pub. L. No. 102-243, § 2(5), (10), (12), (13), 105 Stat. 2394, 2394–95 (1991)).

74 *Id.*

75 *Id.*

76 *Id.* (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

77 Jon Romberg, *Trust the Process: Understanding Procedural Standing Under* Spokeo, 72 OKLA. L. REV. 517, 582 (2020) (describing the Ninth Circuit's holding); *see Van Patten*, 847 F.3d at 1043.

78 923 F.3d 85 (2d Cir. 2019).

79 *See id.* at 88.

80 *Id.* at 93 (quoting TCPA, Pub. L. No. 102-243, § 2(12), 105 Stat. 2394, 2394–95 (1991)).

81 *Id.* (alteration in original) (quoting Susinno v. Work Out World Inc., 862 F.3d 346, 351 (3d Cir. 2017)).

82 *Id.* (quoting *Van Patten*, 847 F.3d at 1043).

83 *Id.* (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

84 *Id.* at 94.

Most recently, the Seventh Circuit weighed in on the dispute, similarly concluding that the alleged harm from an unwanted text is sufficiently concrete to satisfy Article III. In *Gadelhak v. AT&T Services, Inc.*,[85] plaintiffs filed a class action suit against AT&T for using "a device that sends surveys to customers [via text message] who have interacted with AT&T's customer service department."[86] "Annoyed by the texts," the class sought damages for AT&T's violation of the TCPA.[87] At the outset, the Seventh Circuit acknowledged that the class's standing was not predicated on the mere fact that the TCPA authorized the suit.[88] The standing inquiry instead "depend[ed] on whether the unwanted texts from AT&T caused [] concrete harm or were merely a technical violation of the statute."[89] The court then applied the *Spokeo* framework to answer that question. Much like the Second and Ninth Circuits, the Seventh Circuit concluded that the alleged harm satisfied both components of the framework.[90] The Seventh Circuit acknowledged that "[a] few unwanted automated text messages may be too minor an annoyance to be actionable at common law."[91] Yet it recognized that unwanted texts that invade consumers' privacy "pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable."[92]

In contrast to its sister circuits, in the aforementioned case *Salcedo v. Hanna*,[93] the Eleventh Circuit held that a single, unsolicited spam text was insufficient to establish Article III standing.[94] As with the other circuits, the Eleventh Circuit's panel did not question the plaintiff's assertions of redressability, causation, or particularization. Rather, it focused on the alleged injury's concreteness. The court took as its task determining whether Salcedo's alleged injury was "real and concrete"—and thus an appropriate basis to invoke federal jurisdiction—or merely "figmentary," and thus not an injury in fact.[95]

The panel recognized the Supreme Court's decision in *Spokeo* as the starting point for the concreteness analysis. Yet it also acknowledged that

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85 950 F.3d 458 (7th Cir. 2020).

86 *Id.* at 460.

87 *Id.*

88 *Id.* at 461–62.

89 *Id.* at 462.

90 *See id.* at 463.

91 *Id.*

92 *Id.*

93 936 F.2d 1162 (11th Cir. 2019).

94 *See id.* at 1172.

95 *Id.* at 1167 n.4.

Spokeo's holding about bare statutory violations was not itself dispositive.[96] The plaintiff in *Spokeo* had alleged only that the defendant failed to take reasonable steps under the statute to ensure the accuracy of the information, without alleging any real-world harm from that information's falsity.[97] Salcedo, by contrast, had alleged not only a statutory violation—the unsolicited spam text[98]—but additional real-world injuries. First, he had "waste[d] his time answering or otherwise addressing the message."[99] Second, while doing so, he and his phone "were unavailable for otherwise legitimate pursuits."[100] Third, the message "resulted in an invasion of [his] privacy and right to enjoy the full utility of his cellular device."[101]

