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# One Buzz: Is a Single Text Enough to Confer Article III Standing Under the TCPA?

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## INTRODUCTION

In 2020 alone, the Federal Communications Commission (FCC) received roughly 14,000 complaints from consumers about unwanted text messages.[1] A portion of those complaints regarded the practice of

1. Becky Sullivan, *Complaints about spam texts were up 146% last year. Now, the FCC wants to take action*, NPR (Oct. 19, 2021, 12:48 PM ET),

unsolicited telemarketing and arose from situations that looked something like this: John is at home sitting on the couch while he anxiously awaits the next notification from his smartphone. Suddenly, his phone buzzes and his attention, once focused on the newest episode of *Forensic Files*, is now focused squarely on his cell phone. Perhaps, he figured it was a text message from a colleague, a friend, or a loved one. Maybe he thought it was a news update or a response from the employer with whom he submitted a job application the week prior. Then again, maybe he thought wrong. The much-anticipated notification is a text message from a local business, which reads: "BUY ONE, GET ONE HALF-OFF! SUPPLY IS LIMITED – VISIT IN-STORE FOR MORE DETAILS."

John is slightly perplexed; he does not recall signing up to receive promotional advertisements from the local business. Nonetheless, he reads the message and deletes it within a matter of seconds, where it is then buried in a stack of data and largely forgotten. Weeks later, John sees a billboard advertising a local attorney's services. The billboard reads: "Have you recently received a telemarketing text message that you didn't sign up for? If so, call me!" Of course, John thought the text he received was somewhat annoying, but he never imagined that it could serve as the basis for a lawsuit in federal court. Even after seeing the sign, John has his doubts. Surely, receiving a single unsolicited text message is not an injury *concrete* enough to establish standing in a federal lawsuit against the sender—or is it?

In the growing age of technology, the text message has become one of the most widely adopted forms of electronic communication.[2] This widespread use is not limited solely to peer-to-peer communication.[3] In 2020, 42% of business owners reported sending text messages to customers in the last year.[4] For some consumers, however, this practice has morphed into something entirely different than simple and efficient

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https://www.npr.org/2021/10/19/1047303425/complaints-about-spam-texts-fcc-robocalls [https://perma.cc/T6FY-63DW].

2. *See* Kyle Kuczynski, *Mass Texting Changes in 2021 - Here's Why:*, MESSAGE DESK (May 8, 2021), https://messagedesk.com/blog/mass-text-messaging-changes-2021/ [https://perma.cc/Y6C3-MSL2] (noting that 96% of people use the text message feature on their cell phone).

3. *See* Meghan Tocci, *Current Texting and SMS Marketing Statistics*, SIMPLE TEXTING (June 10, 2021), https://simpletexting.com/2021-texting-statistics/ [https://perma.cc/5AH6-9F5H] (noting that "62% of consumers say they have subscribed to receive texts from at least one business in the last year").

4. *Id.*

communication from a business to a consumer.[5] Questionable practices, like unsolicited spam text messages and scam phone calls, have plagued the telemarketing industry in recent years.[6] As a result, the everyday consumer has been left to drown in a sea of unwanted robocalls and spam text messages.[7]

In response to growing consumer concern, Congress enacted the Telephone Consumer Protection Act (TCPA) in 1991, which prohibited the use of certain unsolicited telemarketing media that had become popular within the industry.[8] While the TCPA makes no mention of text messages,[9] the FCC, under Congress's express authority, extended that prohibition to unsolicited text messages.[10] Additionally, the TCPA provides a private right of action in federal court to consumers who fall victim to unsolicited telemarketing practices.[11] However, the mere fact that Congress provides a statutory remedy does not automatically necessitate the conclusion that

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5. *See* Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017); Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85 (2d Cir. 2019); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458 (7th Cir. 2020); Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019); Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021).

6. *See generally* Walt Hickey, *Experts say the "tsunami" of robotexts is only just the beginning, but you can stop companies from spamming your text messages*, BUS. INSIDER (Sept. 1, 2021, 7:08 AM), https://www.businessinsider.com/text-spam-how-to-stop-automatic-messages-why-it-happens-2021-9 [https://perma.cc/Q799-XDMR] [hereinafter Hickey, *Robotexts*]; Walt Hickey, *THE ANNOYANCE ENGINE: Spam robocalls became profitable scams by exploiting the phone system, but you can stop them*, BUS. INSIDER MEX. (Mar. 3, 2021, 8:03 AM), https://businessinsider.mx/the-annoyance-engine-spam-robocalls-became-profitable-scams-by-exploiting-the-phone-system-but-you-can-stop-them-2/ [https://perma.cc/GGE2-S3ZA] [hereinafter Hickey, *THE ANNOYANCE ENGINE*].

7. *See generally* Hickey, *Robotexts*, *supra* note 6; Hickey, *THE ANNOYANCE ENGINE*, *supra* note 6.

8. S. REP. NO. 102-178, at 1 (1991); *see* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227.

9. The first SMS text message was sent a year later in 1992. *See 25 years since the world's first text message*, VODAFONE (Dec. 4, 2017), https://www.vodafone.com/news/technology/25-anniversary-text-message [https://perma.cc/4DJC-87QX].

10. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 17 FCC Record 14113, 165 (2003) [hereinafter *2003 FCC Order*]; *see generally* 47 U.S.C. § 227(b)(2) (outlining the scope of the FCC's regulatory and rulemaking authority).

11. *See* 47 U.S.C. § 227(b)(3).

*all* who allege a harm under the statutory violation will prevail in their suits.[12]

To bring suit in federal court, a plaintiff must have Article III standing under the United States Constitution.[13] To confer Article III standing, a plaintiff must allege a concrete injury in fact, which is fairly traceable to the challenged action of the defendant and will likely be redressed by a favorable decision.[14] Whether the plaintiff has suffered a concrete injury in fact, the "first and foremost" requirement of the Article III standing analysis, is the chief inquiry for present purposes.[15] Concrete injuries need not be tangible or physically perceptible.[16] Rather, alleged intangible injuries, like the receipt of a single text message, can also be concrete.[17] In *Spokeo v. Robins*, the United States Supreme Court instructed courts presented with an intangible injury to look to: (1) Congress's judgment, which might more appropriately be classified as legislative intent; and (2) whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as a basis for a lawsuit in English or American courts.[18]

In a string of recent TCPA cases, a number of federal circuit courts employed the *Spokeo* analysis to determine whether receiving unsolicited text messages in general was a sufficiently concrete enough injury in fact to confer Article III standing under the TCPA.[19] In all of these cases, the answer was *yes*.[20] More recently, however, the issue became a bit more specific: whether the receipt of a *single* unsolicited text message is a sufficiently concrete injury in fact to establish Article III standing under

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12. Lujan v. Defs. of Wildlife, 504 U.S. 555, 578 (1992) (citing Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

13. *See* U.S. CONST. art. III, § 2, cl. 1 (restricting federal jurisdiction to "cases" and "controversies").

14. *See Lujan*, 504 U.S. at 555.

15. Steel Co. v. Citizens for Better Env't, 523 U.S. 83, 103 (1998) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)) ("First and foremost, there must be alleged . . . an 'injury in fact'–a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not "conjectural" or "hypothetical."'").

16. Spokeo, Inc. v. Robins, 578 U.S. 330, 340 (2016).

17. *See id.*; *see also* Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021) (holding that a single text message is a sufficient intangible injury to confer Article III standing).

18. *Id.* at 340–41.

19. *See* Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017); Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85 (2d Cir. 2019); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458 (7th Cir. 2020).

20. *Van Patten*, 847 F.3d at 1049; *Melito*, 923 F.3d at 95; *Gadelhak*, 950 F.3d at 463.

the TCPA.[21] Only two federal circuit courts of appeals addressed this precise question.[22] While both courts applied the *Spokeo* analysis, each court reached a different conclusion.[23] In *Salcedo v. Hanna*, the Eleventh Circuit answered in the negative and held that a plaintiff's receipt of only a single unsolicited text message *was not* sufficient to confer Article III standing.[24] More recently, in *Cranor v. 5 Star Nutrition*, the Fifth Circuit reached the contrary conclusion—a single unsolicited text message *was* sufficient to confer Article III standing.[25]

When analyzing this issue under a proper *Spokeo* analysis, with proper weight given to Congress's legislative judgment and traditional common-law tort theories, a single text message does not create a sufficiently concrete enough injury in fact to establish Article III standing. Under the legislative judgment prong of *Spokeo*, Congress expressly delegated authority to the FCC to implement and regulate the prohibitions within the TCPA.[26] In accordance with the Supreme Court's steadfast attitude towards agency deference,[27] courts should defer to the FCC's determination that unsolicited text messages are to be treated synonymously with unsolicited phone calls, which the TCPA expressly prohibits.[28] Thus, the first prong of *Spokeo* is satisfied; however, *Spokeo*'s second prong—whether the harm has a close relationship to a harm that

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21. *See* Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019); *Cranor*, 998 F.3d 686.

22. *Id.*

23. *Compare Salcedo*, 936 F.3d at 1163 (holding that one unsolicited text message was insufficient to confer Article III standing), *with Cranor*, 998 F.3d at 686 (holding that one unsolicited text message was sufficient to confer Article III standing).

24. *Salcedo*, 936 F.3d at 1163.

25. *Cranor*, 998 F.3d at 686.

26. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(2) (outlining the scope of the FCC's regulatory and rulemaking authority); Pub. L. No. 102-243, § 2(15), 105 Stat. 2395 ("The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.").

27. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

28. *See 2003 FCC Order*, *supra* note 10, ¶ 165 ("We affirm that under the TCPA, it is unlawful to make *any call* using an automatic telephone dialing system or an artificial or prerecorded message to any wireless telephone number . . . . This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls, provided the call is made to a telephone number assigned to such service.").

was actionable at common law—is not. The traditional common-law theories that have been advanced in federal courts differ so significantly, both quantitatively and qualitatively, that it cannot plausibly be said that receiving a single unsolicited text message has a close relationship to a harm that has traditionally been actionable at common law.[29] As the Eleventh Circuit acknowledged in *Salcedo*, an individual's receipt of a single unsolicited text message is precisely the kind of fleeting infraction that tort law has historically resisted addressing.[30] Thus, because the second prong of *Spokeo* is not satisfied, there is no Article III standing for a plaintiff who receives only a *single* unsolicited text message in violation of the TCPA.

