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> *"[M]odern 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."*
>
> – Chief Justice John Roberts[1]

In the United States, 96 percent of adults own a cell phone, and young adults send and receive an average of 128 texts a day.[2] By the end of each day, 99 percent of texts sent will be read.[3] Unsurprisingly, businesses have taken notice of this trend, as evidenced by the 197 percent growth of business-to-business (B2B) and the 92 percent growth of business-to-consumer (B2C) text messaging between 2015 and 2017.[4]

The regulatory scheme currently in place to protect consumers against intrusive telemarketing consists primarily of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM), the Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (TCFPA), and the Telephone Consumer Protection Act of 1991 (TCPA).[5] The CAN-SPAM Act regulates email marketing communications[6] and the TCFPA regulates marketing phone calls.[7] The TCPA, as implemented by the Federal Communications Commission (FCC),[8] is

1. Riley v. California, 573 U.S. 373, 385 (2014).

2. *See Mobile Fact Sheet*, Pew Rsch. Ctr. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/#find-out-more (reporting that 96 percent of Americans "own a cellphone of some kind"); Kenneth Burke, *How Many Texts Do People Send Every Day (2018)?*, Text Request, https://www.textrequest.com/blog/how-many-texts-people-send-per-day/ (last updated Nov. 2018) (classifying eighteen-to-twenty-four-year-olds as "young adults" and reporting their daily texts average).

3. *Worldwide Texting Statistics*, Vt. State Highway Safety Off. (June 20, 2018), https://shso.vermont.gov/sites/ghsp/files/documents/Worldwide%20Texting%20Statistics.pdf.

4. Salesforce Rsch., Fourth Annual State of Marketing 9 (Jan. 2018), https://www.salesforce.com/content/dam/web/en_us/www/assets/pdf/datasheets/salesforce-research-fourth-annual-state-of-marketing.pdf.

5. *See* Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (CAN-SPAM Act), 15 U.S.C. §§ 7701–7713; Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (TCFPA), 15 U.S.C. §§ 6101–6108; Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227.

6. *CAN-SPAM Act: A Compliance Guide for Business*, Fed. Trade Comm'n, https://www.ftc.gov/tips-advice/business-center/guidance/can-spam-act-compliance-guide-business (last updated Jan. 2021).

7. *Telemarketing and Consumer Fraud and Abuse Prevention Act*, Fed. Trade Comm'n, https://www.ftc.gov/enforcement/statutes/telemarketing-consumer-fraud-abuse-prevention-act (last visited Apr. 11, 2021).

8. The TCPA was enacted by Congress in 1991 in an effort to curb unrestricted telemarketing, which Congress found to be pervasive, "an intrusive invasion of privacy," "a risk to public safety," and a nuisance. 47 U.S.C. § 227 note (1991) (Congressional Statement of Findings). To that end, Congress empowered the FCC to design rules that prevent such nuisances and invasions of privacy. *TCPA Statute and Regulation*, ACA Int'l, https://www.acainternational.org/tcpa/tcpa-statute-and-regulations#:~:text=The%20United%20States%20Congress%20passed,(ATDS)%20and%20prerecorded%20messages (last visited Apr. 11, 2021). Established in 1934, the FCC is a federal government agency, tasked with "regulat[ing] interstate and international communications by radio, television, wire, satellite and cable[,]" and "[it] is the United States' primary authority for communications law, regulation and technological innovation." *About the FCC: What We Do*, Fed. Commc'ns Comm'n, https://www.fcc.gov/about-fcc/what-we-do (last visited

intended to protect against the nuisances and privacy harms of unsolicited and intrusive telemarketing calls and texts;[9] it provides private persons and entities with a right of action against violators of the statute.[10]

In *Salcedo v. Hanna*,[11] decided in 2019, the U.S. Court of Appeals for the Eleventh Circuit considered whether a single unsolicited text, sent in violation of the TCPA, was sufficient to confer standing under Article III of the U.S. Constitution.[12] The court, applying *Spokeo, Inc. v. Robins*[13] and distinguishing its prior decision in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, P.A.*,[14] concluded that the issue was non-justiciable because the text did not constitute an injury-in-fact—an element required for standing.[15]

This Case Comment contends that the Eleventh Circuit erred in dismissing Salcedo's claim for lack of standing.[16] First, the court failed to recognize that the concrete intangible harms of nuisance and invasion of privacy caused by an unsolicited text constitute an injury-in-fact sufficient to confer standing under Article III.[17]

Apr. 11, 2021); *The Federal Communications Commission (FCC)*, Nat'l Telecomms. & Info. Admin., https://www.ntia.doc.gov/book-page/federal-communications-commission-fcc (last visited Apr. 11, 2021).