Given Salcedo's allegations of real-world injury, the panel turned to *Spokeo*'s framework to discern whether his alleged injuries were sufficiently concrete. Though, in the panel's view, Salcedo had alleged no "tangible" harms, even novel, "intangible" claims may support jurisdiction so long as either Congress intended to make their vindication cognizable or if the common law supported an analogous cause of action.[102] According to the panel, neither of those conditions held true. In its view, Congress's focus had been on disruptive *calls*; it had not intended to elevate "a few seconds" of "annoyance" from a text's "chirp, buzz, or blink" to a cognizable injury.[103] Moreover, none of the common law causes of action it analyzed bore a sufficiently "close relationship" to Salcedo's claim to say it was analogous to a harm traditionally actionable.[104] As such, the panel held his claim insufficiently concrete to be an injury in fact, and thus an inappropriate "basis for invoking the jurisdiction of the federal courts."[105] Rejecting the arguments of its sister circuits, the Eleventh Circuit has recently doubled down on its interpretation of the TCPA.[106] Part IV, in turn, analyzes the errors on which the Eleventh Circuit's original judgment was predicated.

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96 *See id.* at 1167.

97 *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1546 (2016).

98 *Salcedo*, 936 F.3d at 1165.

99 *Id.* at 1167.

100 *Id.*

101 *Id.*

102 *See id.* at 1167–68.

103 *Id.* at 1172–73.

104 *Id.* at 1171 (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

105 *Id.* at 1172.

106 *See* Cordoba v. DirecTV, LLC, 942 F.3d 1259, 1270 (11th Cir. 2019); *see also* Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1306 (11th Cir. 2020) (tripling down on the holding in *Salcedo v. Hanna*); Trichell v. Midland Credit Mgmt., Inc., 964 F.3d 990, 999–1000 (11th Cir. 2020) (quadrupling down on the holding in *Salcedo v. Hanna*).

IV. THE ELEVENTH CIRCUIT'S DEMONSTRABLY ERRONEOUS REASONING

Spokeo, as mentioned, directs courts to analyze the concreteness of novel statutory violations in two respects: first, whether there was a "judgment of Congress" that the alleged injury ought to be cognizable, and second, whether the alleged injury has any "common law" analogue from "English or American" history.[107] Because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements," Congress's creation of a cause of action is probative, though not always dispositive, that the alleged injury is "concrete."[108] Additionally, that "a harm . . . [was] traditionally . . . regarded as providing a basis for a lawsuit" at common law is "instructive" that the harm constitutes an injury in fact.[109] Though the Eleventh Circuit properly took up this two-part inquiry in the context of the TCPA, it erred in key respects under both parts of the framework. First, it wrongly asserted that *only* the disruption from residential calls, and not texts, falls within the purposes of the TCPA. Second, in rejecting analogies to the common law, it improperly focused on the *degree* of harm required, rather than the *kind* of harm required, to maintain a common law action.

A. The Judgment of Congress

As an initial matter, the Eleventh Circuit panel conceded that Salcedo's complaint fell squarely within the TCPA's cause of action. Though texting did not exist at the time of the TCPA's passage, it came within the statute's ambit after an FCC rulemaking—pursuant to a Congressional delegation within the TCPA—that interpreted text messages to be "calls."[110] Indeed, as previously discussed, it is well settled that the TCPA's mention of "calls" extends to texts.[111] Neither the propriety of that delegation nor of the rulemaking were at issue in *Salcedo*. Accordingly, the Eleventh Circuit acknowledged that Salcedo's allegations were "undisputedly a violation of the statute as interpreted by the FCC."[112]

Oddly, however, the panel concluded that even though Salcedo's complaint came within the statute for statutory interpretation purposes, it fell outside the statute for Article III purposes.[113] It acknowledged that Congress enacted the TCPA in recognition of the fact that "[u]nrestricted

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107 *Spokeo*, 136 S. Ct. at 1549.

108 *Id*.

109 *Id*.

110 *See supra* notes 26–27 and accompanying text.