Part I of this Comment provides a thorough overview of the TCPA and Article III standing. Part II discusses federal circuit court decisions pertaining to the TCPA's application to unsolicited text messages. Part III outlines the Eleventh and Fifth Circuit's opinions in *Salcedo v. Hanna* and *Cranor v. 5 Star Nutrition*, respectively. Part IV analyzes and critiques the Eleventh and Fifth Circuits' *Spokeo* analyses. Finally, Part V offers and applies a novel *Spokeo* analysis in light of the circuit split, concluding that a plaintiff does not have Article III standing under the TCPA to bring a claim for a single unsolicited text message.

## I. THE INTERPLAY: THE TCPA AND ARTICLE III STANDING

In 1991, Congress enacted the TCPA in response to the growing number of consumer complaints regarding the use of automated equipment to engage in telemarketing.[31] In its findings, Congress noted that telemarketing sales increased more than four-fold from 1984 to 1991, indicating a sharp rise in the use of telecommunication equipment.[32]

29. *See generally* Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1043 (9th Cir. 2017) ("Actions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right to privacy is recognized in most states."); Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85, 93 (2d Cir. 2019) (discussing traditional common-law theories of intrusion upon seclusion and nuisance); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020) (discussing traditional common-law theory of intrusion upon seclusion); *Salcedo*, 936 F.3d at 1162 (discussing traditional common-law theories of intrusion upon seclusion, trespass, nuisance, conversion, and trespass to chattels); *Cranor*, 998 F.3d at 686 (discussing the traditional common-law theory of public nuisance).

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

31. S. REP. NO. 102-178, at 1 (1991).

32. Pub. L. No. 102-243, § 2(4), 105 Stat. 2394.

Congress reasoned that the rise in the use of such equipment increased the number of consumer complaints.[33] Generally, the complainants believed that unsolicited telemarketing was a nuisance and an invasion of privacy.[34] Thus, the avowed purpose of Congress's enactment of the TCPA was to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home, and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers."[35] To achieve this purpose, Congress set out a comprehensive legislative scheme to alleviate consumer concerns.

A few specific characteristics of the TCPA are noteworthy for the purposes of this Comment. First, Congress designated the FCC as the regulating body of the TCPA.[36] As such, the FCC has express authority to "prescribe regulations to implement the requirements" of the TCPA.[37] Second, on its face, the TCPA not only prohibits the use of certain media to engage in unsolicited telemarketing but also provides a private right of action for a person or entity to recover for violations under the Act.[38] Thus, a person or entity alleging a violation under the TCPA is entitled to bring an action to seek an injunction, recover for actual monetary loss, or seek $500 in damages for each violation.[39] Third, and perhaps most important, as it is currently written, the TCPA is silent with respect to text messages.[40] However, the FCC, as the regulating body of the TCPA and through its rulemaking authority, has provided that text messages are to be treated synonymously with phone calls, which *are* among the listed telemarketing media prohibited by the TCPA.[41] Thus, although Congress itself has not explicitly added text messaging to the list of prohibited telemarketing

33. S. REP. NO. 102-178, at 1 (1991).

34. *Id.* at 2.

35. *Id.* at 1.

36. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(2).

37. *Id.*

38. *See id.* § 227. It should also be noted that two other mechanisms exist for enforcing violations under the TCPA. The attorney general of a state may bring an action when there is reason to believe that a person has engaged in or is currently engaging in "a pattern or practice of telephone calls or other transmissions" to residents of that state. *Id.* § 227(g)(1). Additionally, the FCC may enforce monetary forfeiture penalties against individuals and entities that violate the TCPA. Spencer W. Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 358 (2014) (citing 47 U.S.C. § 503 (2012)).

39. 47 U.S.C. § 227(b)(3).

40. *See id.* § 227.

41. *2003 FCC Order*, *supra* note 10, ¶ 165; *see* 47 U.S.C. § 227(b)(1).

media in the TCPA, the FCC has extended this prohibition to text messages.[42]

Among other things, the TCPA prohibits calls using automatic telephone dialing systems or artificial or prerecorded voices to any telephone number assigned to a "paging service, cellular telephone service . . . or any service for which the called party is charged for the call . . . ."[43] An automatic telephone dialing system is one that has the capacity to store or produce telephone numbers to be called using a random or sequential number generator to dial such numbers.[44] Thus, an unsolicited phone call from an individual who *manually* dials each phone number and does not use an artificial or prerecorded voice does not violate the TCPA.[45] Aside from robocalls, the TCPA also prohibits the use of fax machines to send unsolicited advertisements unless the sender has an established relationship with the recipient or has received the number of the fax machine through the voluntary communication of the number.[46] The TCPA's protections on fax machines also provide an exemption for recipients who have voluntarily agreed to make their numbers available in a directory, advertisement, or internet site.[47] Simply stated, an individual can establish a facially sufficient complaint under the TCPA by proving that he or she: (1) received a fax machine message or a phone call using an automatic telephone dialing system or prerecorded voice;[48] and (2) did not consent to receiving the unsolicited communication.[49]

Although a person or entity alleging a violation in federal court may have a facially sufficient complaint under the TCPA, the person or entity must also have standing to bring such a complaint under Article III of the United States Constitution.[50] The pinnacle case for the constitutional

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42. *2003 FCC Order*, *supra* note 10, ¶ 165.

43. 47 U.S.C. § 227(b)(1)(A)(iii).

44. *Id.* § 227(a)(1).

45. *See* Caroline Stephens, *Political Robocalls: Let Freedom Ring*, 69 ALA. L. REV. 19, 25 (2018) (distinguishing manually dialing each phone number from use of automatic telephone dialing system).

46. 47 U.S.C. § 227(b)(1)(C).

47. *Id.*

48. Again, a text message also falls within the TCPA's definition of the term *call*, and, consequently, receiving an unsolicited text message establishes a facially sufficient complaint, just like the receipt of phone calls or fax messages. *2003 FCC Order*, *supra* note 10, ¶ 165.

49. *See* 47 U.S.C. § 227(b).

50. *See* U.S. CONST. art. III, § 2, cl. 1. The text of Article III does not explicitly mention the term *standing*. The concept is rooted in the federal judiciary's limited authority to hear cases and controversies. *Id.*; *see* Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc., 454 U.S.

requirement of standing is *Lujan v. Defenders of Wildlife* in which the Supreme Court identified three elements which, when satisfied, establish the "irreducible constitutional minimum" that is Article III standing.[51] In accordance with *Lujan*, a plaintiff bears the burden of proving: (1) an injury in fact; (2) which is fairly traceable to the challenged action of the defendant; and (3) which will likely be redressed by a favorable decision.[52] It is the first element, injury in fact, that stands at the center of this inquiry. Specifically, the question is whether a plaintiff who receives a *single* unsolicited text message has suffered a cognizable, concrete injury in fact to confer Article III standing under the TCPA.

### *A. Injuries in Fact, Defined*

Justice Antonin Scalia, writing for the majority in *Lujan*, defined *injury in fact* as an invasion of a legally protected interest, which is "concrete and particularized," actual or imminent, and not conjectural or hypothetical.[53] Importantly for present purposes, the Court also spoke directly to cases where Congress has explicitly provided a private right of action in a statute.[54] According to Scalia, Congress's broadening of the categories of injury that may be alleged in support of standing is an entirely different matter from abandoning the requirement that plaintiffs must have suffered an injury themselves.[55] In other words, an act of Congress that creates a statutory right and a private right of action does not necessarily create Article III standing.[56] A plaintiff who does not suffer any real, concrete harm may not then allege a bare procedural violation and satisfy the injury-in-fact requirement of Article III.[57]

For example, suppose that after finding that Chemical X posed a serious and severe risk to human health, Congress passed a federal statute that prohibited any business in the United States from buying, selling, or distributing Chemical X. Not only did Congress prohibit those uses of Chemical X, but it also provided a right of action for citizens to recover for violations under the statute. As he is walking to work one day, John spots a local business unloading thirty-gallon drums, marked with the title

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464, 471 (1982) ("Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'").

51. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992).
52. *Id.* at 560–61.
53. *Id.* at 560.
54. *Id.* at 578.
55. *Id.* (quoting Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).
56. Salcedo v. Hanna, 936 F.3d 1162, 1167 (11th Cir. 2019).
57. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

"Chemical X," from the bed of a pickup truck. John immediately calls his lawyer with instructions to file a suit in the Moot District Court. John does not allege that he has suffered any injury or that he has been harmed in any way. Unfortunately for John, the local business's bare statutory violation, devoid of any real harm, is insufficient to confer Article III standing.[58]

### *B. Concreteness: Intangible Harms & The* Spokeo *Effect*

Recall that *Lujan* requires an injury in fact to be concrete and particularized to establish Article III standing.[59] The most extensive analysis of this requirement came from the Supreme Court's opinion in *Spokeo v. Robins*.[60] The Court noted that these two terms, although conflated by the lower court, are actually two distinct, separate tests.[61] Writing for the majority, Justice Samuel Alito stressed that the requirement was two-fold—the alleged injury must be both concrete *and* particularized.[62] For an injury to be particularized, it must affect the plaintiff in a personal and individual way.[63] Additionally, for an injury to be concrete, it must *actually exist* and should be *real* in the sense that it is not abstract.[64]

*Spokeo* also spoke to another crucial facet of the standing analysis—a concrete injury need not be a tangible injury.[65] Although courts traditionally envision physical harm or financial loss as constituting tangible injuries, the Supreme Court has clarified that the injury does not need to be physically perceivable to be concrete.[66] Intangible injuries, like wasted time or aggravation, can also be concrete.[67] Given the arduous task that would almost certainly plague the lower courts in deciding whether an intangible harm is sufficiently concrete, Justice Alito concluded that courts should look to history and Congress's judgment to determine if an intangible harm meets the concreteness standard.[68] The doctrine of

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58. *See id.* (holding that a plaintiff could not "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III").
59. *See* discussion *supra* Part I.
60. *See Spokeo*, 578 U.S. at 330.
61. *Id.* at 340.
62. *Id.*
63. *Id.* at 339.
64. *Id.* at 340.
65. *Id.*
66. *See id.*
67. *Id.*
68. *Id.*

standing is grounded in historical practice, and, therefore, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as a basis for a lawsuit in English or American courts.[69] Additionally, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.[70] However, as previously noted, a statute that grants an individual a statutory right to bring suit does not automatically satisfy the injury-in-fact requirement.[71] For example, a plaintiff could not "allege a bare procedural violation, divorced from any concrete harm" and still satisfy the injury-in-fact requirement of Article III.[72]

In sum, *Spokeo* provides a two-pronged test for determining whether an intangible harm satisfies the concreteness requirement.[73] A court must look to both Congress's judgment and whether the alleged intangible harm has a close relationship to a harm that has traditionally been regarded as a basis for a lawsuit at common law.[74] This framework is properly applied to any and all cases where an intangible harm has been alleged to establish Article III standing.[75] Courts routinely classify the receipt of a text message as an intangible harm, and, thus, there is little dispute that the *Spokeo* analysis is controlling in this area of law.[76]