9. *See* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 371 (2012) ("Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls. The [TCPA] Act bans certain practices invasive of privacy and directs the [FCC] to prescribe implementing regulations."); *see also* Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 156 (2016) (citing Gomez v. Campbell-Ewald Co., 768 F.3d 871, 874 (9th Cir. 2014)) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)."). *See generally* FCC Enf't Advisory, 31 FCC Rcd. 12615, 12615 (2016), 2016 WL 6822902 (clarifying the "clear limits on the use of autodialed text messages" because "text messages sent to cell phones using any automatic telephone dialing system are subject to the [TCPA]").

10. 47 U.S.C. § 227(b)(3).

> A person or entity may, if otherwise permitted by laws or rules of court of a State, bring in an appropriate court of that State . . . an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation, . . . 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 . . . both such actions.

Id.

11. 936 F.3d 1162 (11th Cir. 2019).

12. *See id.* at 1165; *see also* U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . . .").

13. 136 S. Ct. 1540, 1547–49 (2016).

14. 781 F.3d 1245, 1253–56 (11th Cir. 2015).

15. *Salcedo*, 936 F.3d at 1165 ("[W]e have examined the statute, our precedent, and—following the Supreme Court's guidance—history and the judgment of Congress, and we conclude that the allegations in this suit do not establish standing.").

16. *See infra* notes 17–18 and accompanying text.

17. *Compare Salcedo*, 936 F.3d at 1173 (stating that some "intangible and ephemeral" harms can constitute an injury-in-fact but that Salcedo's harm from receiving the unsolicited text does not), *with* Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1043 (9th Cir. 2017) (finding that unsolicited texts "present the precise harm and infringe the same privacy interests" the TCPA addresses and therefore,

Second, by reviewing the history and judgment of Congress instead of deferring to the FCC in light of the TCPA's silence on text messages, the court failed to adhere to the *Chevron* doctrine.[18] Finally, the court's decision encourages a nearly uninhibited growth of intrusive text marketing practices.[19]

On the morning of August 12, 2016, John Salcedo received an unsolicited, lengthy, impersonal, and bilingual text from an anonymous short code.[20] The code, registered to Alex Hanna and the Law Offices of Alex Hanna, P.A., sent the commercial text to thousands of former clients via automatic messaging system to advertise the office's legal services.[21] Although Salcedo was one such former client, he had never consented to receive a solicitation from Hanna.[22] As a result, he arguably suffered the intangible harms that the TCPA is designed to protect against, namely intrusion upon seclusion, nuisance, and invasion of privacy.[23] The unsolicited text

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constitute an intangible harm sufficient for Article III standing), *and* Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 92–93 (2d Cir. 2019) (same).

18. *See Salcedo*, 936 F.3d at 1169–70 (finding that "[t]he TCPA is completely silent on the subject of unsolicited text messages" but refusing to extend any deference to the FCC). The *Chevron* doctrine refers to the principle of judicial deference given in administrative actions, established in the landmark case of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The Supreme Court set forth a two-step inquiry for interpreting an administrative agency's construction of a statute. *Id.* at 842–43. The first inquiry is whether Congress has directly spoken to the issue in question. *Id.* at 842. If Congress has made its legislative intent explicit, then a court must give effect to that intent. *Id.* at 842–43. If the statute is silent or ambiguous as to Congress's intent on the issue, a court must engage in the second inquiry—whether the relevant administrative agency's answer to the silence or ambiguity is a permissible construction of the statute. *Id.* at 843. If Congress has explicitly delegated authority to the administrative agency to elucidate a statute by regulation, then as long as the regulations are not "arbitrary, capricious, or manifestly contrary to the statute," they will be given considerable and controlling weight. *Id.* at 843–44. "*Chevron* thus provides a stable background rule against which Congress can legislate: Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency." City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

19. *Cf.* Rules & Regulations Implementing the TCPA of 1991, 30 FCC Rcd. 7961, 7979 (July 10, 2015) (recognizing that the rise of complaints brought under the TCPA is likely "attributable to the skyrocketing growth of mobile phones, rising from approximately 140 million wireless subscriber connections in 2002 to approximately 326 million in 2012").

