No. 17-14077

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

v.

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

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

PLAINTIFF-APPELLEE'S PETITION FOR REHEARING AND REHEARING EN BANC

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

1. Blickensderfer, Steven
2. Blonsky, Daniel F.
3. Carlton Fields, P.A.
4. Coffey Burlington, P.L.
5. Crotty, Patrick C.
6. Edwards Pottinger LLC
7. Gayles, The Honorable Darrin P. (U.S.D.J.)
8. Hanna, Alex A.
9. Holas, Sean M.
10. Jaffe, Steven
11. Law Offices of Alex A. Hanna, P.A.
12. Lehrman, Seth M.
13. Nelson, Scott L.
14. Ovelmen, Richard J.
15. Owens, Scott D.

16. Public Citizen Foundation, Inc. (which includes Public Citizen Litigation Group)
17. Public Citizen, Inc.
18. Raffanello, Susan E.
19. Salcedo, John
20. Scott D. Owens, P.A.
21. Smullin, Rebecca
22. Turnoff, The Honorable William C. (U.S.M.J.)

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

Pursuant to 11th Circuit Rule 26.1-2(d), plaintiff-appellee provides the following list of all persons and entities listed on all certificates of interested persons previously filed in the appeal prior to the date of filing of this petition.

1. Blickensderfer, Steven
2. Blonsky, Daniel F.
3. Carlton Fields, P.A.
4. Coffey Burlington, P.L.
5. Crotty, Patrick C.
6. Edwards Pottinger LLC
7. Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L.

8. Gayles, The Honorable Darrin P. (U.S.D.J.)
9. Hanna, Alex A.
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13. Lehrman, Seth M.
14. Nelson, Scott L.
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16. Owens, Scott D.
17. Public Citizen Foundation, Inc.
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20. Raffanello, Susan E.
21. Salcedo, John
22. Scott D. Owens, P.A.
23. Smullin, Rebecca
24. Turnoff, The Honorable William C. (U.S.M.J.)

STATEMENTS OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court: *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019); *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017); *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015).

Additionally, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

Whether a person who receives a text message sent to a cell phone in violation of the Telephone Consumer Protection Act (TCPA) prohibition on unconsented-to, auto-dialer calls to cell phones, 47 U.S.C. § 227(b)(1)(A)(iii), suffers concrete injuries providing standing to sue under the TCPA's right of action for the remedies provided by the Act.

/s/ Rebecca Smullin
Rebecca Smullin

Attorney of Record for
Plaintiff-Appellee John Salcedo

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ISSUE MERITING EN BANC CONSIDERATION

Whether a person who receives a text message sent to a cell phone in violation of the Telephone Consumer Protection Act (TCPA) prohibition on unconsented-to, auto-dialer calls to cell phones, 47 U.S.C. § 227(b)(1)(A)(iii), suffers concrete injuries providing standing to sue under the TCPA's right of action for the remedies provided by the Act.

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE

Plaintiff John Salcedo filed a class-action complaint against defendants for violating the TCPA by sending text-message advertisements in violation of 47 U.S.C. § 227(b)(1)(A)(iii), which bans calls made without consent to cellular phone numbers using an auto-dialer or artificial or prerecorded voice. App. Tabs 1, 11. Defendants moved to dismiss the complaint on standing grounds. The district court held Mr. Salcedo had standing. App. Tab. 43. A panel of this Court reversed, concluding Mr. Salcedo had not alleged injury in fact and remanding with instructions to dismiss without prejudice.

FACTS

Mr. Salcedo alleges that he received from defendants a three-part, unwanted text-message that violated the TCPA, and that the message caused him to waste his time and made his phone unavailable for other pursuits when he was attending to it. *See* App. Tab 11 ¶¶ 34, 35, 55.

Before the panel, Mr. Salcedo argued he suffered concrete harm from defendants' unlawful message, which intruded on his privacy. *See* Appellee Br. 21-40. Additionally, he argued that the lost time and interference with use of his phone were separate concrete harms. *See id.* at 41-45. Invoking history and Congress's judgment, and citing decisions of this and other circuits finding standing in TCPA cases, Mr. Salcedo argued that these injuries establish standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

Acknowledging the standing question is a "close" one, Slip Op. 7 n.4, the panel majority held that "history and the judgment of Congress do not support finding concrete injury in Salcedo's allegations," *id.* at 18. Assessing Congress's judgment, it concluded that the privacy injury Congress identified in the TCPA was limited to "intrusion into the privacy of the home," despite the statute's express ban on unwanted robocalls to *cellular phones* (which are commonly used outside the home). *Id*. at 13. Discussing history, the majority concluded the harm of an unwanted text-call was not "closely related to" a common-law privacy tort. *Id.* at 15-16.

The majority also concluded that Mr. Salcedo's other asserted injuries do not establish standing. It rejected his arguments that the unavailability of his phone bears a close relationship to torts regarding interference with possessions (trespass, nuisance, conversion, or trespass to chattels). *See id.* at 16-18. It also indicated that *more* lost time would be required for standing. *See id.* at 20.

Judge Jill Pryor concurred in the judgment and noted that the panel did not resolve "whether a plaintiff who alleged that he had received multiple unwanted and unsolicited text messages may have standing to sue under the TCPA." *Id*. at 22.

ARGUMENT

The junk text that defendants sent Mr. Salcedo violated a central, substantive provision of the TCPA, a statute Congress enacted to protect individuals' privacy. *See generally Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371, 373 (2012). Mr. Salcedo explained in his brief that history and congressional judgment, combined with this Court's precedent, show that this message and Mr. Salcedo's other injuries are concrete. This appeal raises a question of exceptional importance on which the panel's decision conflicts with the precedents of this circuit and others.

Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016), where the Supreme Court found an Article III case or controversy in a TCPA case that, like this one, involved a single text-message, highlights the panel's error. Although the majority decision explicitly addressed only mootness, Chief Justice Roberts's dissent from the mootness holding acknowledged that "[a]ll agree that at the time Gomez filed suit, he had a personal stake in the litigation. In his complaint, Gomez alleged that he suffered an injury in fact when he received unauthorized text messages from Campbell. … (It was later determined that he received only one text message.)" *Id*. at 679.