## II. TCPA SUITS IN LIGHT OF *SPOKEO*

In the wake of *Spokeo*, multiple federal circuit courts attempted to apply the newfound two-pronged test.[77] Courts first applied the framework to cases where the plaintiff received multiple unsolicited telemarketing

69. *Id.* at 340–41.
70. *Id.* at 341.
71. *Id.*; *see* discussion *supra* Part I.
72. *Spokeo*, 578 U.S. at 341.
73. *See id.* at 340.
74. *Id.*
75. *See id.* ("In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.").
76. *See generally, e.g.*, Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017); Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85 (2d Cir. 2019); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458 (7th Cir. 2020); Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019); Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021).
77. *See, e.g.*, *Van Patten*, 847 F.3d at 1042–43; *Melito*, 923 F.3d at 92–95; *Gadelhak*, 950 F.3d at 462–63; *Salcedo*, 936 F.3d at 1168–73; *Cranor*, 998 F.3d at 690–93.

text messages.[78] In those cases, the question was simply whether receiving unsolicited text messages in general was sufficient to establish Article III standing, and the federal circuits answered in the affirmative. In the cases that follow, the receipt of multiple unsolicited text messages was a sufficiently concrete injury in fact to confer Article III standing under the TCPA.[79]

### *A. Ninth Circuit:* Van Patten v. Vertical Fitness Group

The first federal circuit court to apply the *Spokeo* framework to unsolicited text messages was the Ninth Circuit in *Van Patten v. Vertical Fitness Group* in which a fitness gym's marketing partner sent the plaintiff two unsolicited text messages.[80] The court began by acknowledging *Spokeo*'s declaration that Article III standing requires a concrete injury even in the context of a statutory violation.[81] With this in mind, the Ninth Circuit employed its own analysis under the two-prong *Spokeo* test.[82] Eventually, the Ninth Circuit held that a plaintiff who receives two unsolicited telemarketing text messages has alleged a sufficiently concrete injury in fact to establish Article III standing.[83]

#### *1. The Ninth Circuit's Analysis of the First Prong: Congressional Judgment*

In the Ninth Circuit's view, Congress's enactment of the TCPA focused specifically on protecting consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax messages.[84] In fact, the court stated that unsolicited telemarketing text messages present the exact harm and infringe on the same privacy interests that Congress sought to protect when it enacted the TCPA.[85] The court acknowledged that the FCC had interpreted the TCPA's prohibitions to encompass both voice calls and text messages but did not find that to be

78. *See Van Patten*, 847 F.3d at 1042–43; *Melito*, 923 F.3d at 92–95; *Gadelhak*, 950 F.3d at 462–63.

79. *See Van Patten*, 847 F.3d at 1043; *Melito*, 923 F.3d at 95; *Gadelhak*, 950 F.3d at 463.

80. *Van Patten*, 847 F.3d at 1041.

81. *Id.* at 1042.

82. *Id.* at 1042–43.

83. *Id.* at 1043.

84. *Id.* at 1042.

85. *Id.* at 1043.

determinative.[86] Instead, the court concluded that Congress itself had identified unsolicited contact as a concrete harm and, furthermore, gave consumers a means to redress that harm.[87] Thus, the first prong of *Spokeo* was satisfied.[88]

*2. The Ninth Circuit's Analysis of the Second Prong: Close Relationship to a Traditional Harm at Common Law*

Turning to the second prong, the court noted that American courts have traditionally heard actions to alleviate a defendant's concerns of invasions of privacy and nuisance.[89] Furthermore, the court stated that the right to privacy is recognized in most states.[90] Therefore, the Ninth Circuit concluded that receiving two unsolicited text messages constituted a sufficiently concrete injury in fact, which then provided the plaintiff with Article III standing.[91]

*B. Second Circuit:* Melito v. Experian Marketing Solutions, Inc.

A little over two years later in *Melito v. Experian Marketing Solutions, Inc.*, the Second Circuit employed its own *Spokeo* analysis.[92] In a putative class-action lawsuit, the plaintiffs alleged that they received unsolicited telemarketing text messages from American Eagle.[93] They did not allege any additional injury beyond the receipt of those text messages.[94] The Second Circuit found that a plaintiff's receipt of multiple unsolicited text messages in violation of the TCPA was enough to confer standing under Article III.[95]

86. *Id.* at 1041–42.
87. *Id.* at 1043.
88. *Id.*
89. *Id.*
90. *Id.* (citing Restatement (Second) of Torts § 652(B) (Am. L. Inst. 1977)).
91. *Id.*
92. Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85, 93 (2d Cir. 2019).
93. *Id.* at 87. The court did not state exactly how many text messages each member of the class received, but the court inferred that each member received multiple text messages, exemplified by the reference to text *messages* and not a text *message*. *See id.* ("Plaintiffs allege that [the defendant] sent spam text messages to their phones . . . .").
94. *Id.*
95. *Id.* at 95.

*1. The Second Circuit's Analysis of the First Prong: Congressional Judgment*

With respect to the congressional intent prong, the court followed its sister circuit in *Van Patten* and found that unsolicited 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" concerns that Congress envisioned when it enacted the TCPA.[96] In other words, the plaintiffs alleged the exact injury that the TCPA was enacted to prevent.[97] Like the Ninth Circuit in *Van Patten*, the Second Circuit acknowledged the FCC's interpretation that text messages should be treated the same as phone calls, but its holding focused more specifically on Congress's exact concerns when it enacted the TCPA.[98] Thus, the first prong of *Spokeo* was satisfied.[99]

*2. The Second Circuit's Analysis of the Second Prong: Close Relationship to a Traditional Harm at Common Law*

The court also concluded that the second prong of the analysis was satisfied, reasoning that the harms Congress sought to alleviate by passing the TCPA closely relate to traditional tort claims, including claims for invasion of privacy, intrusion upon seclusion, and nuisance.[100] The court discussed neither the specific historical characteristics of those theories nor how those characteristics might apply to the facts at bar.[101] Instead, the Second Circuit relied exclusively on circuit court precedent.[102] The court found no reason to diverge from its sister circuits only because neither defendant "meaningfully contend[ed] otherwise."[103] Concluding, the Second Circuit held that both of the *Spokeo* prongs were satisfied and that the plaintiffs had successfully alleged a concrete injury in fact to confer Article III standing.[104]

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96. *Id.* at 93.
97. *Id.*
98. *Id.* at 88.
99. *Id.* at 93.
100. *Id.* (citing Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1043 (9th Cir. 2017); Susinno v. Work Out World Inc., 862 F.3d 346, 351 (3d Cir. 2017)).
101. *See id.*
102. *Id.* (citing *Van Patten*, 847 F.3d at 1043; *Susinno*, 862 F.3d at 351).
103. *Id.*
104. *Id.* at 94.

### *C. Seventh Circuit:* Gadelhak v. AT&T Services, Inc.

A little less than a year after the Second Circuit decided *Melito*, the Seventh Circuit decided *Gadelhak v. AT&T Services, Inc.*[105] In *Gadelhak*, AT&T sent five text messages to the plaintiff asking customer service survey questions in Spanish.[106] The plaintiff was not a customer of the defendant and did not speak Spanish.[107] Annoyed by the messages, he subsequently filed a putative class action against the defendant for violating the provisions of the TCPA.[108] Before actually applying the *Spokeo* framework, the Seventh Circuit noted that neither of the parties had actually contested the standing issue but that it was the court's obligation to confirm jurisdiction before adjudicating the issue at hand.[109] After analyzing both prongs of *Spokeo*, the Seventh Circuit, like its sister circuits, held that Article III standing was established for a plaintiff whose alleged injury was the receipt of five unsolicited telemarketing text messages.[110]

#### *1. The Seventh Circuit's Analysis of the First Prong: Congressional Judgment*

Like the Second and Ninth Circuits, the Seventh Circuit concluded that the receipt of unwanted text messages was the very harm that Congress sought to prevent when it enacted the TCPA.[111] The court acknowledged that although Congress cannot transform a non-injury into an injury by a simple declaration, this was not the case with respect to the TCPA's prohibitions.[112] In this case, the court stated that Congress identified a relative of a harm that has traditional common-law roots, and the plaintiff claimed to have suffered the exact harm that Congress sought to prevent under the TCPA.[113] Unlike the Ninth and Second Circuits in *Van Patten* and *Melito*, the Seventh Circuit refrained from even recognizing the FCC's determination that phone calls and text messages

105. *See* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462–63 (7th Cir. 2020) (applying the *Spokeo* framework).
106. *Id.* at 460.
107. *Id.*
108. *Id.*
109. *Id.* at 461.
110. *Id.* at 463.
111. *Id.* at 462.
112. *Id.*
113. *Id.*

are to be treated synonymously.[114] In any case, because the plaintiff here claimed to have suffered the precise harm Congress designed the TCPA to prevent, the Seventh Circuit held that the first prong of *Spokeo* was satisfied.[115]

*2. The Seventh Circuit's Analysis of the Second Prong: Close Relationship to a Traditional Harm at Common Law*

Additionally, the court concluded that an individual's receipt of five text messages had a close relationship to the traditional common-law tort of intrusion upon seclusion, which involves an invasion of privacy.[116] According to the Seventh Circuit, courts have recognized liability for intrusion upon seclusion for irritating intrusions like the one the plaintiff allegedly suffered in this case.[117] Thus, the harm posed by multiple unwanted text messages was analogous to an invasion of privacy.[118] To be clear, the court emphasized that *Spokeo* instructs courts to look for a close relationship to a traditional common-law harm in kind, not degree.[119] While the common law offers guidance, it does not stake out the limits of Congress's power to identify potential harms that are deserving of a remedy.[120] In other words, five unwanted telemarketing text messages may be too minor of an annoyance to be actionable at common law, but those text messages pose the same *kind* of harm that common-law courts recognize.[121] Accordingly, both prongs of *Spokeo* were satisfied, and the plaintiff's receipt of five unsolicited telemarketing text messages was sufficient to establish Article III standing.[122]

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114. *See id.*
115. *Id.*
116. *Id.* (citing Restatement (Second) of Torts § 652(B) (Am. L. Inst. 1977)).
117. *Id.*
118. *Id.*
119. *Id.* (citing Spokeo, Inc. v. Robbins, 578 U.S. 330, 340–41 (2016)) (addressing the Eleventh Circuit's opinion in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019)).
120. *Id.* at 462–63.
121. *Id.* at 463 (citing Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1043 (9th Cir. 2017)).
122. *Id.*

### *D. The Result: Uniformity for the Receipt of Multiple Unsolicited Text Messages in Violation of the TCPA*

Importantly, *Van Patten*, *Melito*, and *Gadelhak* all dealt with a plaintiff's receipt of more than one text message and the alleged harm that resulted.[123] Thus, for any individual who filed suit within the jurisdiction of the Second, Seventh, or Ninth Circuits, there remained no question that receiving more than one unsolicited text message was sufficient to establish Article III standing. Although the circuits agree that Article III standing attaches to a plaintiff who receives multiple unsolicited text messages in violation of the TCPA, the result is not as clear when the alleged injury is the receipt of only a *single* unsolicited text message.[124]

## III. THE CIRCUIT SPLIT: COMPETING RATIONALES IN *SALCEDO* AND *CRANOR*

The Fifth and Eleventh Circuits are the only federal circuit courts that have opined on the issue of a plaintiff receiving a single unsolicited text message.[125] Both courts attempted to answer a single question: whether a plaintiff has Article III standing under the TCPA when the alleged harm is only the receipt of a *single* unsolicited text message.[126] Given the contrasting holdings by each court, a plaintiff who files suit in a Louisiana federal court under the purview of the Fifth Circuit will be afforded different treatment than a plaintiff who files the exact same suit, alleging the exact same harm, in a Florida federal court under the jurisdiction of the Eleventh Circuit.