20. *See Salcedo*, 936 F.3d at 1165 (noting that Salcedo received the unsolicited text message at 9:56 a.m.); Amended Complaint at 8–9, Salcedo v. Hanna, 2017 WL 4226635 (S.D. Fla. June 14, 2017) (No. 16-cv-62480-DPG), 2016 WL 11620087 (depicting the text message). The text, sent in three parts, included a photo coupon for a 10 percent discount on legal services and read "Call Me Now! Llamame a Mi!" Amended Complaint, *supra*. A short code is an abbreviated phone number, usually five or six digits in length, that is capable of sending a high volume of text messages quickly, making it an optimal tool for business text message advertising. *SMS Short Code Services*, SlickText, https://www.slicktext.com/sms-short-code-service.php (last visited Apr. 11, 2021).

21. Amended Complaint, *supra* note 20, at 9; Brief for Appellee John Salcedo at 3, *Salcedo*, 936 F.3d 1162, No. 17-14077 (11th Cir. Feb. 9, 2018).

22. Amended Complaint, *supra* note 20, at 12; *see also* Brief for Appellee John Salcedo, *supra* note 21.

23. *See* Amended Complaint, *supra* note 20, at 9; *see also* Brief for Appellee John Salcedo, *supra* note 21, at 4–6, 25–27 (discussing how Salcedo suffered harms that the TCPA was enacted to protect against).

message was also sent to Hanna's other former clients without their consent, causing them harms similar to those suffered by Salcedo.[24]

On October 20, 2016, Salcedo filed a class complaint and later, on December 27, a subsequent amended complaint in the U.S. District Court for the Southern District of Florida, alleging a TCPA violation.[25] Hanna moved to dismiss the claim for lack of standing under Article III of the U.S. Constitution, but the district court denied the motion.[26] Hanna moved again to dismiss for lack of standing or, alternatively, to certify an interlocutory appeal.[27] The district court granted leave for an interlocutory appeal because the case involved a controlling question of law with substantial ground for difference of opinion, which an immediate appeal could resolve.[28] Both parties filed briefs with the U.S. Court of Appeals for the Eleventh Circuit, which ruled in Hanna's favor.[29] Salcedo's subsequent petition for rehearing en banc was denied.[30]

The federal standing doctrine has its roots in Article III of the Constitution, which vests judicial power in a single judiciary branch.[31] This power—quite plainly—is "to say what the law is."[32] The endowment of power is not limitless, however, as it is confined solely to "cases" and "controversies."[33] This constitutional limitation on jurisdiction is "fundamental to the judiciary's proper role in our system" of separated governmental powers.[34] Without the existence of a case or controversy, federal courts

24. Amended Complaint, *supra* note 20, at 9–10.

25. Complaint at 1, *Salcedo*, 2017 WL 4226653 (No. 16-cv-62480-DPG); *see also* Amended Complaint, *supra* note 20, at 1.

26. Brief for Appellee John Salcedo, *supra* note 21, at 2.

27. *Id.* In an interlocutory appeal, a district judge in a civil case may permit the appeal of an order that is not ordinarily appealable when the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and [when] an immediate appeal . . . may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b). The appellate court may exercise its discretion in granting review. *Id.*

28. Salcedo v. Hanna, No. 16-cv-62480-GAYLES, 2017 WL 4226635, at *1–2 (S.D. Fla. June 14, 2017).

29. Brief for Appellee John Salcedo, *supra* note 21; Initial Brief of Appellants Alex Hanna and Law Offices of Alex A. Hanna, P.A., Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019) (No. 17-14077), 2017 WL 6387352; *see Salcedo*, 936 F.3d at 1165, 1172 (11th Cir. 2019) (concluding that Salcedo did not meet Article III standing requirements).

30. Salcedo v. Hanna, No. 17-14077-JJ, 2019 U.S. App. LEXIS 32559, at *1 (11th Cir. Oct. 30, 2019).

31. *See* U.S. Const. art. III, § 1, cl. 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III.").

32. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

33. *See* U.S. Const. art. III, §2, cl. 1 ("The judicial Power shall extend to all Cases . . . [and] Controversies . . . ."); *see also Marbury*, 5 U.S. (1 Cranch) at 178 ("The judicial power of the United States is extended to all cases arising under the constitution.").