111 *See id.*

112 Salcedo v. Hanna, 936 F.3d 1162, 1169 n.6 (11th Cir. 2019).

113 *See id.* at 1172.

telemarketing . . . can be an intrusive invasion of privacy" and a "nuisance" to people's "homes."[114] Yet because texting did not exist at the time of the TCPA's 1991 enactment, Congress's findings said "nothing" about texts.[115] The TCPA, in the panel's view, spoke only to unsolicited *calls*, being "completely silent on . . . unsolicited text messages."[116] This fact led the court to assume that the harms Congress sought to avert in the TCPA could *only* be inflicted by residential calls, but not by texts.[117]

In framing Congressional concern as reaching only calls, rather than spam texts, the court relied on several unsupported and dubious empirical assertions. It claimed that because "cell phones . . . often have their ringers silenced," there is less of a nuisance concern than with ringing residential lines.[118] Yet this misconstrues the true nature of the harm. The injury from a spam call is not merely the ringing of the phone. If a loved one, dear friend, work colleague, or family physician were to call a landline, the phone would ring just the same. The harm is not simply the ring, but also the discovery, after picking up the phone, that the voice on the other end is an unwanted solicitor. Only upon that annoying discovery and the resultant waste of time is telemarketing's harm perfected.

Text messages are capable of inflicting precisely this same nuisance, irrespective of whether the phone is silenced. For example, imagine you receive a spam text. Your phone vibrates, and you retrieve it from your pocket. You unlock the lock screen and read the message, only to realize, to your annoyance, it is an unwanted solicitation. You then delete the message so that it does not consume your phone's memory. This receipt of an unsolicited spam text inflicts the same harms as a robocall: the initial distraction of its receipt, the annoyance upon discovering the solicitor's pretense, and the resultant waste of time. In some ways it is even *more* concrete than an intrusion upon a landline. Unlike a call, the text remains stored on the phone until its hapless recipient deletes it. The text thus occupies the phone's finite memory and, until it is deleted, likely annoys the recipient each time she is forced to view it again in her list of recent messages. It is unsurprising, then, that consumer advocates have identified "robotexts" as "the next annoying spam ready to blow up your phone."[119]

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114 *Id.* at 1169 (quoting TCPA, Pub. L. No. 102-243, § 2(5)–(6), 105 Stat. 2394, 2394 (1991)).

115 *Id.* (emphasis omitted).

116 *Id.*

117 *Id.* at 1169–70.

118 *Id.* at 1169.

119 James Leggate, *Robotexts Are the Next Annoying Spam Ready to Blow Up Your Phone*, FOX BUS. (Aug. 21, 2019), https://www.foxbusiness.com/technology/robotexts-annoying-spam-blow-up-your-phone [https://perma.cc/RG35-AXWA]; *see also* Katherine

In a similar vein, the court claimed that "cell phones are often taken outside of the home," and thus pose "less potential for nuisance and home intrusion."[120] Yet this assertion is equally dubious. Cellphones' portability and "pervasiveness"[121] make their owners *more* prone to unwanted nuisance communications. Formerly, telemarketers could only target homeowners' residential landlines. Now, they can "chirp, buzz, or blink"[122] their quarry not just through cellphones carried into the home, but also through those carried to work, houses of worship, restaurants, and children's recitals. Indeed, cellphones have become "an item no person leaves home without."[123] Cellphones are qualitatively and quantitatively distinct from landlines, bearing massive amounts of information that implicate our most sensitive privacy interests.[124] Yet "[i]n an age when cellphones have become extensions of our bodies, robocallers now follow people wherever they go, disrupting business meetings, church services[,] and bedtime stories with their children."[125]

Ignoring these modern realities, the Eleventh Circuit conflated the *harm* Congress sought to avert—the nuisance and intrusion from unwanted telemarketing—with the *mechanism* by which that nuisance was conveyed in 1991, namely, calls. Nothing in Congress's framing of that harm precludes text messages from similarly coming within the statute's scope. That Congress delegated to the FCC the authority to include new forms of technology only strengthens that conclusion. Congress did not intend to tether the harm to a specific device, like a landline, but to the phenomenon of vexatious telemarketing itself.

Bindley, *Getting Attacked by Robotexts? Here's What to Do*, WALL STREET J. (Aug. 21, 2019, 7:00 AM), https://www.wsj.com/articles/getting-attacked-by-robotexts-heres-what-to-do-11566385200 [https://perma.cc/EZY3-6JVN].

120 *Salcedo*, 936 F.3d at 1169.

121 Riley v. California, 573 U.S. 373, 395, 401 (2014) (holding that persons have a reasonable expectation of privacy in the contents of their cellphones).

122 *Salcedo*, 936 F.3d at 1172.