### *A. Eleventh Circuit:* Salcedo v. Hanna

In *Salcedo v. Hanna*, John Salcedo, a former client of a Florida attorney, received a *single* text message from the attorney offering a ten

123. *See Van Patten*, 847 F.3d at 1037; Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85 (2d Cir. 2019); *see also Gadelhak*, 950 F.3d at 458.

124. *Compare Salcedo*, 936 F.3d at 1173 (holding that single text message is insufficient to confer Article III standing), *with* Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 693 (5th Cir. 2021) (holding that a single text message is sufficient to establish Article III standing).

125. *Compare Salcedo*, 936 F.3d at 1173 (holding that single text message is insufficient to confer Article III standing), *with Cranor*, 998 F.3d at 693 (holding that a single text message is sufficient to establish Article III standing).

126. *See Salcedo*, 936 F.3d at 1162; *see also Cranor*, 998 F.3d at 686.

percent discount on his services.[127] Shortly thereafter, he filed suit under the TCPA in federal district court as the representative of a putative class of former clients who received unsolicited text messages from the attorney over the prior four years.[128] Hanna moved to dismiss the complaint for lack of standing, but the district court disagreed and denied the motion.[129] On appeal, the Eleventh Circuit used the *Spokeo* framework to assess whether the plaintiff had alleged a sufficiently concrete injury in fact to establish Article III standing.[130]

*1. The Eleventh Circuit's Analysis of the First Prong: Congressional Judgment*

Under the first prong in the *Spokeo* analysis, the Eleventh Circuit acknowledged that Congress amended the TCPA several times since its inception without specifically adding text messages to the categories of restricted telemarketing media.[131] Furthermore, it was not Congress but the FCC that extended the TCPA's restrictions to text messages.[132] The FCC's interpretation of the TCPA, in other words, is not relevant where the Supreme Court in *Spokeo* specifically instructed courts to look at *Congress*'s judgment.[133]

The Eleventh Circuit went even further by stating that "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."[134] Looking to the legislative findings, the Eleventh Circuit found that in enacting the TCPA, Congress was concerned about privacy within the sanctity of the home, which does not necessarily apply to text messaging.[135] Cell phones, for instance, are often taken outside of the home and usually have their ringers silenced.[136] By nature of their portability and their ability to be silenced, calls to a cell phone may involve a lesser intrusion than calls to home

127. *Salcedo*, 936 F.3d at 1165.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 1169.
132. *Id.* ("At most, we could take Congress's silence as tacit approval of that agency action.").
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*

phones.[137] The court even acknowledged that Congress could not have foreseen the explosion in the popularity of text messages as a preferred medium of communication. However, the Eleventh Circuit ultimately concluded that *Spokeo* instructs courts to consider the judgment of Congress about the alleged harm, not to theorize what Congress might say about a harm it has not actually addressed.[138] According to the Eleventh Circuit, Congress's judgment, therefore, provided little support for finding that the plaintiffs alleged a concrete injury in fact, and, thus, the first prong of *Spokeo* was not satisfied.[139]

*2. The Eleventh Circuit's Analysis of the Second Prong: Close Relationship to a Traditional Harm at Common Law*

Judge Branch, writing for the majority, also determined that the second prong of the *Spokeo* analysis was not satisfied.[140] To start, the Eleventh Circuit analyzed whether Salcedo had suffered a traditional harm under the accepted tort of intrusion upon seclusion, which requires an intrusion upon the solitude of another person or their private affairs or concerns.[141] Although Salcedo argued that his cell phone was part of his private affairs, the court determined that the Second Restatement's definition contemplates a different category of intrusion into one's private affairs.[142] For example, the Restatement lists examples that include eavesdropping, wiretapping, and looking through one's personal documents, all of which were fundamentally different from the harm that occurred in the case.[143]

Alternatively, Salcedo argued that the harm he suffered was analogous to the traditional common-law torts of trespass and nuisance,[144] both of

137. *Id.* at 1170.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 1171 (citing Restatement (Second) of Torts § 652(B) (Am. L. Inst. 1977)).
142. *Id.* at 1170–71 (citing Restatement (Second) of Torts § 652(B) (Am. L. Inst. 1977)) (Intrusion upon seclusion creates liability for invasions of privacy that would be "highly offensive to a reasonable person.").
143. *Id.* at 1171.
144. Notably, the court only discussed private nuisance, which differs fundamentally from public nuisance. *See id.*; *see also* Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 693 (5th Cir. 2021) (noting the *Salcedo* court did not address "public nuisance").

which involve an invasion of real property.[145] The Eleventh Circuit stated that Salcedo had not alleged an invasion of any interest in real property, and, therefore, the defendant's conduct was "not closely related to these traditional harms because it [was] not alleged to have infringed upon Salcedo's real property, either directly or indirectly."[146] In other words, because Salcedo's cell phone does not fit within the definition of "real property," a close relationship with trespass and nuisance could not be established.

Finally, Salcedo asked the court to consider the personal property torts of conversion and trespass to chattels, liability for which arises only from an interference or depravation of property for an extended period of time.[147] Citing the Restatement, the court quickly brushed aside these theories as well, noting that although his allegations bore a passing resemblance to these kinds of historical harms, the allegations differed so significantly in degree so as to undermine his position.[148] Common-law conversion, for example, requires an interference with property so substantial that it seriously interferes with another person's right to control it.[149] The plaintiff's allegations were nowhere near a "complete and permanent dominion" over his cell phone, and, thus, this theory was inapplicable.[150] Trespass to chattels, by contrast, involves intentionally using property that is in the possession of someone else.[151] Traditionally, liability for trespass to chattels arises only when the possessor of the property is deprived of the use of the chattel for a substantial period of time and the trespasser physically touches the property.[152] Neither of these requirements are satisfied in the case of the receipt of a single text message.[153]

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145. *Salcedo*, 936 F.3d at 1171. *Real property* is defined by Black's Law Dictionary as "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *Real property*, BLACK'S LAW DICTIONARY (11th ed. 2019).

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

147. *Id.* at 1171–72.

148. *Id.* at 1172.

149. *Id.* at 1171 (citing Restatement (Second) of Torts § 222(A) (Am. L. Inst. 1965)).

150. *Id.*

151. *Id.* at 1171–72 (citing Restatement (Second) of Torts § 217(B) (Am. L. Inst. 1965)).

152. *Id.* at 1172 (citing Restatement (Second) of Torts § 217(B) (Am L. Inst. 1965); United States v. Jones, 565 U.S. 400, 426 (2012)).

153. *Id.*

The Eleventh Circuit concluded that Salcedo's allegations were "precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing."[154] Since neither prong of the *Spokeo* analysis was satisfied, the plaintiff's receipt of a single text message was not sufficient to confer Article III standing under the TCPA.[155] In the court's words: "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 waved in one's face."[156] Perhaps the receipt of a single unsolicited text message is an annoyance, but it is not a sufficient basis for invoking jurisdiction in federal court.[157]

Following its *Spokeo* analysis, the court noted the opposite conclusion the Ninth Circuit reached in *Van Patten*.[158] In so doing, it criticized the relatively brief and simplistic rationale the Ninth Circuit used to support the assertion that receiving unsolicited text messages had a close relationship to intrusion upon seclusion and nuisance.[159] A thorough examination of these torts, as the Eleventh Circuit stated, revealed significant differences in the kind and degree of harm that Congress contemplated when it enacted the TCPA.[160] The court found that neither *Spokeo* prong was satisfied, and as a result, the plaintiff's receipt of a single text message was not a sufficiently concrete injury in fact to establish Article III standing.[161]

### *B. Fifth Circuit:* Cranor v. 5 Star Nutrition

Following *Salcedo*, the issue appeared to be resolved—while a plaintiff who received multiple unsolicited text messages in violation of the TCPA was able to establish standing,[162] a plaintiff who received only a single text message was not.[163] Unfortunately, the resolution was short-lived. In the most recent case testing the interplay between the TCPA and Article III standing, the Fifth Circuit created a dreaded circuit split in *Cranor v. 5 Star Nutrition*.[164]

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154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.* at 1173.
162. *See* discussion *supra* Part II.A–D.
163. *See Salcedo*, 936 F.3d at 1173.
164. *See* Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 693 (5th Cir. 2021).