34. *See* Raines v. Byrd, 521 U.S. 811, 818 (1997) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 37 (1976)).

cannot venture into a discussion of what the law is.[35] Thus, a plaintiff's complaint must establish standing, which focuses on the "nature and source of the claim."[36]

Judicial inquiries into the minimum requirements for Article III standing culminated in the seminal 1992 case *Lujan v. Defenders of Wildlife*, which offered needed clarity and established that the standing doctrine consists of three essential elements.[37] In *Lujan*, the plaintiffs feared that a statute, aimed "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," would not protect endangered animals in territories outside the United States—where the plaintiffs may one day visit.[38] Accordingly, they asserted standing under the "ecosystem nexus" theory, among others, which—they argued—grants standing to anyone in the adversely affected global ecosystem.[39]

The *Lujan* Court refused to find an injury-in-fact and thus standing, reasoning that the plaintiffs' asserted injury was neither actual nor imminent but rather conjectural and generalized.[40] This solidified the three standing elements:[41] Plaintiffs bear the burden of proving that (1) they have "suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[42] Plaintiffs are further constrained by Congress's inability to circumvent Article III standing requirements and statutorily grant a right of action to those who would ordinarily lack standing.[43]

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35. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006) ("If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so.").

36. *See Raines*, 521 U.S. at 818 (internal quotations omitted) (citations omitted) (noting that under the "case-or-controversy requirement," complaints must establish that the plaintiff has "standing to sue"). "[B]y requiring [a litigant] to allege a . . . [threshold] personal stake in the outcome of a controversy," the standing doctrine limits who is able to sue in federal court to seek redress for a legal wrong and "serves to prevent the judicial process from being used to usurp the powers of the political branches." Town of Chester v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650 (2017) (internal quotations omitted) (citations omitted). *See generally* Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (discussing the policy considerations behind the injury-in-fact standing requirement).

37. *See* 504 U.S. 555, 560 (1992).

38. *Id.* at 562–67 (quoting 16 U.S.C. § 1531(b)).

39. *Id.* at 565–66. The "ecosystem nexus" theory "proposes that any person who uses *any part* of a 'contiguous ecosystem' adversely affected by a funded activity has standing even if the activity is located a great distance away." *Id.* at 565 (emphasis in original). The *Lujan* Court noted that this theory is inconsistent with the 1990 precedent in *Lujan v. National Wildlife Federation*, which held that "a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity.'" *Id.* at 565–66 (citing Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 887–88 (1990)). The plaintiffs asserted additional standing theories, unrelated to this Case Comment.

40. *Id.* at 564–71.

41. *Id.* at 560–61.

42. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1547 (2016) (first citing *Lujan*, 504 U.S. at 560–61; then citing Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000); and then citing FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990)).

43. *Spokeo, Inc.*, 136 S. Ct. at 1547–48 (first citing Raines v. Byrd, 521 U.S. 811, 820 (1997); and then citing Gladstone, Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979)). Congress may expand the bounds of

As articulated in *Spokeo, Inc. v. Robins* in 2016, the injury-in-fact element of standing requires that a plaintiff prove they have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'"[44] In *Spokeo*, the plaintiff asserted standing under a theory of statutory violation upon discovering that incorrect personal information about him was disseminated on the defendant's online search engine.[45] Although taking no position as to whether the plaintiff's rights were harmed by the statutory violation, the *Spokeo* Court confirmed that a particularized injury, necessary to establish the injury-in-fact, "must affect the plaintiff in a personal and individual way."[46] The Court further explained that the injury must also be concrete, "that is, it must actually exist" and not be abstract.[47] Importantly, the Court clarified that even an intangible harm[48] can be sufficiently concrete to satisfy the injury-in-fact requirement.[49]

When determining whether an intangible harm, stemming from a statutory violation, constitutes an injury-in-fact, a court will look to both history[50] and the judgment of Congress in passing the statute.[51] As explained in *Spokeo*, this is for two reasons:[52] first, because the Article III standing is "grounded in historical practice, it is instructive to consider whether an . . . intangible harm has a close relationship to a harm that has traditionally been regarded as . . . [the] basis for a lawsuit . . . ;"[53] and second, because Congress can "identify intangible harms that meet . . . Article III

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the standing requirement, but "[i]n no event . . . may Congress abrogate the Art. III minima[.]" *Gladstone, Realtors*, 441 U.S. at 100.

44. 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). The Court referred to injury-in-fact as "the first and foremost of standing's three elements." *Id.* (internal quotations omitted) (citation omitted).

45. *Id.* at 1544, 1546. The website was a publicly accessible online platform, offering a wide array of personal information about any person, pulled from a variety of databases. *Id.* at 1546.

46. *Id.* at 1548, 1550 (citation omitted).

47. *Id.* at 1548.

48. In applying *Spokeo,* courts have identified invasion of privacy, intrusion, slander, and informational injuries, among others, as intangible harms that satisfy the injury-in-fact requirement. *See* Jackson Erpenbach, Note, *A Post*-Spokeo *Taxonomy of Intangible Harms*, 118 Mich. L. Rev. 471, 483–99 (2019) (discussing significant developments made by federal courts in identifying intangible harms when analyzing standing under the *Spokeo* framework).