I. The decision conflicts with authority in five other circuits.

En banc rehearing should be granted because the panel's decision conflicts with authoritative decisions of every other circuit that has applied *Spokeo*'s analysis to cases involving texts or other calls violating the TCPA's prohibitions. The Second, Third, Fourth, Eighth, and Ninth Circuits have uniformly held that receiving such calls is concrete harm.

In *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85 (2d Cir. 2019), the Second Circuit concluded that plaintiffs established standing for their TCPA claim because they received "unsolicited spam text messages" in violation of the cell-robocall ban, § 227(b)(1)(A)(iii). *Id*. at 88. *Melito* explains:

> First, the nuisance and privacy invasion attendant on spam texts are the very harms with which Congress was concerned when enacting the TCPA. Second, history confirms that causes of action to remedy such injuries were traditionally regarded as providing bases for lawsuits in English or American courts. Plaintiffs were therefore not required to demonstrate any additional harm.

Id.

Similarly, *Susinno v. Work Out World Inc*., 862 F.3d 346, 350-52 (3d Cir. 2017), and *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017), concluded that violations of the cell-robocall ban are concrete harms. In *Van Patten*, the plaintiff had received two unlawful text messages, *see* 847 F.3d at 1041, and in *Susinno*, the plaintiff had received one unlawful pre-recorded voice call that went to voicemail, *see* 862 F.3d at 348. Likewise, the Fourth and Eighth Circuits

held that individuals receiving calls in violation of other TCPA restrictions have standing. *See Golan v. FreeEats.com, Inc.,* 930 F.3d 950, 958-59 (8th Cir. 2019) (finding standing based on two violations of the TCPA's restrictions on calls to residential lines, § 227(b)(1)(B)); *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 653-54 (4th Cir. 2019) (finding standing based on violations of TCPA do-not-call regulations).

The panel's decision conflicts with these decisions in several ways. *First*, its holding on standing directly conflicts with *Melito* and *Van Patten*, despite materially identical facts.

Second, it conflicts with the five other circuits' examination of history. All five concluded that violation of a TCPA call-ban "has a close relationship to" a common-law tort, confirming the injury's concreteness, *Spokeo*, 136 S. Ct. at 1549. The Second, Third, Fourth, and Ninth Circuits identified close relationships between unlawful calls and intrusion upon seclusion, a privacy tort. Their decisions cite the Restatement (Second) of Torts § 652B (Am. Law Inst. 1977), which identifies telephone calls as one example of an actionable intrusion, when they "amount to … hounding," *id.* cmt. d. *See Krakauer*, 925 F.3d at 653; *Melito*, 923 F.3d at 93; *Susinno*, 862 F.3d at 351-52; *Van Patten*, 847 F.3d at 1043 (also referencing nuisance). Similarly, regarding violative calls to answering machines, the Eighth Circuit held: "These harms bear a close relationship to the types of harms

traditionally remedied by tort law, particularly the law of nuisance." *Golan*, 930 F.3d at 959.

Acknowledging that one call traditionally "would provide no cause of action," *Susinno* holds that history shows a single TCPA violation to be concrete harm because Congress "sought to protect the same interests implicated in" tort law. 862 F.3d at 352. "Put differently, Congress … elevated a harm that, while 'previously inadequate in law,' was of the same character of previously existing 'legally cognizable injuries.'" *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549); *see also Golan*, 930 F.3d at 959 (similar); *Krakauer*, 925 F.3d at 654 ("Our inquiry is focused on types of harms protected at common law, not the precise point at which those harms become actionable.").

In contrast, the panel rejected the analogy between TCPA-banned calls and intrusions upon seclusion. Rather than focusing on the similarity of the protected interests involved, the panel focused on distinctions irrelevant to other circuits: that a single text-message "fall[s] short of [the] degree of harm" required at common law, Slip Op. 15, and is unlike three of the Restatement's examples *other than* the phone example, *see id.* at 16.

Third, the panel's decision contradicts the other circuits' analysis of Congress's judgment. While the other circuits concluded that Congress's judgment

establishes that violations of the TCPA's call-bans constitute concrete harm, the panel reached the opposite conclusion, based on irreconcilable analysis.

For example, the panel's decision departs from other circuits' rulings by centering on the panel's assessment that in the TCPA, Congress was principally concerned about invasions of privacy in the home. *See* Slip Op. 12, 13. The other circuits addressing cell-robocall violations understood that Congress's privacy-protective purpose extends more broadly and that unwanted cell-calls reflect "the very injury [the TCPA] is intended to prevent." *Melito*, 923 F.3d at 93 (brackets in original, citation omitted); *see also Susinno*, 862 F.3d at 351 ("Congress squarely identified [the] injury" of robocalls to cell phones); *Van Patten*, 847 F.3d at 1043 (stating that "telemarketing text messages … present the precise harm" Congress targeted). These courts found no need to compare Congress's concern about cell-robocalls with its concern about calls to residential lines, which Congress addressed in a separate provision, § 227(b)(1)(B). *Cf. Susinno*, 862 F.3d at 349 ("[T]he statute's expression of particular concern for residential calls does not limit … [its] application to cell phone calls.").

The panel's analysis of Congress's judgment also diverges from the other circuits' by focusing on the role of the Federal Communication Commission (FCC) in implementing the cell-robocall ban. The opinion describes Congress's judgment as "ambivalent at best," Slip Op. 12, partly because of FCC authority to create

exemptions and partly because it was the FCC that made explicit that the cell-robocall ban applies to text messages, *see id.* at 10-12. This analysis cannot be reconciled with the other circuits' applications of *Spokeo* to violations of TCPA call-bans. All five concluded that such violations establish standing, without suggesting that the FCC's implementation role obscures Congress's judgment that violations are concrete harm.

Susinno, for example, cites the exemption provision discussed by the panel, § 227(b)(2)(C), but focuses on an aspect the panel overlooked, and reads it to emphasize, rather than diminish, Congress's privacy-protective purpose. *See* 862 F.3d at 351. Similarly, *Golan* holds that plaintiffs have standing to sue over violations of a different TCPA prohibition for which the FCC also has exemption authority, *see* § 227(b)(1)(B), (b)(2)(B), without suggesting that such authority dilutes Congress's judgment. *See* 930 F.3d at 959.

Likewise, the Second and Ninth Circuit attributed no significance to the fact that it was the FCC that construed the TCPA to apply to text messages. *See Melito*, 923 F.3d at 93 & n.5 (stating that it is "irrelevant" that "it was the FCC, not Congress, that interpreted the TCPA to cover text messages"). As *Melito* recognized, "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 TCPA." 923 F.3d at 93; *see also Van Patten*, 847 F.3d at 1043 (similar).