In *Cranor*, the plaintiff made a purchase at the defendant 5 Star's store and provided 5 Star with his cell phone number at some point during the transaction.[165] In the months that followed, he received two text messages from 5 Star to which he responded with a "STOP" request.[166] A dispute ensued, and both parties entered into a settlement agreement to avoid litigation.[167] In accordance with the terms of the settlement agreement, both parties waived all causes of action, claims, or counterclaims that related to the receipt of the two text messages.[168] However, after the settlement agreement was executed, 5 Star sent yet *another* unsolicited telemarketing text to Cranor.[169] Cranor responded once more with a "STOP" request but this time filed a class action complaint in the Western District of Texas, alleging TCPA violations on behalf of himself and others who, like him, received 5 Star's *singular* unsolicited telemarketing text message.[170]

*1. The Fifth Circuit's Analysis of the First Prong: Congressional Judgment*

The Fifth Circuit began its analysis by acknowledging that, in enacting the TCPA, Congress found that unrestricted telemarketing can be an intrusive invasion of privacy and a nuisance.[171] As this was the case, the court had to strike a balance between an individual's privacy rights, public safety interests, and commercial freedoms of speech and trade.[172] The court noted that, in Congress's view, the only way to strike this balance was to place an outright ban on certain types of calls.[173] Given this discussion, the Fifth Circuit concluded that the first prong of the *Spokeo* analysis was satisfied because Cranor's injury was exactly the one Congress sought to remediate in enacting the TCPA.[174]

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165. *Id.* at 686.
166. *Id.* at 688–89.
167. *Id.* at 689.
168. *Id.*
169. *Id.* In total, Cranor received three text messages. The first two were dispensed with by the settlement agreement. *Id.* The last text message discussed here represents an entirely new harm that provides the basis for the suit.
170. Principal Brief of Plaintiff-Appellant at 7, Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021) (No. 19-51173).
171. *Cranor*, 998 F.3d at 690 (citing Pub. L. No. 102-243, § 2, ¶¶ 5, 10, 105 Stat. 2394 (1991)).
172. *Id.* (citing Pub. L. No. 102-243, § 2, ¶¶ 9–10, 105 Stat. 2394 (1991)).
173. *Id.*
174. *Id.*

The court plainly rejected the legislative judgment analysis the Eleventh Circuit gave in *Salcedo* for three reasons.[175] First, the TCPA expressly covers cellular phones.[176] The court reasoned that "[i]f the statute only prohibited nuisances *in the home*," as the Eleventh Circuit concluded, "then it would make little sense to prohibit telemarketing to mobile devices designed for use *outside the home*."[177] Second, the TCPA addresses nuisance and invasion of privacy concerns in a variety of non-residential contexts.[178] For example, the court noted that the TCPA prohibits automated, telephone-dialing-system or prerecorded calls to "any emergency telephone line," "the telephone line of any guest room or patient room of a hospital," or "a paging service."[179] Given that all of these instances occur outside the home, the court concluded that the text of the TCPA shows that Congress sought to remediate nuisance and invasion of privacy in a broader set of circumstances than just in the home.[180] Lastly, the Fifth Circuit expressed that Congress explicitly delegated authority to the FCC to prescribe regulations implementing the TCPA and that no part of this express delegation limits the FCC to consider nuisances and privacy only in the home.[181] Given all of these contentions, the Fifth Circuit concluded that the TCPA could not be read to regulate unsolicited telemarketing only when it affects the home, and, thus, *Spokeo*'s first prong was satisfied.[182]

*2. The Fifth Circuit's Analysis of the Second Prong: Close Relationship to a Traditional Harm at Common Law*

Additionally, the Fifth Circuit concluded that the plaintiff's injury had a close relationship to common-law public nuisance, which it defined as an "unreasonable interference with a right common to the general public."[183] Historically, only the sovereign could remedy a public nuisance and would do so through criminal prosecution and abatement by way of

175. *Id.*
176. *Id.* (citing Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1)(A)(iii) (2018)).
177. *Id.* at 691.
178. *Id.*
179. *Id.* (citing 47 U.S.C. § 227(b)(1)(A) (2018)).
180. *Id.*
181. *Id.* (citing 47 U.S.C. § 227(b)(2) (2018)).
182. *Id.* at 690.
183. *Id.* at 691 (citing Restatement (Second) of Torts § 821(B) (Am. L. Inst. 1979)).

an injunction.[184] However, the court noted, a private citizen could also file suit but only if he or she could show that he or she had suffered damage that was particular to him or her and not shared in common by the rest of the general public.[185]

In the Fifth Circuit's view, Cranor wished to use the nation's telecommunications infrastructure without harassment.[186] The court analogized the plaintiff to an individual who wished to use a piece of infrastructure like a road or a bridge without confronting a malarial pond, obnoxious noises, or disgusting odors.[187] In that same vein, 5 Star was akin to someone who illegally emits pollution or a disease that damages members of the public.[188] Thus, Cranor established an unreasonable interference with a right common to the general public.[189] Furthermore, the Fifth Circuit concluded that Cranor also alleged personal injuries that separated him from the public at large.[190] When Congress enacted the TCPA, it acknowledged that some members of the public may be able to avoid robodialed advertisements; however, not everyone would be able to do so.[191] Cranor alleged that he belonged in the latter group.[192] The court accepted Cranor's factual contention that after receiving the unwanted text, he was prompted to read the message and send a "STOP" request to communicate that he did not wish to continue receiving text messages.[193] Furthermore, the text message depleted the battery life on Cranor's cell phone and used minutes that his telephone service provider allocated to him.[194] Thus, the Fifth Circuit concluded that not only had Cranor alleged an unreasonable interference with a right common to the general public, but he had also alleged injuries that separated him from the general public.[195] Consequently, this was enough to show a close relationship between his injury and an actionable public nuisance at common law.[196]

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184. *Id.* at 692 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 90, at 643 (5th ed. 1984)).

185. *Id.* (citing Soap Corp. of Am. v. Reynolds, 178 F.2d 503, 506 (5th Cir. 1949)).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* (citing Pub. L. No. 102-243, § 2, ¶ 12, 105 Stat. 2394 (1991)).

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* (citing Spokeo, Inc. v. Robins, 578 U.S. 330 (2016)).

The Fifth Circuit also took time to examine the Eleventh Circuit's determination that a plaintiff who receives a single unsolicited text message cannot allege a close relationship to a harm with traditional common-law roots.[197] First, the court found that *Salcedo*'s view of trespass to chattels was substantially narrower than its scope at common law.[198] In historical practice, a trespass was actionable *per se* without any proof of actual damage.[199] In contrast, the law today requires that there be some actual damage to the property before the action can be maintained.[200] Thus, the Fifth Circuit stated that the Eleventh Circuit in *Salcedo* incorrectly mistook the modern Restatement for the eighteenth-century common law.[201] The *Spokeo* second-prong inquiry, in other words, instructs courts to look to the traditional common law rather than the modern common law.[202] Thus, looking at the Restatement for an analysis of trespass to chattels as it stands today is not helpful guidance.[203] Second, the court critiqued *Salcedo*'s focus on the substantiality of the harm in receiving a single text.[204] The inquiry under the second prong of the *Spokeo* analysis, in other words, asks whether an alleged intangible harm *has a close relationship* to a harm that English or American courts have traditionally regarded as a basis for a lawsuit.[205] The inquiry is *not* the point at which that harm becomes actionable.[206] Although the Seventh Circuit in *Gadelhak* originally articulated this principle, the Fifth Circuit reiterated that the *Spokeo* inquiry looks for a close relationship in *kind*, not *degree*.[207] The court complained that *Salcedo*'s rationale threatened to make an already difficult area of the law even more unmanageable and summarily rejected it.[208] In sum, the Fifth Circuit held that both prongs of *Spokeo* were satisfied in the case of a single unsolicited text message, and, thus, the plaintiff had alleged a sufficiently concrete injury in fact to confer Article III standing under the TCPA.[209]

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197. *Id.*
198. *Id.* at 693.
199. *Id.* (citing JOHN W. SALMOND, LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 331 (1907)).
200. *Id.* at 692 (citing United States v. Jones, 565 U.S. 400, 419 n.2 (2012)).
201. *Id.*
202. *See id.*; *see also* Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016).
203. *See Cranor*, 998 F.3d at 693.
204. *Id.*
205. *Id.* at 692 (citing *Spokeo*, 578 U.S. at 340–42).
206. *Id.* at 693.
207. *Id.*
208. *Id.*
209. *Id.*

## IV. THE PROBLEMATIC RATIONALE IN *SALCEDO* AND *CRANOR*

On their face, *Salcedo* and *Cranor* appear to be irreconcilable. Tasked with answering the same legal question, two federal circuit courts of appeals reached conclusions on opposite ends of the spectrum.[210] A thorough reading of both *Salcedo* and *Cranor*, however, reveals that both the Fifth and Eleventh Circuits relied on faulty rationale in reaching their respective conclusions.[211]

### *A. First Prong: Congressional Judgment*

Regarding the first prong, the Eleventh Circuit in *Salcedo* erroneously determined that the TCPA's congressional findings show a concern for privacy only within the sanctity of the home, which does not necessarily apply to cell phone text messaging.[212] In the Eleventh Circuit's view, because cell phones are mobile devices by definition, they present less potential for nuisance and home intrusion.[213] As the Fifth Circuit in *Cranor* correctly noted, the TCPA addresses nuisance and invasions of privacy in a wide variety of contexts that do not involve interferences within the home exclusively.[214] Specifically, the TCPA prohibits the use of automatic telephone dialing systems or pre-recorded calls to any emergency telephone line or the telephone line of a guest or patient room in a hospital.[215] Congress's inclusion of these other non-residential contexts in the TCPA casts the first shadow of doubt on the Eleventh Circuit's reasoning. If courts and legal scholars are to accept the Eleventh Circuit's determination as true, then it would make little sense for Congress to prohibit calls to cellular telephone services at all.[216] As the Fifth Circuit in *Cranor* stated, if the TCPA was enacted to prevent nuisances and

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210. *Compare* Salcedo v. Hanna, 936 F.3d 1162, 1163 (11th Cir. 2019) (holding that one unsolicited text message was insufficient to confer Article III standing), *with Cranor*, 998 F.3d at 686 (holding that one unsolicited text message was sufficient to confer Article III standing).

211. *See id.* at 1163; *see also Cranor*, 998 F.3d at 686.

212. *See Salcedo*, 936 F.3d at 1169 ("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.").

213. *Id.*

214. *Cranor*, 998 F.3d at 691.

215. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1)(A).

216. *See Cranor*, 998 F.3d at 690 (noting that the TCPA expressly covers cellular phones).

invasions of privacy *in the home*, it would make little sense to prohibit telemarketing to mobile devices designed for use *outside the home*.[217]

Although the Fifth Circuit persuasively critiqued certain portions of the Eleventh Circuit's decision in *Salcedo*, this does not imply that its analysis under *Spokeo*'s first prong was free of error. In support of its contention that the TCPA expressly covers cellular phones, the Fifth Circuit stated that the TCPA also includes text messaging in its prohibitions on transmitting false caller ID information.[218] Thus, the Fifth Circuit concluded that Congress intended for text messages to be included among the prohibitions in the TCPA by addressing nuisance and invasion of privacy concerns both inside and outside the home.[219] On its face, this rationale makes sense. However, the fact that the TCPA expressly prohibits text messages in another context casts doubt on Congress's hypothetical intention that unsolicited telemarketing text messages should be prohibited. If Congress intended to prohibit telemarketing text messages, then a prohibition in the telemarketing context would have been a natural addition when it included a prohibition on text messaging in a non-telemarketing context. Instead, the TCPA is completely silent with respect to telemarketing text messages.[220] Even after two amendments and much scholarly discussion, there is still no mention of a TCPA prohibition on unsolicited telemarketing text messages.[221] Obviously then, there has been ample opportunity for Congress to alleviate the uncertainty, but it has expressed hesitation to do so. The text, legislative history, and congressional judgment behind the prohibitions on telemarketing in the TCPA is not dispositive on the issue of unsolicited text messages in general, let alone a *single* unsolicited text message. Thus, a new analysis under *Spokeo*'s first prong is required to reach the right result.