49. *Spokeo, Inc.*, 136 S. Ct. at 1549.

50. By looking to the history of both American and English courts, judges can determine whether certain conduct would have given rise to a cause of action under common law. Susinno v. Work Out World Inc., 862 F.3d 346, 350–51 (3d Cir. 2017).

51. By examining the structure and purpose of a statute, courts can determine if a given violation of that statute is concrete and sufficient to constitute an injury-in-fact. Perry v. Cable News Network, Inc., 854 F.3d 1336, 1340 (11th Cir. 2017). Congress cannot grant standing to parties that otherwise do not have it, but Congress can define the injuries that will give rise to standing. *Spokeo, Inc.*, 136 S. Ct. at 1549.

52. *Spokeo, Inc.*, 136 S. Ct. at 1549.

53. *Id.* (citing Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 775–77 (2000)).

standing requirements," it may elevate the status of a previously inadequate de facto injury to that of a "concrete" and "legally cognizable" one.[54]

To establish standing, Salcedo pointed to Eleventh Circuit precedent that found standing in an analogous case involving the TCPA.[55] In response, Hanna contended that the precedent, which involved a junk fax message, was not comparable to a spam text.[56] The court favored Hanna's argument and distinguished the injury suffered in the prior case as tangible and quantifiable while characterizing Salcedo's harm as intangible and insufficiently concrete.[57]

Salcedo also argued that Congress's intent in passing the TCPA warranted construing his harm as concrete.[58] Standing, he said, should be granted, because Congress identified the intangible harms of intrusion of privacy and nuisance, and passed the TCPA to make them legally actionable.[59] In rejecting this argument, the court again sided with Hanna, noting that the statute was silent with regards to text messages and that Congress's judgment on the subject was "ambivalent at best."[60]

Finally, Salcedo urged the court to turn to history for guidance and to find the intangible harms protected by the TCPA comparable to historical common law harms such as nuisance, intrusion upon seclusion, and invasion of privacy.[61] The court disregarded the nebulous nature of these harms and found that they could not be equated to the intangible harms suffered by Salcedo.[62]

Congress passed the TCPA in an effort to curb the voluminous complaints about abuses of telephone technology, especially the intangible but concrete "intrusive nuisance calls" from telemarketers.[63] The Act, which "bans certain practices invasive of privacy" and creates a private right of action for statutory violations, also empowers

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54. *Id.* (quoting Lujan v. Def. of Wildlife, 504 U.S. 555, 578 (1992)); *see also supra* note 51 and accompanying text.

55. Brief for Appellee John Salcedo, *supra* note 21 *passim* (citing Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245 (11th Cir. 2015)).

56. Initial Brief of Appellants Alex Hanna and Law Offices of Alex A. Hanna, P.A., *supra* note 29, at *12–14.

57. Salcedo v. Hanna, 936 F.3d 1162, 1167–68 (11th Cir. 2019). The court reasoned that a cell phone is not entirely consumed while receiving a text message, whereas a fax machine is unavailable for other use while receiving a fax. *Id.* at 1168.

58. *See* Brief for Appellee John Salcedo, *supra* note 21, at 28–32 (citation omitted) ("[B]ecause 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 . . . .'").

59. *Id.* at 8–9, 29; *see also Salcedo*, 936 F.3d at 1168–70 (discussing Congress's concerns with invasions of privacy when enacting the TCPA).

60. *Salcedo*, 936 F.3d at 1169–70.

61. Brief for Appellee John Salcedo, *supra* note 21, at 23–28, 42–43; *Salcedo*, 936 F.3d at 1171–72.

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

63. *See* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 370–72 (2012) (noting that Congress's motivation behind the TCPA included the finding that unrestricted telemarketing can be an intrusive invasion of privacy); *see also* 47 U.S.C. § 227 note (1991) (Congressional Statement of Findings).

the FCC to implement appropriate regulations to achieve congressional goals.[64] *Salcedo* thus invalidates the intangible harms caused by unsolicited texts that both Congress and the FCC have identified and intended to protect against through the TCPA.[65]

First, the *Salcedo* court erred when it found that a single unsolicited text message did not constitute an intangible, concrete injury-in-fact for purposes of Article III standing.[66] When the concreteness of an injury is difficult to recognize, such that it is intangible, courts must look to history for guidance to determine whether the intangible harm bears "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit."[67]