123 Stephens, *supra* note 24, at 24; *see also* Waller, et al., *supra* note 20, at 366 ("Cell phones present increased privacy and safety concerns because consumers bring their cell phones wherever they go."). As Chief Justice Roberts put it, "modern cell phones . . . are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy." *Riley*, 573 U.S. at 385.

124 *See Riley*, 573 U.S. at 393.

125 Tara Siegel Bernard, *Yes, Those Robocalls You're Ignoring Are Increasing; Here's What You Can Do*, SEATTLE TIMES (May 7, 2018, 6:26 AM), https://www.seattletimes.com/nation-world/yes-those-robocalls-youre-ignoring-are-increasing/ (last visited Sept. 14, 2020).

B. The English and American Common Law Tradition

Having dismissed Salcedo's argument that the "judgment of Congress" should render his injury concrete, the Eleventh Circuit turned to the second *Spokeo* inquiry: whether an analogous common law action might indicate the intangible harm he asserted "traditionally [was] regarded as providing a basis for a lawsuit."[126] As with his arguments about Congress, the panel also brushed aside Salcedo's claim that analogous common law actions supported the concreteness of his injury. In the court's view, the common law torts he analogized required a more profound harm than that entailed by a single, unsolicited text. Though the court noted a "passing resemblance" to some of the old actions, it found that Salcedo's asserted harms "differ[ed] so significantly in degree as to undermine his position."[127] Yet here as well, the Eleventh Circuit was critically misguided on two fronts: first, it misread the relevant historical tort law, and second, it conflated an inquiry about the *kind* of common law action at issue with the *degree* of harm required to plead that action at common law.

Of the relevant torts, the Eleventh Circuit contended that "only the privacy tort of intrusion upon seclusion [bore] any possible relationship to Salcedo's allegations."[128] The panel, however, argued that Salcedo had no prima facie case under even that action. Intrusion upon seclusion imposes liability for an interference in private affairs "highly offensive to a reasonable person."[129] By contrast, Salcedo's allegations of "isolated, momentary, and ephemeral" harm fell "short of th[at] degree of . . . objectively intense interference."[130] In the panel's view, even his best-case tort amounted to no case at all.

But even if we assume Salcedo had an action under intrusion upon seclusion, it is mysterious what that might have told us about the historical understanding of the case-or-controversy requirement. That tort is not a creature of traditional Anglo-American common law, but emerged only in 1960.[131] The point of the *Spokeo* "common law" inquiry is to examine such actions as proxies for the Framing-era meaning of "cases" and

126 *Salcedo*, 936 F.3d at 1171.

127 *Id.* at 1172.

128 *Id.* at 1171 n.10 (citation omitted).

129 *Id.* at 1171 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977)).

130 *Id.*

131 *See* Adam J. Tutaj, *Intrusion upon Seclusion: Bringing an "Otherwise" Valid Cause of Action into the 21st Century*, 82 MARQ. L. REV. 665, 666 (1999) (noting the tort's "birth in 1960"); *see also* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388–89 (1960) (describing the apparent emergence, "in recent years," of a privacy tort aimed at "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs").

"controversies."[132] That is to say, what lawyers in England and the American colonies, roughly contemporaneous with the Framing, would have considered the type of dispute amenable to judicial resolution.[133] The Eleventh Circuit's analysis of the intrusion upon seclusion tort, in light of that tort's recent recognition, was essentially irrelevant.

That point aside, the pertinent tort was not intrusion upon seclusion, but the ancient writ of trespass to chattels. The Eleventh Circuit rejected the trespass to chattels analogy as well.[134] Quoting the Restatement (Second) of Torts, it asserted that liability would arise under that theory only if "the possessor is deprived of the use of the chattel for a substantial time," or if "the possessor's materially valuable interest in the physical condition, quality, or value of the chattel" is impaired.[135] In its view, Salcedo's allegation could not meet those thresholds; it was "precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing."[136]

Similar to its intrusion upon seclusion argument, the Eleventh Circuit parroted a fairly recent interpretation of the trespass to chattels tort—accumulated in the 1965 Restatement[137]—which fails to illuminate Framing-era understandings. Indeed, the common law version of trespass to chattels lacked the Restatement's "substantial time" and "materially valuable interest" qualifiers.[138] Instead, any unauthorized interference with chattels was "actionable *per se* without any proof of actual damage."[139] Like trespasses to the person and to land, which could be used to vindicate even the slightest unauthorized touching,[140] the plaintiff with a meritorious suit in