### *B. Second Prong: Close Relationship to a Traditional Harm at Common Law*

If the receipt of a single text message has a close relationship to any traditional common-law tort theory, it is likely public nuisance.[222]

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217. *Id.* at 691.

218. *Id.* at 690–91 (citing 47 U.S.C. § 227(E)(1) (2018)).

219. *Id.* at 691.

220. Salcedo v. Hanna, 936 F.3d 1162, 1169 (11th Cir. 2019); *see* 47 U.S.C. § 227.

221. *See Salcedo*, 936 F.3d at 1166, 1169, 1170, 1173; *see also Cranor*, 998 F.3d at 691.

222. *See Cranor*, 998 F.3d at 691 ("Here, [the plaintiff's] asserted injury has a close relationship to a harm actionable at common law: public nuisance.").

Although the receipt of a single unsolicited text message does not at all fit neatly within the traditional understanding of common-law public nuisance, it fits neatly enough, according to the Fifth Circuit at least, to establish a close relationship to that type of harm.[223] The Eleventh Circuit in *Salcedo* either intentionally or negligently chose not to examine or mention traditional common-law public nuisance.[224] The Eleventh Circuit was correct in that all of the theories advanced differed so strongly in kind and degree that the second prong of *Spokeo* could not be satisfied, but this blanket statement is insufficient.[225] Like the Fifth Circuit in *Cranor*, the Eleventh Circuit in *Salcedo* should have, at the very least, mentioned how common-law public nuisance could or could not have a close relationship to the harm in receiving a single unsolicited telemarketing text message.[226]

However, even the Fifth Circuit's analysis under *Spokeo*'s second prong is misguided for at least two reasons.[227] First, the Fifth Circuit focused broadly on the receipt of unsolicited text messages *in general* rather than the receipt of a *single text message* specifically.[228] Under the somewhat rigid second prong of *Spokeo*, appropriately characterizing the harm that occurs in each case is crucial to determining whether that harm has a close relationship to a theory that has traditionally been actionable at common law.[229] Overgeneralizing the type of harm alleged by a plaintiff might lend credence to the idea that the harm bears a passive resemblance

223. *See id.*

224. *See Salcedo*, 936 F.3d at 1162.

225. *Id.* at 1171–72.

226. *See Cranor*, 998 F.3d at 691 (discussing the traditional common-law theory of public nuisance).

227. *See id.*

228. The court never explicitly stated that its intention was to focus on text messages in general rather than the receipt of only a single text message. However, its analysis of common-law public nuisance reasonably implies that it does not find any distinction. For example, in *Commonwealth v. Allen*, a case cited by the Fifth Circuit in support of its analysis, the Supreme Court of Pennsylvania held that a quarry operator was liable for a public nuisance after obstructing a common highway twice per day over a prolonged period of time. Commonwealth v. Allen, 23 A. 1115, 1116 (Pa. 1892). The Fifth Circuit paid no mind to the express statement in *Allen* that "[t]he running of a traction-engine over a public highway *upon a single occasion* would not constitute a public nuisance." *Id.* at 1116 (emphasis added); *see also Cranor*, 998 F.3d at 691.

229. At least one scholar has pointed out that federal circuit courts have overgeneralized the harm in TCPA cases using the *Spokeo* framework. *See* Mary Love, *You Have One New Message—The Eleventh Circuit Correctly Applies the* Spokeo *Framework to TCPA Claims for Unsolicited Text Messaging*, 73 SMU L. REV. F. 187, 193–94 (2020).

to a traditional common-law theory, but such a conclusion falls short of the close-relationship requirement articulated by the Supreme Court in *Spokeo*.[230] The importance of this determination is best exemplified by the following, rather farcical, example.

Suppose that Jane asks her brother John if she could "throw some rocks at him." In return for partaking in her questionable endeavor, Jane says that she will pay John 20 dollars. John scoffs and responds the way that most would: "of course not." John could be seriously injured, or even killed, all for the meager sum of 20 dollars. Now, imagine that the same dynamic exists. Only this time, in addition to simply asking John if she could "throw some rocks at him" for 20 dollars, Jane reveals the rocks to be ten tiny grains of sand. John accepts, and after being lightly pelted by ten grains of sand, he is 20 dollars richer.

John's answer to Jane turns on the *specific* characterization of his prospective harm. Within this principle lies the fault in *Cranor*'s rationale. Focusing too broadly on the receipt of unsolicited text messages in general undermines the Fifth Circuit's reasoning in a key respect: a harm cannot be said to have a close relationship to a traditional common-law recovery theory unless that harm is defined precisely and accurately.[231]

Second, recall that the Fifth Circuit critiqued the Eleventh Circuit's narrow view of trespass to chattels at common law in *Salcedo*.[232] The Fifth Circuit pointed out the Eleventh Circuit's reliance on the modern, twentieth-century Restatement in finding that trespass to chattels requires proof of some actual damage to the chattel before the action could be maintained.[233] At common law, the Fifth Circuit maintained, trespass to chattels was actionable without any proof of actual damage.[234] Thus, the Fifth Circuit concluded that the Eleventh Circuit in *Salcedo* mistook the "twentieth-century Restatement for the eighteenth-century common law."[235]

Additionally, the Fifth Circuit stated that "[a]n action *might* lie even where . . . the alleged tortfeasor never physically touched the claimant's

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230. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016) ("[I]t 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." (emphasis added)).

231. *See* Love, *supra* note 229, at 193–94 ("[O]vergeneralization of the harm is . . . an incorrect application of [*Spokeo*] . . . .").

232. *Cranor*, 998 F.3d at 693.

233. *Id.*

234. *Id.*

235. *Id.*

property."[236] In support of this assertion, the court relied on John Salmond's treatise, which concluded that "[i]t is *presumably* a trespass willfully to frighten a horse so that it runs away."[237] Neither of these statements are definitive. Instead, the court alludes to a situation where an action *might* lie and cites to a source that concludes that an action is *presumably* a trespass although there is no physical contact.[238] What the court did not address, however, is the authority that directly contradicts these assertions.[239] For example, scholars have noted that under traditional common law, an action for trespass to chattels could be brought only upon an interference with the chattel that is direct and physical.[240] Today, direct and physical contact is no longer required, and a remote interference suffices.[241] Thus, it appears that the Fifth Circuit itself is guilty of mistaking modern legal regimes for the eighteenth-century common law. Consequently, like the first prong, neither of the two circuits adequately applied the second prong of *Spokeo*.

## V. RESOLUTION: THE PROPER *SPOKEO* ANALYSIS

Both the Fifth and Eleventh Circuit's applications of the *Spokeo* framework are insufficient means to two different ends—both courts answered the question presented using a faulty rationale.[242] A proper analysis under *Spokeo*'s first prong in this context does not theorize what Congress may or may not have thought about an alleged intangible harm but instead looks directly at what Congress explicitly determined when it enacted the federal statute. If that determination involves a delegation of power to a federal agency, as it does in the TCPA context, courts should defer to the agency's determination by analogizing to the Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*. Furthermore, in applying *Spokeo*'s second prong, the analysis should

236. *Id.* (emphasis added).

237. *Id.* (alteration in original) (emphasis added) (citing JOHN W. SALMOND, LAW OF TORTS: A TREATISE ON THE ENGLISH LAW OF LIABILITY FOR CIVIL INJURIES 331 (1907)).

238. *Id.*

239. *See* Adam J. Levitt & Nicole E. Negowetti, *Agricultural "Market Touching": Modernizing Trespass to Chattels in Crop Contamination Cases*, 38 U. HAW. L. REV. 409, 424–25 (2016) ("Under early common law, an action for trespass could be brought only when interference with chattel was direct and physical.").

240. *Id.* at 425 (citing Holmes v. Doane, 69 Mass. 328, 329 (1855)).

241. *Id.* at 427.

242. *See* discussion *supra* Part IV.

adequately discuss the traditional common-law theories that are most applicable to the alleged intangible harm and, in so doing, should focus specifically on the historical quantitative *and* qualitative characteristics of each theory to establish whether the second prong is or is not satisfied.

### *A. The Suggested First Prong: Congressional Judgment*

In the ideal case contemplated by *Spokeo*, courts would be able to read the language of federal statutes and thoroughly examine the legislative history to determine whether the first prong is satisfied. The harsh reality, however, is that there will be situations where even after analyzing a statute and legislative history in depth, Congress's judgment with respect to a certain intangible harm is still unclear.[243] In these cases, courts are essentially asked to "legislate from the bench."[244] That is, courts are forced to substitute their role for the role of Congress.[245] The simple fact is that Congress, not the judiciary, is well-positioned to identify potential harms and institute policy to remedy those harms.[246] This being the case, courts should look at what Congress explicitly stated with respect to the relevant portions of the federal statute instead of theorizing what Congress was thinking or might have been thinking when the statute was enacted. If Congress expressly delegates authority to a federal agency in the statute, it ordinarily follows that its stated intention was to allocate at least a portion of its lawmaking power to the agency.[247] Thus, when the language and legislative history behind a federal statute is so conflicting and ambiguous that Congress's judgment is inconclusive, courts should defer to the agency's interpretation of that statute.

This approach not only follows the express intention of Congress, but it also adheres to the traditional notion of agency deference found in *Chevron*.[248] In accordance with *Chevron*, one of the foremost cases in administrative law, when Congress leaves a gap in a federal statute, Congress delegates its authority to the agency to fill the gap left, implicitly

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243. *See, e.g.*, Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019); *Cranor*, 998 F.3d 686.

244. *See generally* Bruce G. Peabody, *Legislating From the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185, 201–03 (2007).

245. *See generally id.*

246. *Cranor*, 998 F.3d at 687; Peabody, *supra* note 244, at 201–03.

247. *See generally* Ronald J. Krotoszynski Jr., *Why Deference: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 42 ADMIN. L. REV. 735 (2002).

248. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

or explicitly, by Congress.[249] Those regulatory constructions are then given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.[250] By analogizing to the agency deference principles articulated in *Chevron*, courts are not tasked with serving as an impromptu legislature. Instead, courts are able to identify exactly what Congress intended when it enacted the statute. By its very definition, this approach falls within the realm of congressional judgment as it was contemplated by the Court in *Spokeo*.[251] In light of this principle and after giving proper weight to the FCC's determination that text messages are to be treated synonymously with phone calls under the TCPA, the first prong of *Spokeo* is satisfied in the case of a single unsolicited telemarketing text message.

Chief Justice Roberts once remarked that the TCPA was the "strangest statute [he had] ever seen."[252] Exemplified by this statement and the competing conclusions in *Salcedo* and *Cranor*, the congressional intent behind the TCPA is ambiguous and contradictory at best.[253] On the one hand, the TCPA is absolutely silent on the subject of text messages.[254] Congress has had the opportunity on more than one occasion to include text messages in its prohibitions on unsolicited telemarketing media, but it has not done so.[255] On the other hand, cellular phones are expressly covered under the TCPA's prohibition on telemarketing media.[256] Thus, despite the Eleventh Circuit's contrary conclusion, it cannot be said that Congress sought to protect privacy interests only within the home.[257]

Given this uncertainty, *Spokeo* and *Chevron* should be read not as conflicting Supreme Court principles but as necessary complements to one another. *Spokeo* instructs courts to look at congressional judgment, but

249. *Id.*

250. *Id.* at 844. The "arbitrary and capricious" standard will not be discussed in depth and is only included to provide relevant background information on the Supreme Court's holding.

251. *See* Spokeo, Inc. v. Robins, 578 U.S. 330, 340–41 (2016) (noting that the judgment of Congress plays an important role in identifying intangible harms).

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

253. *Compare* Salcedo v. Hanna, 936 F.3d 1162, 1169 (11th Cir. 2019) ("The TCPA is completely silent on the subject of unsolicited text messages."), *with* Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 690 (5th Cir. 2021) ("[T]he TCPA expressly covers cellular phones.").

254. *Salcedo*, 936 F.3d at 1169; *see* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227.

255. *See* discussion *supra* Part III.A.

256. 47 U.S.C. § 227(b)(1)(A)(iii).

257. *See* discussion *supra* Part III.A.

courts have long struggled to successfully interpret such a contradictory statute and accompanying legislative history.[258] Instead of essentially theorizing what Congress was thinking or might have been thinking when it enacted the TCPA, courts should look at what they know for certain: Congress explicitly delegated authority to the FCC to regulate and implement the TCPA's restrictions.[259] If courts appropriately analogize to the holding in *Chevron*, that delegated authority includes interpreting relevant provisions of and filling gaps within the TCPA.[260] Although Congress has not extended the TCPA's prohibitions to text messages, the FCC has.[261]

Yet, there remains ambiguity in the FCC's interpretation of the prohibitions the TCPA implemented. For example, in 2015, Glide Talk petitioned the FCC for expedited clarification and a declaratory ruling on the FCC's determination that the TCPA's prohibitions apply to text messages.[262] Glide Talk raised the issue of whether the TCPA afforded

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258. *Compare Salcedo*, 936 F.3d at 1169 ("The TCPA is completely silent on the subject of unsolicited text messages."), *with Cranor*, 998 F.3d at 690 ("[T]he TCPA expressly covers cellular phones.").

259. 47 U.S.C. § 227(b)(2) (outlining the scope of the FCC's regulatory and rulemaking authority); Pub. L. No. 102-243, § 2(15), 105 Stat. 2395 ("The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.").

260. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). At least one scholar has also suggested that courts should apply *Chevron* deference to the first prong of *Spokeo*. *See* Curtis R. Crooke, *Reply 'Stop' to Cancel: Whether Receiving One Unwanted Marketing Text Message Confers Standing in Federal Court*, 62 B.C. L. REV E. SUPP. II.-84, II.-97–99 (2021). Additionally, the Ninth Circuit in *Satterfield v. Simon & Schuster, Inc*., applied *Chevron* deference to the FCC's determination that phone calls and text messages are to be treated synonymously under the TCPA. Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009). However, in that case, Article III standing was not addressed, and the Ninth Circuit found that the district court erred in granting summary judgment. *Id.* at 952–54. "The FCC has reasonably interpreted 'call' under the TCPA to encompass both voice calls and text calls. This interpretation is reasonable and is therefore entitled to deference." *Id.* at 955 (citing *Chevron*, 467 U.S. at 843–44).

261. *2003 FCC Order*, *supra* note 10, ¶ 165

262. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Record 7961 (2015) [hereinafter *2015 FCC Order*]. Glide Talk, more commonly referred to as "Glide," is a company which operates a user application that allows individuals to use video technology to communicate in real-time. *Glide Talk*, CBINSIGHTS, https://www.cbinsights

SMS text messages the same consumer protections as voice calls.[263] It contended that "[t]ext messages are more akin to instant messages or emails" rather than voice calls.[264] Based on this contention, Glide argued that some of the limitations and concerns under the TCPA that are relevant to voice calls may need to be approached differently for text messages.[265] Glide therefore urged the FCC to examine and clarify these distinctions, but the FCC refused to do so.[266] The FCC noted that it had already determined that the TCPA applies to text messages and, further, that there was no uncertainty on this issue.[267] In essence, the FCC viewed Glide's request as an attempt to seek a reversal of the FCC's prior ruling and found that it was therefore inappropriate for declaratory ruling.[268]

Put into context, the FCC's reasoning here is quite puzzling. At the very least, a recognition of the distinction between the characteristics of text messages and cellular phone calls was, and still is, in order. It is difficult to comprehend how the FCC could conclude that there is "no uncertainty on this issue" given that numerous federal circuit courts of appeals have recognized the precariousness in this area of the law.[269]

Furthermore, members of the FCC have expressed that the TCPA has become the "poster child for lawsuit abuse."[270] In 2008, plaintiffs filed a total of 14 lawsuits alleging TCPA violations.[271] In the first nine months of 2014 alone, plaintiffs filed 1,908 lawsuits alleging the same.[272] For example, during a Los Angeles Lakers game in 2013, the Lakers displayed a statement to fans in the arena that instructed them to text a personalized message to a designated phone number.[273] If the fans were lucky, their

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.com/company/glide-talk [https://perma.cc/V8G5-NZ9M] (last visited July 10, 2022).

263. *2015 FCC Order*, *supra* note 262, at 8016, ¶ 107.

264. *Id.*

265. *Id.* at 8016–8017, ¶ 107.

266. *Id.* at 8017, ¶ 107.

267. *Id.*

268. *Id.*

269. *See id.*; Van Patten v. Vertical Fitness Grp., 847 F.3d 1037 (9th Cir. 2017); Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85 (2d Cir. 2019); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458 (7th Cir. 2020); Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019); Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021).

270. *2015 FCC Order*, *supra* note 262, at 8073 (Dissenting Statement of Commissioner Ajit Pai).

271. *Id.*

272. *Id.*

273. Emanuel v. L.A. Lakers, Inc., No. CV 12-9936, 2013 WL 1719035, at *1 (C.D. Cal. Apr. 18, 2013).

personalized messages would appear on the Jumbotron.[274] After an individual sent their proposed message to the designated phone number, an automated message quickly followed and informed each fan that not all messages would be visible on the Jumbotron.[275] A plaintiff's attorney caught wind of this and promptly filed a federal class action lawsuit in California.[276] The FCC has noted that the Los Angeles Lakers are not the only ones who have battled vexatious litigants since the inception of the TCPA, and it will certainly not be the last.[277] One could easily imagine a scenario where a struggling business, naïve to the TCPA's prohibitions, sends out a single telemarketing text message to a mass of customers who have shopped at the store only to be greeted by a class-action lawsuit in federal court. The common thread amongst these cases, a commissioner of the FCC stated, is that in practice the TCPA has strayed far from its original purpose.[278] It appears that until the FCC closes these loopholes, trial lawyers will continue to find weaknesses to exploit.[279] Nonetheless, in line with the landmark holding in *Chevron*, the FCC regulations should be the controlling authority in this area of law. The FCC has held that the TCPA applies to text messages, and, therefore, it appears that the first prong in the *Spokeo* analysis is satisfied.[280]

### *B. The Suggested Second Prong: Close Relationship to a Traditional Harm at Common Law*

Examining the history of the common law for Article III standing purposes is not an analysis that seeks to establish liability.[281] Indeed, the *Spokeo* inquiry focuses on the *types* of harms that were traditionally protected at common law, not the precise point at which those harms became actionable.[282] However, for some traditional common-law

274. *Id.*

275. *Id.*

276. *Id.* The issue in this case was not decided under Article III standing and the *Spokeo* framework but has been included to illustrate how the TCPA has become ripe for abuse.

277. *2015 FCC Order*, *supra* note 262, at 8073 (Dissenting Statement of Commissioner Ajit Pai).

278. *Id.*

279. *Id.*

280. *2003 FCC Order*, *supra* note 10, ¶ 160.

281. *See generally* Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 693 (5th Cir. 2021).

282. *Id.* (quoting Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 654 (4th Cir. 2019)).

theories, examinations of quantity and quality are directly and significantly intertwined in defining the protected legal right at issue.[283] A historical analysis of public nuisance and intrusion upon seclusion, for example, makes clear that the *quality* of the injury depends largely on the *quantity* of the conduct.[284] Analyzing whether the harm in receiving a single text bears a close relationship to a harm that has traditionally been actionable at common law therefore requires a court to look not only at the historical attributes of each theory but also at the built-in quantitative requirements that help assess the qualitative harm. Doing otherwise would ignore the significant overlap in quantity and quality that underlies each theory and would result in a court analyzing simply whether *any* relationship exists between the harm and traditional common-law theories rather than whether a *close relationship* exists between the harm and traditional common-law theories. For theories that do not contain a built-in quantitative requirement, the *Spokeo* test still controls, and courts must continue to ask whether a harm bears a close relationship to a harm that has traditionally been actionable at common law.[285] In so doing, courts must look precisely at how the traditional common law assessed certain theories instead of analyzing the harm under modern theories of recovery.[286] This approach is in line with the express holding of *Spokeo*, which instructs courts to look specifically at the English and American common law.[287]

In the TCPA context, litigants have advanced a wide variety of common-law theories in federal court to establish Article III standing

283. The Defendant in *Cranor* briefly argued about the interplay between quality and quantity. Brief of Defendant-Appellee 5 Star Nutrition at 31, Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686 (5th Cir. 2021) (No. 19-51173) ("Cranor's argument . . . ignores the fact that considerations of 'quantity' and 'quality' can overlap when defining the scope of a traditionally recognized legal interest."). 5 Star Nutrition argued this point specifically regarding the traditional common-law theory of "intrusion upon seclusion," which it said "only protects a plaintiff's interest against 'highly offensive' intrusions, and the line between offensive and inoffensive intrusions can turn solely on considerations such as 'persistence and frequency.'" *Id.* It is entirely conceivable that the defendant-appellee raising the issue persuasively in its brief is the reason why the Fifth Circuit never explicitly analyzed intrusion upon seclusion, while instead opting to find a close relationship with public nuisance. *Cranor*, 998 F.3d at 691–92.