Additionally, in *Krakauer*, the Fourth Circuit applied Congress's judgment to TCPA violations that would not exist but for an FCC regulation. *See* § 227(c)(5). That court concluded that a "straightforward application of *Spokeo* … neatly resolves" that the violations constitute concrete injury. 925 F.3d at 653.

II. The panel's decision conflicts with this Court's precedent.

Rehearing en banc is also necessary to secure uniformity of this Court's decisions. Applying *Spokeo* in *Perry v. Cable News Network, Inc.*, 854 F.3d 1336 (11th Cir. 2017), and *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), this Court took an approach completely different from the panel's.

Perry addresses a claim that CNN violated the Video Privacy Protection Act (VPPA) when its mobile application shared information with a data-analytics company. *See* 854 F.3d at 1338-39. The plaintiff asserted no injury other than violation of the statute, which was passed in 1988 in response to a newspaper's publication of a Supreme Court nominee's video rentals. *See id.* at 1340. In holding that Congress's judgment showed the violation to be concrete, *Perry* does not compare newspaper publication of video-rental records to application-based data-sharing. Instead, *Perry* holds that "[t]he structure and purpose of the VPPA" are sufficient to "support[] the conclusion that it provides actionable rights." *Id.* Thus,

the statute's prohibition, cause of action, and purpose of preserving privacy together confirm that the plaintiff suffered the harm Congress identified. *See id. Perry* therefore establishes that when a statute's language extends to a modern-day version of the harm that motivated Congress, Congress's judgment in identifying the injury and crafting language to address it supports recognition of a concrete injury.

In *Muransky*, this Court provided more explicit instruction about evaluating Congress's judgment, establishing that courts owe deference to statutory language in identifying which harms are concrete. *Muransky* involved a receipt printed with 10 digits of a credit-card number, in violation of a statutory requirement to truncate such numbers to five digits. *See* 922 F.3d at 1180-81. In holding that the plaintiff alleged concrete injury, this Court "declin[ed] to substitute [its] judgment for Congress's" when deciding where "to draw the line between a concrete injury and non-actionable risk." *Id*. at 1188. Instead, it "deduc[ed] that Congress intended to draw the line" where it was drawn, *id.* at 1190, and cautioned that *Spokeo* should not be "read ... as giving courts a license to reject the standard set by Congress in favor of judge-found facts at odds with that standard," *id.* at 1189.

The panel's analysis of Congress's judgment is squarely at odds with *Perry* and *Muransky*.[1] Much like the VPPA, the TCPA includes a substantive prohibition,

[1] The opinion references *Perry* but does not explain its departure from *Perry*'s mode of analysis. *See* Slip Op. 18 n.11.

§ 227(b)(1)(A)(iii), and a cause of action for violations, § 227(b)(3), and is accompanied by legislative history emphasizing that unwanted calls are the harm Congress aimed to prevent, *see generally* Pub. L. No. 102–243, § 2, 105 Stat. 2394, 2394-95 (1991) (congressional findings); *Mims*, 565 U.S. at 370-71. Under *Perry*, these factors would be enough to demonstrate Congress's judgment that prohibited calls are concrete harm—even though the prohibition applies to calls involving technology (text messaging) Congress did not contemplate. But the panel failed to give effect to these indications of Congress's intent. The opinion discounts the statute's language because it does not use the term "text message" and predates this technology. Further, the opinion elevates the congressional findings' references to *residential* privacy over the statute's express attention to calls to *cellular* phones. *See* Slip Op. 10-12.

Additionally, the opinion engages in the type of second-guessing that *Muransky* rejects. Instead of "deduc[ing] that Congress intended to draw the line" where it drew it, *Muransky*, 922 F.3d at 1190, the panel "substitute[d] [its] judgments," *id.* at 1188, assessing a prohibited call as an "inconsequential annoyance," Slip Op. 19, and suggesting that calls are less harmful if they are received on a cell phone or outside the home—despite Congress's explicit targeting of calls to cell phones as well as calls to residential ones. *See id.* at 11, 13.

The panel's historical analysis also departs from *Perry* and *Muransky* in parsing the differences between Mr. Salcedo's allegations and the elements of analogous torts. *See* Slip Op. 15-18. *Muransky* confirms that, under *Spokeo*, a "close relationship" does not require an "exact" match between "newly proscribed conduct" and "a cause of action under common law." 922 F.3d at 1191 (citation omitted). And, similar to *Susinno*, 862 F.3d at 352, *Perry* indicates that for a "close relationship," it is enough that a statute aims to protect the same interests as the common law: *Perry* cites privacy rights in general terms, finding a "close relationship" between traditionally actionable harm and a VPPA violation, without discussing whether the violation would constitute a tort. *See* 854 F.3d at 1340-41.

The panel decision also conflicts with *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015), whose holding was affirmed, following *Spokeo*, in *Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC*, 858 F.3d 1362 (11th Cir. 2017). In *Palm Beach*, this Circuit concluded that the recipient of a single TCPA-prohibited fax suffered concrete injury from "occupation of its fax machine" for the one minute "required for the electronic transmission of the data." *Id.* at 1251. Here too, Mr. Salcedo alleges that a device—his cell phone—was made unavailable. The panel opinion speculates about how cell phones' operations may differ from fax machines'. *See* Slip Op. 9. But that information is not in the complaint, and there is no constitutional distinction between briefly

occupying a fax machine and briefly making a phone unavailable, whatever the precise mechanism for such unavailability.

III. The decision is at odds with precedent on the sufficiency of small harms to support standing.

The way the panel's decision evaluates small harms reinforces the exceptional importance of the question presented here. The Supreme Court and this Court have firmly established that the size of an injury is irrelevant to whether it is concrete. The panel's reasoning is inconsistent with this doctrine.

Even "an identifiable trifle" is sufficient for standing. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (citation omitted); *see also Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("The Supreme Court has rejected the argument that an injury must be 'significant.'"); *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987) ("There is no minimum quantitative limit required to show injury."). Thus, "degree of injury" does not matter when deciding whether a harm is concrete. *ACLU of Ga. v. Rabun County Chamber of Commerce, Inc.*, 698 F.2d 1098, 1108 (11th Cir. 1983) (per curiam).