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132 *See supra* notes 61–62 and accompanying text. Proper application of the *Spokeo* framework depends on resort not merely to the history of tort law, but to that history in the *relevant era*—that contemporaneous with the Framing, which, in turn, reveals the original public meaning of "cases" and "controversies." *See* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016); Olin, *supra* note 62, at 74. Novel, twentieth-century inventions in tort law should have accordingly little bearing on that inquiry.

133 *Spokeo*, 136 S. Ct. at 1549; *see also* Vt. Agency of Nat. Res. v. United States, 529 U.S. 765, 773–78 (2000) (labeling the "long tradition of *qui tam* actions in England and the American Colonies . . . particularly relevant to the constitutional standing inquiry" and the meaning of the case or controversy requirement).

134 *Salcedo*, 936 F.3d at 1171–72.

135 *Id.* at 1172 (quoting RESTATEMENT (SECOND) OF TORTS § 218(c), cmt. e (AM. LAW INST. 1965)).

136 *Id.*

137 RESTATEMENT (SECOND) OF TORTS §§ 216–222 (AM. LAW INST. 1965).

138 *Salcedo*, 936 F.3d at 1171–72 (quoting RESTATEMENT (SECOND) OF TORTS § 218(c), cmt. e).

139 R.F.V. HEUSTON, SALMOND ON THE LAW OF TORTS 138 (7th ed. 1923).

140 *See id.* at 6 ("To lay one's finger on another person without lawful justification is as much a forcible injury in the eye of the law, and therefore a trespass, as to beat him with a

trespass to chattels was "always . . . entitled to nominal damages at least."[141] The action was also, in its earlier iteration, one of strict liability.[142] That was so because the common law considered chattels "inviolab[le]."[143] Indeed, at common law, "English courts had allowed suits for trespass (to persons and to property) even when there had been no damage and no injury in fact apart from the *legal* injury of the trespass itself."[144] It was only in more recent times that courts departed from "the original rule of the old writ of trespass" and began to require evidence "of some actual damage to the chattel."[145]

Given that such immaterial interferences were cognizable at common law, the Eleventh Circuit's conclusion that "tort law ha[d] resisted addressing" "fleeting infraction[s]"[146] is spurious. Salcedo's alleged harms were not "fleeting," "ephemeral," or "figmentary."[147] The message had invaded his phone, caused it to buzz, necessitated his response, wasted his time, and would have existed in the phone, consuming its memory, but for its deletion. For similar reasons, many twenty-first century courts have recognized trespass to chattels actions levied by the recipients of spam emails that interfere with their use and enjoyment of their computers.[148] But even if the court were inclined to label those interferences "fleeting," the relevant historical tort law suggests it still would have supported a civil action.[149]

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stick. To walk peacefully across another man's land is a forcible injury and a trespass, no less than to break into his house *vi et armis*.").

141 *Id.* at 138. "Any unauthorised touching or moving of a chattel is actionable at the suit of the possessor of it, even though no harm ensues." *Id.* An additional, critical point is that even where an injury to a chattel was not "direct" and "forcible"—meaning it was outside even the common law's extremely capacious conception of those terms—that *still* did not render the injury non-cognizable. Rather, the chattel's owner could bring a suit under a different form of action known as "case." *Id.* at 137; *see also id.* at 5–8 (contrasting trespass actions with actions on the case).

142 *See id.* at 138.

143 United States v. Jones, 565 U.S. 400, 419 n.2 (2012) (Alito, J., concurring in the judgment) ("At common law, a suit for trespass to chattels could be maintained if there was a violation of 'the dignitary interest in the inviolability of chattels' . . . .") (quoting W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS 87 (5th ed. 1984)).

144 William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 200 (2016).

145 W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 87 (5th ed. 1984).

146 Salcedo v. Hanna, 936 F.3d 1162, 1172 (11th Cir. 2019).

147 *Id.* at 1172, 1171, 1167 n.4.