In *Van Patten v. Vertical Fitness Group, LLC*, the U.S. Court of Appeals for the Ninth Circuit found in 2017 that two unsolicited text messages sent in violation of the TCPA constituted an intangible harm that satisfied the injury-in-fact requirement of Article III standing.[68] The Ninth Circuit noted that courts have historically granted remedies for invasion of privacy, intrusion upon seclusion, and nuisance.[69] The court also reaffirmed that "in enacting the TCPA, Congress made specific findings" relating to the intrusive invasion of privacy and the nuisance of unrestricted telemarketing.[70] Recognizing the relationship between the historically recognized harms and the present TCPA violation, the court found that the infringement upon privacy by unsolicited telemarketing was precisely the type of harm Congress intended to protect against.[71]

Similarly, in *Melito v. Experian Marketing Solutions, Inc.*, the U.S. Court of Appeals for the Second Circuit found in 2019 that unsolicited text messages sent in violation of the TCPA constituted an intangible harm that satisfied the injury-in-fact requirement of Article III standing.[72] The Second Circuit court also noted that redress was historically provided by American courts for claims of invasion of privacy, intrusion upon seclusion, and nuisance.[73] The court concluded that these historical

64. *Mims*, 565 U.S. at 370–71; *see also supra* note 8 and accompanying text.

65. *Compare Salcedo*, 936 F.3d at 1169 (rejecting the application of Congress's findings that "[u]nrestricted telemarketing … can be an intrusive invasion of privacy" to text message telemarketing), *with* FCC Enf't Advisory, 31 FCC Rcd. 12615, 12615 (2016), 2016 WL 6822902 ("[T]ext messages sent to cell phones using any automatic telephone dialing system are subject to the [TCPA].").

66. *Compare Salcedo*, 936 F.3d at 1173, *with* Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037 (9th Cir. 2017), *and* Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85 (2d Cir. 2019).

67. Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016).

68. 847 F.3d 1037, 1041–43 (9th Cir. 2017).

69. *Id.* at 1043.

70. *Id.*

71. *See id.* (analogizing the historical right to be protected from invasions of privacy, intrusions upon seclusion, and nuisance, to Congress's specific findings in the TCPA of the harms of intrusive invasion of privacy and nuisance in the telemarketing context).

72. 923 F.3d 85, 92–95 (2d Cir. 2019).

73. *Id.* at 93.

harms bear a close relationship to the intangible harms suffered by recipients of unsolicited text messages and the harms that Congress sought to alleviate in passing the Act.[74]

Like the plaintiffs in *Melito* and *Van Patten*, Salcedo brought a claim alleging a violation of the TCPA due to an unsolicited text message.[75] Like the *Melito* and *Van Patten* courts, the *Salcedo* court applied *Spokeo* and analogized Salcedo's intangible harm to historical harms in order to ascertain the presence of a concrete injury-in-fact.[76] But the *Salcedo* court departed from traditional interpretations of *Spokeo* and found the intangible harm Salcedo had suffered as bearing only a passing resemblance to historical harms like invasion of privacy, intrusion, nuisance, conversion, and trespass, thereby deeming Salcedo's harm insufficient to constitute a concrete injury-in-fact.[77] By firmly cementing historical torts in history and refusing to recognize similar modern harms, the court has effectively invalidated the purpose behind the *Spokeo* analysis.[78] For these reasons, the *Salcedo* court erred when it failed to find that a single unsolicited text message constituted an injury-in-fact for Article III standing purposes; the particularized intangible harm at issue was, in fact, concrete.[79]

Second, given the TCPA's silence regarding text messages, the *Salcedo* court erred when it failed to defer to the FCC's reasonable interpretation of the statute, as required by the *Chevron* doctrine.[80] The FCC, recognizing the harassing, intrusive, illegal, and unwanted nature of unsolicited text messages, implemented rules and regulations under the TCPA's authority to clarify that the statute applies to texts.[81] Under the *Chevron* doctrine, courts must defer to the relevant administrative agency's statutory interpretation when Congress delegates general authority to that agency and is silent on an issue, leaving its intent unclear or ambiguous.[82]

In *Palm Beach Golf Center-Boca, Inc. v. Sarris, D.D.S., P.A.*, the Eleventh Circuit determined in 2015 that the TCPA was silent regarding "who should be classified as

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74. *Id.*

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

76. *See id.* at 1167–72; *see also Melito*, 923 F.3d at 93 ("As both the Ninth and Third Circuits have noted, 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.'") (quoting Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1037, 1043 (9th Cir. 2017)).