284. *See* discussion *infra* Parts IV.B.1–2.

285. Spokeo, Inc. v. Robins, 578 U.S. 330, 341 (2016).

286. *See id.*

287. *See id.* ("[I]t 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." (emphasis added)).

under *Spokeo*.[288] Only three theories, however, have made their way to the forefront of the analysis under *Spokeo*'s second prong: (1) intrusion upon seclusion; (2) public nuisance; and (3) trespass to chattels.[289] All three of these theories will be addressed in turn, and a thorough analysis of each theory will reveal that the second prong of *Spokeo* is not satisfied in the case of a single unsolicited telemarketing text message.

*1. Intrusion Upon Seclusion*

In general, the common-law theory of intrusion upon seclusion creates liability for intrusions upon the solitude or seclusion of an individual or an individual's private affairs that would be highly offensive to a reasonable person.[290] It further requires that the alleged interference be substantial and strongly objectionable.[291] Typical examples of an intrusion upon an individual's private affairs or concerns include eavesdropping, wiretapping, and looking through one's personal documents.[292]

To be clear, the conduct at issue should not be merely offensive but *highly offensive*.[293] Imagine John rents a room in a house that is immediately adjacent to Jane's residence. For a three-week period, John peers through Jane's window with binoculars and takes intimate pictures of her without her knowledge. This would certainly be classified as a *highly offensive* invasion of privacy.[294] A more relevant example, at least as far as the TCPA is concerned, is a photographer who wishes to expand

288. *See, e.g.*, Van Patten v. Vertical Fitness Grp., 847 F.3d 1037, 1043 (9th Cir. 2017) ("Actions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right to privacy is recognized by most states."); Melito v. Experian Mktg. Sol., Inc., 923 F.3d 85, 93 (2d Cir. 2019) (discussing the traditional common-law theories of intrusion upon seclusion and nuisance); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462 (7th Cir. 2020) (discussing the traditional common-law theory of intrusion upon seclusion); Salcedo v. Hanna, 936 F.3d 1162, 1171 (11th Cir. 2019) (discussing the traditional common-law theories of intrusion upon seclusion, trespass, nuisance, conversion, and trespass to chattels); *Cranor*, 998 F.3d at 686 (discussing the traditional common-law theory of public nuisance).

289. *See Van Patten*, 847 F.3d at 1043; *Melito*, 923 F.3d at 93; *Gadelhak*, 950 F.3d at 462; *Salcedo*, 936 F.3d at 1171; *Cranor*, 998 F.3d at 686.

290. Restatement (Second) of Torts § 821(B) (Am. L. Inst. 1979); Restatement (Second) of Torts § 652(B) (Am. L. Inst. 1977).

291. Restatement (Second) of Torts § 821(B) cmt. d (Am. L. Inst. 1979).

292. Restatement (Second) of Torts § 652(B) cmt. b (Am. L. Inst. 1977).

293. *Id.* § 652(B).

294. This hypothetical is based loosely on *Souder v. Pendleton Detectives, Inc.*, 88 So. 2d 716 (La. Ct. App. 1956).

their business by photographing a local socialite. The photographer calls twice per day for two months straight, usually at inconvenient times for the local socialite. Even after the socialite objects, the photographer persists. In this case, the sheer *quantity* of the photographer's actions crossed the *qualitative* line from offensive to *highly offensive*.[295]

The receipt of a single unsolicited text message differs strongly in quantity and, therefore, quality from the above situation.[296] Consequently, the receipt of a single text message could hardly be said to provide an actionable basis for a lawsuit alleging intrusion upon seclusion at common law. Similar to the receipt of a single text message, there is no liability for walking up to an individual's house and knocking on his or her door on a single occasion.[297] It is only when the knocking is repeated with such persistence and frequency as to amount to "hounding the plaintiff" that his or her right to privacy has been invaded and a close relationship to intrusion upon seclusion is established.[298] The conclusion here is fairly simple: sending a single text message is far from the *highly* offensive behavior contemplated by common-law intrusion upon seclusion.

*2. Public Nuisance*

A plaintiff may establish a public nuisance when he or she has suffered: (1) an unreasonable interference with a right common to the general public; and (2) a harm of a kind different from that suffered by other members of the public.[299] Ordinarily, a public nuisance by its very nature involves the idea of repetition or continuity.[300] That is, public nuisances typically result from prolonged periods of conduct that constitute a public interference rather than single isolated acts.[301] In fact,

295. This hypothetical is based loosely on *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956).

296. *See* discussion *supra* Part IV.B.

297. Restatement (Second) of Torts § 652(B) cmt. d (Am. L. Inst. 1977).

298. *Id.*

299. Restatement (Second) of Torts §§ 821(B), (C) (Am. L. Inst. 1979); Soap Corp. of Am. v. Reynolds 178 F.2d 503, 506 (5th Cir. 1949) ("As a general rule, an individual can neither abate, nor recover damages for, a public nuisance, unless he can show that he has sustained therefrom damage of a special character, distinct and different from the injuries suffered by the public generally . . . .").

300. People *ex rel.* Dowling v. Bitonti, 10 N.W.2d 329, 330 (Mich. 1943).

301. *See id.* ("A nuisance involves the idea of repetition or continuity, and is not to be predicated upon proof of a single isolated prohibited act.").

traditional common-law public nuisance "[cannot] be predicated upon proof of a single isolated prohibited act."[302]

Like intrusion upon seclusion, the quantity of the acts constituting a public interference relates directly to the quality of the harm alleged.[303] For instance, in *Commonwealth v. Allen*, the defendants were prosecuted for obstructing a common highway by using a traction-engine.[304] The engine made trips across the highway two times per day over a prolonged period of time, which resulted in the public being deprived of use of the highway for one hour intervals during each trip.[305] The lower court convicted the defendants, holding that they had "set up, established, maintained, kept up, and [continued] an obstruction" of the highway.[306] The Supreme Court of Pennsylvania affirmed and explicitly stated that "[t]he running of a traction-engine over a public highway *upon a single occasion* would not constitute a public nuisance."[307] Thus, implicitly, the court acknowledged that the quantity of the acts relate to the quality of the harm alleged.

Likewise, in accordance with the traditional common-law understanding of public nuisance exemplified in *Allen*, the harm in receiving a single text message bears no close relationship to traditional common-law public nuisance. If one were to send five unsolicited telemarketing text messages per day for a period of six months, the answer might very easily be different. For present purposes, however, this is not the case. A single act, standing alone, may bear a passive resemblance to traditional common-law public nuisance but is insufficient to establish the close relationship articulated by *Spokeo*.

*3. Trespass to Chattels*

Under the traditional common-law understanding of trespass to chattels, direct and physical contact with the chattel was an indispensable element.[308] If there was no direct and physical contact with the chattel, there was no trespass.[309] The actor need not make physical contact with

302. *Id.*
303. *See* discussion *supra* Part IV.B.
304. Commonwealth v. Allen, 23 A. 1115, 1116 (Pa. 1892).
305. *Id.*
306. *Id.*
307. *Id.* (emphasis added).
308. *See* Levitt & Negowetti, *supra* note 239, at 427 ("Under early common law, an action for trespass could be brought only when interference with chattel was direct and physical.").
309. *Id.*

the chattel—an actor who throws a rock at another's dog, for example, has committed a trespass.[310] Nonetheless, *physical* contact was essential.[311] By contrast, the interference alleged in the case of a single text message is remote and purely electronic in nature. A defendant who sends an unsolicited telemarketing text message has not made any physical contact with the plaintiff's cellular phone either directly or indirectly. Thus, there is no close relationship to traditional common-law trespass to chattels.

#### *4. No Traditional Common-Law Tort Theory Has a Close Relationship to a Plaintiff's Receipt of a Single Unsolicited Telemarketing Text Message*

In short, intrusion upon seclusion, public nuisance, and trespass to chattels are inapplicable to the issue at hand. Even setting aside these three theories, there exists no other traditional common-law theory that is arguably applicable to the receipt of a single unsolicited telemarketing text message.[312] A historical analysis of the common law lends credence to the idea that the theories that courts have addressed thus far differ qualitatively from the receipt of a single unsolicited telemarketing text message. Although the first prong of *Spokeo* is satisfied, the second is not. Thus, a plaintiff who receives a single unsolicited telemarketing text message in violation of the TCPA will not be able to establish Article III standing.

## CONCLUSION

Put simply, both the Fifth Circuit in *Cranor* and the Eleventh Circuit in *Salcedo* misapplied the *Spokeo* framework.[313] Although Congress's judgment may be ambiguous and contradictory, courts are not empowered to craft their own version of the law.[314] Even if Congress's judgment is unclear, courts must still abide by the express intentions of Congress.[315] Where Congress has delegated authority to an agency, that express intention holds significant weight, and courts should defer to the agency's regulatory constructions of the statute.[316] Thus, as the regulating body of

310. *Id.*
311. *Id.* at 424–25.
312. *See* Salcedo v. Hanna, 936 F.3d 1162, 1171–72 (11th Cir. 2019) (discussing trespass to chattels, conversion, and public nuisance).
313. *See* discussion *supra* Part III.
314. *See generally* Peabody, *supra* note 244, at 201–03.
315. *See generally id.*
316. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984).

the TCPA, courts should defer to the FCC's determination that text messages are to be treated the same as phone calls.[317] Additionally, courts must look at the quantitative requirements of each traditional common-law theory to assess the qualitative harm. Doing otherwise would provide an overly simplistic view of how those harms are characterized and would lead to an incorrect analysis under *Spokeo*'s second prong. With this in mind, analyzing the traditional common-law theories of intrusion upon seclusion, public nuisance, and trespass to chattels reveals that all of these theories might bear a distant relationship to traditional common-law theories, but they do not have a close relationship, as *Spokeo* requires, to a harm that has traditionally been actionable at common law. All told, courts should apply the proper *Spokeo* analysis articulated in this Comment. In so doing, they will arrive at the correct conclusion: a plaintiff's receipt of only a single unsolicited telemarketing text message is not a sufficiently concrete injury in fact to confer Article III standing under the TCPA.

317. *See generally 2003 FCC Order*, *supra* note 10, ¶ 165.