148 *See* Daniel J. Schwartz & Joseph F. Marinelli, *"Trespass to Chattels" Finds New Life in Battle Against Spam*, JENNER & BLOCK (Sept. 2004), https://jenner.com/library/publications/7997 [https://perma.cc/FUJ8-4VS9].

149 "History is particularly relevant in determining the existence of an intrinsically injurious intangible right because the existence of a historical analog, either common-law or statutory, that was regularly brought without evidence of harm beyond the violation itself

Aside from this historical point, the Eleventh Circuit's more fundamental error was to assume that *Spokeo* requires a common law analogy not only to the *kind* of harm, but also to the *degree* of harm. It distinguished away several of Salcedo's tort analogies for "fall[ing] short of th[e] *degree* of harm" required at common law.[150] It apparently assumed that if they fell short of that degree, they were, *ipso facto*, nonconcrete. By contrast, the Seventh Circuit correctly recognized that "when *Spokeo* instructs us to analogize to harms recognized by the common law, we are meant to look for a 'close relationship' in kind, not degree."[151] That is so because *Spokeo* does not suggest the standing requirement simply locks in actions as they existed at common law. Rather, those common law actions are probative of the kinds of harms traditionally considered concrete.[152] Even if a concrete harm were not legally cognizable at common law—for instance, an interference in private affairs that was simply offensive, rather than highly offensive—Congress may "elevate" those kinds of harms "previously inadequate in law" "to the status of legally cognizable injuries."[153] Thus, even if the Eleventh Circuit were right that Salcedo's alleged harms in the *degree* alleged were not cognizable at common law, that they were of the same *kind* of harm indicates their status as concrete, de facto injuries that may become legally actionable by statute.

CONCLUSION

The Eleventh Circuit ultimately misconstrued congressional purpose and misread the relevant history of analogous common law actions. As such, courts inside and outside that circuit should respond in three ways. First, those courts not bound by the Eleventh Circuit's holding, such as circuits for which this issue remains one of first impression, should side with the interpretations of the Second, Seventh, and Ninth Circuits. Their approach reflects the correct application of the *Spokeo* framework to the receipt of unwanted, automated texts. Second, the en banc Eleventh Circuit should overrule its current precedent. Because that decision is demonstrably

provides compelling evidence that Congress intended for a similar right to be considered intrinsically injurious." Romberg, *supra* note 77, at 582.

150 *Salcedo*, 936 F.3d at 1171 (emphasis added).

151 Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020) (quoting Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016)).

152 "Intrinsically injurious intangible rights parallel common law rights, such as trespass and breach of contract, for which violation of the right is itself injurious." Romberg, *supra* note 77, at 581.

153 *Spokeo*, 136 S. Ct. at 1549 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1991)).

erroneous,[154] it should be afforded little stare decisis weight upon its reconsideration.[155] And third, should this disuniformity persist across the circuits, the Supreme Court should grant a petition for writ of certiorari to correct the Eleventh Circuit's aberrational analysis. Properly interpreted, common law history and congressional judgment instruct that unsolicited texts are not "fleeting," "ephemeral," or "figmentary." Rather, they are concrete injuries in fact that support Article III standing.

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154 Demonstrably erroneous precedent should be corrected when it falls outside the realm of permissible interpretation. *See* Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 7 (2001); *see generally* Justin W. Aimonetti, *Second Guessing Double Jeopardy: The Stare Decisis Factors as Proxy Tools for Original Correctness*, 61 WM. & MARY L. REV. ONLINE 35 (2020) (exploring the reduced stare decisis weight of demonstrably erroneous precedent).

155 The circuit courts follow "the law of the circuit rule," which "implements the policy of horizontal stare decisis." Amy E. Sloan, *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 718 (2009). "The law of the circuit rule provides that the decision of one panel is the decision of the court and binds all future panels unless and until the panel's opinion is reversed or overruled, either by the circuit sitting en banc or the Supreme Court." *Id.* at 718–19; *see also* Henry J. Dickman, *Conflicts of Precedent*, 106 VA. L. REV. (forthcoming Oct. 2020) (describing various circuits' approaches to horizontal stare decisis). In a future article, we hope to explore whether a panel decision should be afforded any precedential weight when reviewed by the en banc court.