The panel acknowledged this rule, *see* Slip Op. 19-20, but its analysis does not square with it. At bottom, the opinion indicates that an unlawful text-message is not "concrete" because it is not harmful *enough*. It dismisses Mr. Salcedo's allegations of harm in terms referring to the *magnitude* of injury: "a brief,

inconsequential annoyance," *id.* at 19. Further, in analyzing history, it distinguishes defendants' violation from common-law torts largely based on the "degree" of harm, *id*. at 15, 17. Similarly, it distinguishes cell-phone calls from "calls to a home phone," finding Congress's judgment inapposite, based on the assessment that the former "may involve *less* of an intrusion," *id*. at 13 (emphasis added).

Additionally, the panel recognizes that a waste of time is a concrete injury, but then dismisses Mr. Salcedo's allegation of lost time as insufficient to establish standing by focusing on the *amount* of time. Lost time, the opinion suggests, must be "more than a few seconds" to be concrete or more than "five seconds" to constitute a "serious intrusion." *Id*. at 20. This is quantitative analysis on its face, and although an injury must "exist" to establish standing, *Spokeo*, 136 U.S. at 1548, under *SCRAP*, this Court may not disregard an injury because it is not "serious" enough. Moreover, this Circuit's holdings on waste-of-time injury do not set a minimum, despite the panel's statement that they might, *see* Slip Op. 20. *See Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017); *Common Cause/Ga.*, 554 F.3d at 1351. Indeed, *Muransky* recognizes that the minimal time and effort spent "doing away with" a paper receipt "would suffice for standing." 922 F.3d at 1192.

IV. The decision would foster violations and create uncertainty about congressional authority to identify concrete harms.

If left in place, the panel's decision would have significant and adverse consequences. It would encourage TCPA-prohibited spam, when already "unwanted

robocalls and texts … top the list of consumer complaints received by the [FCC]," Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7964 (2015) (footnote omitted). As the FCC has explained, the intrusiveness of such calls may be heightened—not diminished, as the panel thought—"where the calls are received on a phone that the consumer may carry at all times." *Id.* at 8023. Here, contrary to the agency's judgment as well as that of Congress, the panel describes defendants' violation as "inconsequential," Slip. Op. 19, in part because it is "isolated," *id.* at 15.

If not corrected, the opinion could leave consumers inundated with more unwanted calls and texts that, combined, are far from isolated or inconsequential. Marketers and others would almost certainly interpret the opinion as license to send one or two prohibited robocalls to innumerable cell phones, with little threat of private enforcement. For consumers, the distinction between receiving such calls from *many* senders rather than *one* is a distinction without a difference.

The panel decision also throws into question how Congress can "elevate to the status of legally cognizable … injuries that were previously inadequate at law," *Spokeo*, 136 S. Ct at 1549 (alteration adopted, citation omitted). Here, Congress banned cell-robocalls, created a right of action, and expanded upon its intent in findings that refer to "[u]nrestricted telemarketing" and "automated or prerecorded calls" *generally* as an "invasion of privacy," Pub. L. No. 102–243, § 2 ¶¶ 5, 13.

Further, Congress has not disagreed with the FCC's interpretation of the term "call" to include text messages. As the panel recognized, such silence could be taken "as tacit approval of that agency action." Slip Op. 11. Although the panel faults this record for being "ambivalent" on text messaging, *id*. at 12, the opinion does not indicate any practical way for Congress to do more to express its judgment that an unwanted cell-robocall—including one using new technology—is a privacy harm.

Theoretically, Congress could modify the TCPA and its findings to name each new technology the statute's plain terms reach, leaving nothing to the FCC. But requiring such amendments to give life to the statutory right of action is at odds with the practicalities of lawmaking. Such a rule would eviscerate the benefits of using inclusive statutory terms that courts or agencies can apply to new manifestations of a problem. Lawmakers would be overwhelmed with questions about existing statutes' scope, hampering their ability to address truly new harms. Moreover, it is utterly impractical to expect Congress to annotate each statutory provision with findings that emphasize its importance and reiterate that Congress "intended to draw the line" where it drew it, *Muransky*, 922 F.3d at 1190.

The panel's approach—looking behind statutory terms to make its own assessment of a text-message's intrusiveness—also threatens to change the nature of litigation. *Spokeo* directs courts to look to Congress because it "is well positioned to identify intangible harms that meet minimum Article III requirements." 136 S. Ct.

at 1549. If courts must instead make their own case-by-case assessment of each violation's harmfulness, that would "convert[] a simple remedial scheme into a fact-intensive quarrel over how long a party was on the line or how irritated it felt when the phone rang," *Krakauer*, 925 F.3d at 654. As the Fourth Circuit explained about another TCPA provision, "[o]bviously, Congress could have created such a cumbersome scheme if it wanted to. It instead opted for a more straightforward and manageable way of protecting personal privacy, and the Constitution in no way bars it from doing so." *Id.*

CONCLUSION

For the foregoing reasons, this Court should grant panel rehearing or rehearing en banc.

Dated: September 18, 2019

Respectfully submitted,

/s/Rebecca Smullin

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 35(b)(2)(A) and 11th Circuit Rule 35-1 because excluding the material exempted by 11th Circuit Rule 35-1, it contains 3,899 words.

This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman.

/s/ Rebecca Smullin
Rebecca Smullin

Attorney for Plaintiff-Appellee
John Salcedo

September 18, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2019, I electronically filed the foregoing document, with the panel opinion attached as an addendum, with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system, which will cause it to be served on appellants through their counsel as follows:

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ADDENDUM: PANEL OPINION

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-14077

D.C. Docket No. 0:16-cv-62480-DPG

JOHN SALCEDO,
individually and on behalf of others similarly situated,

Plaintiff - Appellee,

versus

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

Defendants - Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(August 28, 2019)

Before JILL PRYOR and BRANCH, Circuit Judges, and REEVES,* District Judge.

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* Honorable Danny C. Reeves, United States District Judge for the Eastern District of Kentucky, sitting by designation.

BRANCH, Circuit Judge:

Is receiving a single unsolicited text message, sent in violation of a federal statute, a concrete injury in fact that establishes standing to sue in federal court? To answer that question, we 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.