77. *Salcedo*, 936 F.3d at 1170–72. The *Salcedo* court noted that its "sister circuit ha[d] reached the opposite conclusion in this context." *Id.* at 1170.

78. *Id.* at 1170; *see also supra* notes 51–55 and accompanying text.

79. *See supra* note 66.

80. *Compare Salcedo*, 936 F.3d at 1169 (failing to defer to the FCC in light of statutory silence), *with* Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1256 (11th Cir. 2015), *and* Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 953–54 (9th Cir. 2009).

81. *See* 47 U.S.C. § 227(b)(2); *see also* FCC Enf't Advisory, 31 FCC Rcd. 12615, 12615 (2016), 2016 WL 6822902 ("The FCC has stated that the restrictions on making autodialed calls to cell phones encompass both voice calls and texts.").

82. *See supra* note 18 and accompanying text.

a sender of unsolicited fax advertisements."[83] The court properly invoked *Chevron* and deferred to the FCC, which had issued a regulation clarifying which classifications of senders the TCPA contemplates.[84] The court concluded that because the FCC rules were in line with congressional intent and the agency's interpretation was not impermissible, the FCC's construction was a reasonable interpretation of the TCPA.[85]

Similarly, in 2009 in *Satterfield v. Simon & Schuster, Inc.*, the U.S. Court of Appeals for the Ninth Circuit found that an unsolicited text message is a call within the meaning of the TCPA and therefore a violation of the statute.[86] The *Satterfield* court began by looking to the language of the TCPA, but found statutory silence regarding the appropriate treatment of text messages.[87] Since the TCPA does not define calls and does not include texts, the *Satterfield* court concluded that the statute did not indicate whether a text message is considered a "call."[88] The court then deferred to the FCC and found that the agency's interpretation of the TCPA as inclusive of texts was consistent with the purpose of the statute and not "arbitrary, capricious, or manifestly contrary to the statute."[89] Therefore, the court concluded that text messages were squarely within the TCPA's meaning of a call.[90]

As in *Palm Beach* and *Satterfield*, the court in *Salcedo* had to interpret the TCPA in relation to a violation on which the TCPA was silent.[91] Unlike *Satterfield*, *Salcedo* did not correctly apply the *Chevron* doctrine and defer to the FCC.[92] Additionally,

83. 781 F.3d at 1255–56. The court was tasked with considering whether "the sender [was] the advertiser, a fax broadcasting [company] hired by [said] advertiser, the common carrier whose network [was] used to send the fax, or whether multiple individuals or entities [were] 'senders'" under section 227(b)(1)(C) of the TCPA. *Id.* at 1256; *see also* 47 U.S.C. § 227(b)(1)(C) ("It shall be unlawful . . . to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement . . . ."). Because the court in *Salcedo* was considering a claim under TCPA (b)(1)(A)(iii) and (b)(1)(B), if the court found standing, the court would then have to make a factual determination regarding who initiated the call and whether Hanna was a directly liable "telemarketer" or a vicariously liable "seller" but would not address the classifications of sender. *Salcedo*, 936 F.3d at 1165; *see also* Imhoff Inv., LLC v. Alfoccino, Inc., 792 F.3d 627, 634–37 (6th Cir. 2015) (describing the differences in analysis under (b)(1)(C) between claims regarding facsimiles and (b)(1)(A) and (B) for claims regarding calls).

84. *Palm Beach*, 781 F.3d at 1256–57; *see also* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 10 FCC Rcd. 12391, 12407 (1995), 1995 WL 464817 (clarifying that liability for violations of the TCPA with respect to advertisements sent via fax rests with entities on whose behalf advertisements are sent and not with service providers like fax broadcasters).

85. *Palm Beach*, 781 F.3d at 1257.

86. 569 F.3d 946, 951–54 (9th Cir. 2009).

87. *See id.* at 953–54 (recognizing that the TCPA was enacted "when text messaging was not available" and concluding that "the statute is silent as to whether a text message is a call within the Act").

88. *Id.*

89. *Id.* at 954 (internal citations ommitted).