I. BACKGROUND

At 9:56 a.m. on August 12, 2016, John Salcedo, a former client of Florida attorney Alex Hanna and his law firm,[1] received a multimedia text message from Hanna offering a ten percent discount on his services.

Salcedo filed suit in the district court as the representative of a putative class of former Hanna clients who received unsolicited text messages from Hanna in the past four years, alleging violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii).[2] He sought, among other relief, statutory damages of $500 per text message and treble damages of $1,500 per text

[1] For simplicity, and without implying any view as to Mr. Hanna's possible personal liability, throughout this opinion we will refer to both defendants—Mr. Hanna and his law firm—collectively as "Hanna."

[2] "It shall be unlawful for any person within the United States . . . to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a . . . cellular telephone service . . . ." 47 U.S.C. § 227(b)(1)(A)(iii).

message sent willfully or knowingly. *See* 47 U.S.C. § 227(b)(3).

Hanna moved to dismiss the complaint for lack of standing, arguing in the alternative that it should be dismissed as to Mr. Hanna for failure to state a claim against him and that certain parts of the complaint should be stricken. The district court disagreed, finding in relevant part that Salcedo had standing under *Mohamed v. Off Lease Only, Inc.*, No. 15-23352-Civ-COOKE/TORRES, 2017 WL 1080342 (S.D. Fla. Mar. 22, 2017). However, finding that its order "involves a controlling question of law as to which there is a substantial ground for difference of opinion," the court allowed Salcedo to pursue an interlocutory appeal and stayed its proceedings pending appeal. A panel of our Court granted Hanna's petition for permission to appeal under 28 U.S.C. § 1292(b). We now consider his appeal.

II. STANDARD OF REVIEW

"We review standing determinations *de novo*." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 975 (11th Cir. 2005).

III. DISCUSSION

Our analysis proceeds as follows. We first introduce the TCPA, the statute under which Salcedo has filed suit. Next, we discuss the standing requirements of Article III of the Constitution, which help to define our limited power to resolve only cases or controversies. We then turn to Salcedo's particular allegations of harm and analyze them in view of our Circuit precedent, history, and the judgment

of Congress.

A. The Telephone Consumer Privacy Act of 1991

Because it found that "residential telephone subscribers consider automated or prerecorded telephone calls . . . to be a nuisance and an invasion of privacy," Telephone Consumer Protection Act of 1991, S. 1462, 102d Cong., Pub. L. No. 102-243, § 2, ¶ 10 (1991), in 1991 Congress enacted the TCPA to restrict interstate telemarketing. The TCPA thus prohibits using automatic telephone dialing systems to call residential or cellular telephone lines without the consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii), (B). It also prohibits sending unsolicited advertisements via facsimile machine. *Id.* § 227(b)(1)(C). It authorizes the Federal Communications Commission ("FCC") to enact implementing regulations. *Id.* § 227(b)(2). Finally for our purposes, the TCPA creates a private right of action whereby a person or entity may seek compensatory or injunctive relief against violators. *Id.* § 227(b)(3).

There have been two relevant updates to the TCPA and its enforcement regime since 1991. First, in October 1992, Congress amended the TCPA to allow the FCC to exempt free-to-receive cellular calls if it so chooses. *Id.* § 227(b)(2)(C). The FCC has not done so. Second, the statute has been silent as to text messaging, for that medium did not exist in 1991. But under its TCPA rulemaking authority, the FCC has applied the statute's regulations of voice calls to text messages. 30

FCC Rcd. 7961, 7964 n.3, 7978–79, 8016–22 (2015); 18 FCC Rcd. 14014, 14115 (2003); *see also Campbell–Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016) ("A text message to a cellular telephone, it is undisputed, qualifies as a 'call' within the compass of § 227(b)(1)(A)(iii)."). Thus, Salcedo's complaint facially appears to state a cause of action under the TCPA as interpreted by the FCC.

B. Article III Standing

Not every right created by Congress or defined by an executive agency is automatically enforceable in the federal courts. Our tripartite system of government recognizes that "there is no liberty if the power of judging be not separated from the legislative and executive powers." *The Federalist No. 78*, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961). To protect this separation of powers, we must assure ourselves that our exercise of jurisdiction falls within the Constitution's grant of judicial power.

Article III vests the judicial power in the federal courts and extends that power to "Cases" and "Controversies." U.S. Const. art. III, §§ 1–2. One tool for determining that the matters before us are truly cases or controversies, as understood by Article III, is the doctrine of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The law of Article III standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). Even when

those political branches appear to have granted us jurisdiction by statute and rule, we are still obliged to examine whether jurisdiction exists under the Constitution.

As the Supreme Court has explained, the "irreducible constitutional minimum" to establish Article III standing requires three elements. *Lujan*, 504 U.S. at 560. "The plaintiff must have (1) 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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560–61). It is the first element—the "foremost" of the three, *id.* (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998))—that is disputed in this appeal and to which we now turn.

To establish standing, an injury in fact must be concrete.[3] *Id.* at 1548. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist," as opposed to being hypothetical or speculative. *Id.* A concrete injury need be only an "identifiable trifle." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (noting that sufficiently concrete injuries have included a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax). But sometimes plaintiffs allege intangible injuries that we cannot so

[3] An injury in fact must also be particularized, that is, affecting the plaintiff "in a personal and individual way." *Spokeo*, 136 S. Ct at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). It is undisputed that Salcedo's allegations are of a personal and individual nature. As the would-be class representative, Salcedo must establish his own personal, concrete injury notwithstanding whatever injuries may have been suffered by the other members of the class. *Id.* at 1547 n.6.

easily identify.

When the concreteness of an alleged injury is difficult to recognize, we look to "history and the judgment of Congress" for guidance. *Spokeo*, 136 S. Ct. at 1549. But an act of Congress that creates a statutory right and a private right of action to sue does not automatically create standing; "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.*[4] "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

C. Eleventh Circuit Precedent

Because Salcedo bears the burden of establishing federal jurisdiction, *Lujan*, 504 U.S. at 561, we look to the substance of his amended complaint's allegations to determine if he has standing due to a concrete injury. Salcedo alleged that receiving the one text message "caused Plaintiff to waste his time answering or otherwise addressing the message. While doing so, both Plaintiff and his cellular

[4] Recognizing that "a bare procedural violation" of a statute "may result in no harm," *Spokeo* reaffirms the proposition that we must always look for concrete harm when assessing Article III standing. *See* 136 S. Ct. at 1550. In some contexts this will mean identifying purely speculative "harm" that never actually materializes as failing to allege an injury in fact. *See, e.g.*, *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016), *reh'g en banc denied*, 855 F.3d 1265 (11th Cir. 2017) (holding that a violation of the mortgage satisfaction reporting requirements of a state law resulted in no concrete harm to the plaintiff).

But we should not ignore the Supreme Court's guidance in *Spokeo* in cases that purport to allege more than merely technical statutory violations. This appeal presents a close question in which we must determine whether Salcedo's allegations are real and concrete as opposed to figmentary. *Spokeo*'s instruction to consider history and the judgment of Congress, *id.* at 1549, helpfully guides us in our conclusion that Salcedo has not alleged a concrete injury in fact.

phone were unavailable for otherwise legitimate pursuits." He further alleged that the message also "resulted in an invasion of Plaintiff's privacy and right to enjoy the full utility of his cellular device."

These allegations are qualitatively different from those in our Circuit precedent that have been successful in establishing standing to sue over a single violation of the TCPA. In *Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015), we found standing for a plaintiff who alleged that receiving a junk fax in violation of the TCPA harmed him because, during the minute or so that it took to receive and process the fax message, his fax machine was unavailable for receiving legitimate business messages. *Accord Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017) (considering also "the cost of printing the unsolicited fax"). To the extent we have relied on tangible costs such as the consumption of paper and ink or toner to establish injury in fact, Salcedo cannot so rely, since receiving a text message uses no paper, ink, or toner. His complaint alleges generally that some text messages cause recipients to incur costs to their wireless service providers, but he has not alleged specifically that Hanna's text cost him any money.

Salcedo's allegations of intangible costs, on the other hand, bear some facial similarities to those in *Palm Beach Golf*. But they differ in kind, rendering *Palm*

Beach Golf inapplicable. At oral argument, Salcedo asserted that receiving Hanna's message was comparable to using a minute of fax machine time, but his complaint does not so allege. Rather, it alleges time wasted only generally. In the absence of a specific time allegation, we decline to assume an equivalence to the facts of *Palm Beach Golf* when receiving a fax message is qualitatively different from receiving a text message. A fax message consumes the receiving device entirely, while a text message consumes the receiving device not at all. A cell phone user can continue to use all of the device's functions, including receiving other messages, while it is receiving a text message.

Salcedo also makes an allegation about unavailability, but that too is distinct from *Palm Beach Golf*. There, we were concerned about the fully realized opportunity cost of being unable to receive other faxes for a full minute. By contrast, Salcedo has alleged no particular loss of opportunity. A fax machine's inability to receive another message while processing a junk fax has no analogy with cell phones and text messaging. Salcedo's assertion that he and his phone were unavailable appears only to recite language we used in *Palm Beach Golf*. *Cf.* 781 F.3d at 1252 (quoting H.R. Rep. 102-317, at 10 (1991)). We are entitled to look past this conclusory recitation to the actual factual substance of Salcedo's allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("we are not bound to accept as true a legal conclusion couched as a factual allegation").

Thus, Circuit precedent in *Palm Beach Golf* does not dictate the outcome of this appeal. And, for reasons we will discuss below, we find our sister circuit's decision involving this precise issue unpersuasive. *See Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (holding that the receipt of two unsolicited text messages constituted an injury in fact).[5] In the absence of controlling authority, we turn our analysis to the framework outlined by the Supreme Court in *Spokeo*. We look to history and the judgment of Congress to see whether they support treating Salcedo's allegations as a concrete injury in fact. Our examination reveals little support for so doing.

D. The Judgment of Congress

We first note what Congress has said in the TCPA's provisions and findings[6] about harms from telemarketing via text message generally: *nothing*. The TCPA is completely silent on the subject of unsolicited text messages. Of course, text messaging in its current form did not exist in 1991 when the TCPA was enacted,

[5] Nor are we bound by the Supreme Court's holding in another TCPA text-messaging case that the case was not mooted by an unaccepted settlement offer. *See Campbell–Ewald*, 136 S. Ct. at 670. The Court did not reach the unraised question of whether the plaintiff had alleged an injury in fact, in part because the defendant apparently never asserted that the plaintiff had failed to do so. *See id.* at 667–68. "[W]e are not bound by a prior decision's *sub silentio* treatment of a jurisdictional question." *Okongwu v. Reno*, 229 F.3d 1327, 1330 (11th Cir. 2000).

[6] Context matters. We are not suggesting that legislative history should play a role in statutory interpretation. Salcedo's allegation is undisputedly a violation of the statute as interpreted by the FCC. Nonetheless, because the Supreme Court has instructed us to consider "the judgment of Congress" in assessing Article III standing, we will consider the congressionally enacted findings as informative of that judgment. *See Spokeo*, 136 S. Ct. at 1549; *cf. Palm Beach Golf*, 781 F.3d at 1252 (citing House committee report).

but Congress has amended the statute several times since then without adding text messaging to the categories of restricted telemarketing.[7] As we have mentioned, it is only through the rulemaking authority of the FCC that the voice call provisions of the TCPA have been extended to text messages. At most, we could take Congress's silence as tacit approval of that agency action.

On the other hand, Congress's legislative findings about telemarketing suggest that the receipt of a single text message is qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA. In particular, the findings in the TCPA show a concern for privacy within the sanctity of the home that do not necessarily apply to text messaging. "Unrestricted telemarketing . . . can be an intrusive invasion of privacy," and "[m]any consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers," Congress found. Pub. L. No. 102-243, § 2, ¶¶ 5, 6. By contrast, cell phones are often taken outside of the home and often have their ringers silenced, presenting less potential for nuisance and home intrusion. It is thus not surprising that, after Congress found that the FCC "should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not

[7] Following recent amendments, however, the TCPA will expressly include text messaging in its prohibitions on transmitting false caller ID information. Consolidated Appropriations Act, 2018, H.R. 1625, 115th Cong., Pub. L. No. 115-141, div. P, § 503(a) (2018) (to be codified at 47 U.S.C. § 227(e)).

considered a nuisance or invasion of privacy," *id.* ¶ 13, within a year it instructed the FCC that it may exempt "calls to a telephone number assigned to a cellular telephone service that are not charged to the called party," 47 U.S.C. § 227(b)(2)(C).