90. *Id.*

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

92. *See id.* ("Any possible deference to the FCC's interpretation of the TCPA . . . is not obviously relevant where the Supreme Court has specifically instructed us to consider the judgment of *Congress*.") (emphasis in original).

the *Salcedo* court improperly distinguished *Palm Beach*, where it had applied the *Chevron* doctrine and followed the FCC in analyzing the appropriate treatment of an unsolicited fax.[93] The *Salcedo* court refused to engage with the body of FCC rules, including a rule that explicitly governs unsolicited text messages.[94] The court should have applied the *Chevron* doctrine and found that deference was due to the relevant administrative authority whose rules were permissible and in line with congressional intent.[95] Had the *Salcedo* court followed its own precedent from *Palm Beach* and the persuasive authority of *Satterfield*, it would have correctly concluded that the analysis of congressional and agency judgment falls wholly within the realm of the *Chevron* doctrine.[96]

Finally, *Salcedo* removes any reservations commercial entities may have regarding the legal consequences of spamming people's mobile phones.[97] Recognizing the pervasive and insistent nature of cell phones in our daily lives, courts have expanded privacy and Fourth Amendment rights to protect them.[98] Yet, the precedent set by *Salcedo* incentivizes businesses to engage in predatory marketing practices and to participate in the very type of behavior the TCPA was intended to protect against—invasion of privacy.[99]

Additionally, because people carry their cell phones even to places where they want privacy, unwanted texts can create an arguably greater nuisance and invasion of privacy than calls to one's home.[100] While an intrusion on a landline is limited to the

93. *See id.* at 1170 (concluding that the problems with receiving a fax "ha[ve] little application to the instantaneous receipt of a text message").

94. *See id.* at 1169 (acknowledging that "through the rulemaking authority of the FCC" the TCPA has been extended to text messages); *see also* Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991, 18 FCC Rcd. 14014, 14115 (2003), 2003 WL 21517853 (finding that the TCPA and FCC prohibitions encompass text messages).

95. *Compare* Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A., 781 F.3d 1245, 1256–57 (11th Cir. 2015) (applying *Chevron* and concluding that the FCC's construction of the TCPA is a reasonable and permissible interpretation of the TCPA), *and Satterfield*, 569 F.3d at 954 (applying *Chevron* and concluding that the FCC's interpretation of the TCPA was not arbitrary, capricious, or antagonistic), *with Salcedo*, 936 F.3d at 1169 n.8 (failing to address the "issue of whether the agency's interpretation of the statute is entitled to any deference").

96. *See supra* note 95 and accompanying text.

97. *See generally* Misa K. Bretschneider, *The Evolving Landscape of TCPA Consent Standards and Ways to Minimize Risk*, 10 Wash. J.L. Tech. & Arts 1 (2014) (discussing the various risks businesses may face in TCPA litigation when they send unsolicited text messages).

98. *See, e.g.*, Riley v. California, 573 U.S. 373, 385–86, 403 (2014) (holding that cell phones are not subject to warrantless searches).

99. *See* 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, 6 (2018) (footnote omitted) ("[T]he legislative history [of the TCPA] highlights 'the use of automated equipment to engage in telemarketing' as its motivating concern, and identifies in its preamble the purpose of the legislation as being 'to prohibit certain practices involving the use of telephone equipment for advertising and solicitation purposes.'") (emphasis omitted).

100. *See Riley*, 573 U.S. at 385–403 (extending the legal protections afforded to homes in warrantless searches to cell phones because of invasions of privacy concerns).

home, a similar intrusion on a mobile device is not.[101] Left unchecked, this court's decision creates an irrational reality where the obsolete landline is afforded more protections than the infinitely more ubiquitous cell phone.[102]

The *Salcedo* court erred when it concluded that Salcedo did not suffer an injury-in-fact and therefore lacked standing under Article III.[103] The court overlooked the prevailing persuasive authority holding that an intangible harm, which under the TCPA bears a close relation to historical harms, is a concrete harm and therefore constitutes an injury-in-fact.[104] Additionally, the court failed to follow its own precedent and similar authority when interpreting the TCPA's silence on text messages.[105] Finally, the court's holding creates a dangerous precedent by removing necessary blockades protecting us from endless spam.[106] How many more texts must advertisers bombard our phones with before a court recognizes the harm?

101. *See* Stephen J. Blumberg & Julian V. Luke, Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2017, U.S. Dep't of Health & Hum. Serv., Ctr. for Disease Control & Prevention, Nat'l Ctr. for Health Stat. 1 (2018), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf (finding that 53.9 percent of Americans have homes without landlines and only own a cell phone).

102. *Compare id.* at 5, tbl. 1 (finding that only 8.4 percent of American households have landlines without wireless), *with Mobile Fact Sheet*, *supra* note 2 (finding that 96 percent of Americans own a cell phone).

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

104. *See supra* note 66.

105. *See supra* note 95 and accompanying text.

106. *See generally* Bretschneider, *supra* note 97 (discussing the minimization and removal of various legal blockades businesses face when engaging with cell phone users).