On text messaging generally, then, the judgment of Congress is ambivalent at best; its privacy and nuisance concerns about residential telemarketing are less clearly applicable to text messaging. Any possible deference to the FCC's interpretation of the TCPA[8]—the source of its application to text messaging—is not obviously relevant where the Supreme Court has specifically instructed us to consider the judgment of *Congress*. And congressional silence is a poor basis for extending federal jurisdiction to new types of harm. We take seriously the silence of that political branch best positioned to assess and articulate new harms from emerging technologies. *See Spokeo*, 136 S. Ct. at 1549 (citing *Lujan*, 504 U.S. at 578)). With this point of caution in mind, we now turn to the judgment of Congress about the specific harms that Salcedo has alleged he suffered when he received Hanna's message.

[8] In this case, we need not reach the issue of whether the agency's interpretation of the statute is entitled to any deference. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (requiring deference to agency's interpretation of silent or ambiguous statute); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (allowing court to determine level of deference in proportion to agency's demonstration of persuasive reasoning); *cf., e.g.*, *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1320 (11th Cir. 2011) (rejecting *Chevron* deference where the statutory language was clear and unambiguous).

We consider the judgment of Congress when assessing standing because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements." *Id*. As we have mentioned, Congress was concerned about "intrusive invasion[s] of privacy" into the home when it enacted the TCPA. Pub. L. No. 102-243, § 2, ¶ 5. Salcedo argues that the particular privacy interest Congress has identified is "the freedom from unwanted robocalls," but that observation is too general. As we have noted, a single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does. Certainly, Salcedo has not alleged that he was in his home when he received Hanna's message. As we have also noted, the 1992 amendment allowing the FCC to exempt free-to-receive calls to cell phones, 47 U.S.C. § 227(b)(2)(C), suggests less congressional concern about calls to cell phones. And by nature of their portability and their ability to be silenced, cell phone calls may involve less of an intrusion than calls to a home phone. We realize that Congress in 1991 could not have foreseen the explosion in personal cell phone use, the popularity of text messaging, and the near-extinction of the residential telephone line. But *Spokeo* instructs us to consider the judgment of Congress about the alleged harm, not to imagine what Congress might say about a harm it has not actually addressed.

We note that our sister circuit has reached the opposite conclusion in this

context. *See Van Patten*, 847 F.3d at 1043. The Ninth Circuit quoted many of these same findings, further noting Congress's purpose of "protect[ing] consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax advertisements." *See* Pub. L. No. 102-243, § 2, ¶ 12. But that court stopped short of examining whether isolated text messages not received at home come within that judgment of Congress. Instead, it concluded that "Congress identified unsolicited contact as a concrete harm." *Van Patten*, 847 F.3d at 1043. We disagree with this broad overgeneralization of the judgment of Congress and have focused our own analysis on text messaging specifically.

Other stated concerns behind the TCPA are also inapposite to Salcedo's allegations. The congressional committee found telemarketing by fax problematic in part because "it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." H.R. Rep. 102-317, at 10 (1991), *quoted in Palm Beach Golf*, 781 F.3d at 1252. As we have noted, such a concern has little application to the instantaneous receipt of a text message. The judgment of Congress, then, provides little support for finding that Salcedo's allegations state a concrete injury in fact.[9]

[9] Congress also stated concerns not raised by either party here: concerns for public safety "when an emergency or medical assistance telephone line is seized," Pub. L. No. 102-243, § 2, ¶ 5; for the cost borne by consumers who use technology to avoid unwanted calls, *id.* ¶ 11; and for "commercial freedoms of speech and trade" that telemarketers enjoy, *id.* ¶ 9.

E. History

We now turn to history for guidance, because the case or controversy requirement of Article III "is grounded in historical practice." *Spokeo*, 136 S. Ct. at 1549. Thus, "it is instructive to consider 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." *Id.*

With respect to his allegations of invasion of privacy, we look to the generally accepted tort of intrusion upon seclusion,[10] which creates liability for invasions of privacy that would be "highly offensive to a reasonable person." Restatement (Second) of Torts § 652B. The requirement that the interference be "substantial" and "strongly object[ionable]" instructs us that a plaintiff might be able to establish standing where an intrusion on his privacy is objectively serious and universally condemnable. *See id.* cmt. d (no liability for one, two, or three phone calls; liability "only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff"). By contrast, Salcedo's allegations fall short of this degree of harm. We do not see this type of objectively intense interference where the alleged harm is isolated,

[10] Most of the accepted torts generally known as "invasion of privacy" involve privacy in the rather specific sense of one's right to be free from unwanted publicity. *See* Restatement (Second) of Torts § 652A. It is only the privacy tort of intrusion upon seclusion, *id.* § 652B, that bears any possible relationship to Salcedo's allegations.

momentary, and ephemeral.

The tort of intrusion upon seclusion also requires an intrusion "upon the solitude or seclusion of another or his private affairs or concerns." *Id.* § 652B. Although Salcedo argues that his cell phone is part of his private affairs, the Restatement contemplates a different category of intrusion into private affairs, listing examples including eavesdropping, wiretapping, and looking through one's personal documents. *See id.* cmt. b. Simply sending one text message to a private cell phone is not closely related to the severe kinds of actively intermeddling intrusions that the traditional tort contemplates. Salcedo's reasoning would equate opening your private mail—a serious intrusion indeed—with mailing you a postcard.

With respect to his allegations of nuisance, Salcedo asks us to compare the traditional torts of trespass and nuisance, but we find them also to be distinct both in kind and in degree. Trespass requires intentionally "enter[ing] land in the possession of the other," *id.* § 158(a), and private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land," *id.* § 821D. Although, as we have noted, Congress was concerned about intrusions into the home when it enacted the TCPA, Salcedo has alleged no invasion of any interest in real property here. Furthermore, even in the context of nuisance to real property, in Florida, "[m]ere disturbance and annoyance as such do not in themselves

necessarily give rise to an invasion of a legal right." *A & P Food Stores, Inc. v. Kornstein*, 121 So. 2d 701, 703 (Fla. 3d Dist. Ct. App. 1960). Hanna's text message is thus not closely related to these traditional harms because it is not alleged to have infringed upon Salcedo's real property, either directly or indirectly.

Salcedo also asks us to consider the personal property torts of conversion and trespass to chattel. Conversion is an interference with chattel "which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Restatement (Second) of Torts § 222A. Salcedo's allegations are nowhere near a complete and permanent dominion over his phone, so recourse to this serious kind of tort is unhelpful. The same is true for the tort of trespass to chattel, which involves intentionally "using . . . a chattel in the possession of another." *Id.* § 217(b). Traditionally, liability arises for this kind of trespass only when "the possessor is deprived of the use of the chattel for a substantial time" or when the trespass harms "the possessor's materially valuable interest in the physical condition, quality, or value of the chattel." *Id.* § 218(c) & cmt. e; *cf. United States v. Jones*, 565 U.S. 400, 426 (2012) (Alito, J., concurring) ("Trespass to chattels has traditionally required a physical touching of the property."). Thus, although Salcedo's allegations here bear a passing resemblance to this kind of historical harm, they differ so significantly in degree as to undermine his position. History shows that Salcedo's allegation is

precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing.

We again note that our sister circuit has reached the opposite conclusion. *See Van Patten*, 847 F.3d at 1043. We decline to adopt its reasoning and instead embrace more fully the Supreme Court's instruction to look for a "close relationship" to a traditionally redressable harm. *See Spokeo*, 136 S. Ct. at 1549 (citing *Vt. Agency of Nat. Res.*, 529 U.S. 765, 775–77 (2000) (discussing traditional *qui tam* law in a case about *qui tam* relator Article III standing)). The Ninth Circuit's one-sentence review of history simply asserted, "Actions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states." *Van Patten*, 847 F.3d at 1043. But as we have more thoroughly explained, an examination of those torts reveals significant differences in the kind and degree of harm they contemplate providing redress for.

In sum, we find that history and the judgment of Congress do not support finding concrete injury in Salcedo's allegations.[11] Salcedo has not alleged anything

[11] Salcedo urges us to follow the reasoning that allowed us to find standing in *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1340–41 (11th Cir. 2017). The facts here do not permit us to do so. In *Perry*, we found standing under the Video Privacy Protection Act, 18 U.S.C. § 2710, for a plaintiff suing over privacy violations involving a mobile video app. *Perry* held that the plaintiff's allegations and the 1980s-era statute involved precisely the same substantive privacy right. Not so here. As we have discussed, both the judgment of Congress and history here reveal concerns about intrusions into the privacy of the home and interferences with property that do not readily transfer to the context of cell phones.

like enjoying dinner at home with his family and having the domestic peace shattered by the ringing of the telephone. Nor has he alleged that his cell phone was searched, dispossessed, or seized for any length of time. Salcedo's allegations of a brief, inconsequential annoyance are categorically distinct from those kinds of real but intangible harms. The chirp, buzz, or blink of a cell phone receiving a single text message is 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. All told, we conclude that Salcedo's allegations do not state a concrete harm that meets the injury-in-fact requirement of Article III.

F. Quality, Not Quantity

To be clear, we are not attempting to measure how small or large Salcedo's alleged injury is. Article III standing is not a "You must be this tall to ride" measuring stick. "There is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be." *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987). Our assessment today is thus qualitative, not quantitative. We have assessed how concrete and real the alleged harm is, *Spokeo*, 136 S. Ct. at 1548, and we have concluded that it is not the kind of harm that constitutes an injury in fact. Some harms that are intangible and ephemeral may do so, but Salcedo's allegations of

the harm he suffered from receiving a single text message do not.

To be sure, under our precedent, allegations of wasted time can state a concrete harm for standing purposes. We have found standing where the harm was, for example, time wasted traveling to the county registrar's office, *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009); and correcting credit reporting errors, *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017). These precedents strongly suggest that concrete harm from wasted time requires, at the very least, more than a few seconds. And on this point the judgment of Congress sheds a final ray of light. The TCPA instructs the FCC to establish telemarketing standards that include releasing the called party's line within five seconds of a hang-up, 47 U.S.C. § 227(d)(3)(B), demonstrating that, on the margin, Congress does not view tying up a phone line for five seconds as a serious intrusion.

Our responsibility to ensure that plaintiffs allege a real injury in fact requires us to look closely at their allegations in light of the statute, our precedent, history, and the judgment of Congress. Such inquiries will, of course, have differing outcomes depending on those inputs. *Compare, e.g.*, *Perry*, 854 F.3d at 1340–41 (finding standing based on intangible harm of statutory violation), *and Palm Beach Golf*, 781 F.3d at 1252 (same), *with Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998, 1003 (11th Cir. 2016), *reh'g denied*, 855 F.3d 1265 (11th Cir. 2017) (en banc)

(finding no standing because plaintiff alleged "neither a harm nor a material risk of harm"). We acknowledge that Congress, as a political entity, is well positioned to assess new harms in light of developments in technology and society, and to respond to the concerns of the American people about novel encroachments on life, liberty, and property. *See Spokeo*, 136 S. Ct. at 1549. The federal courts are not similarly tasked. We have only the power "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). And when a plaintiff comes to us without alleging a concrete harm, a real injury that states a case or controversy, we cannot do even that much.

IV. CONCLUSION

We **REVERSE** the decision of the district court that Salcedo has standing to sue and **REMAND** with instructions to dismiss without prejudice the amended complaint.[12]

[12] Hanna has asked us to instruct the district court to dismiss Salcedo's amended complaint with prejudice. But a jurisdictional dismissal is entered without prejudice. *Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008). "A dismissal 'without prejudice' refers to the fact that the dismissal is not on the merits." *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1094 n.7 (11th Cir. 1996). Although refiling may prove futile (Salcedo has already amended his complaint once in attempt to shore up his allegations), we and the district court presently lack jurisdiction to make that merits determination.

JILL PRYOR, concurring in judgment only:

Plaintiff John Salcedo sued defendants Alex Hanna and the Law Offices of Alex Hanna, P.A. (together, "Hanna") under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii), after they sent him a single unwanted text message advertisement. I agree with the majority opinion that we lack subject matter jurisdiction because Salcedo has no standing to bring a TCPA claim. I write separately to emphasize my understanding that the majority's holding is narrow and the conclusion that Salcedo lacks standing is driven by the allegations in his complaint that Hanna sent him only one text message. The majority opinion—appropriately, in my view—leaves unaddressed whether a plaintiff who alleged that he had received multiple unwanted and unsolicited text messages may have standing to sue under the TCPA. With this understanding, I concur in the majority's judgment.