

February 2021

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Recommended Citation

Quinn Marker, *Injured by a Text: Article III Standing for TCPA Texting Claims*, 89 U. Cin. L. Rev. 575 (2021)
Available at: <https://scholarship.law.uc.edu/uclr/vol89/iss2/11>

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INJURED BY A TEXT: ARTICLE III STANDING FOR TCPA TEXTING CLAIMS

Quinn Marker

I. INTRODUCTION

In 2006, nearly eighty-five percent of U.S. households had a landline phone in their homes.¹ In 2018, that number dropped to below forty percent.² As landlines continue to be replaced by cell phones at groundbreaking speed,³ courts must ensure the true aims of consumer protection laws, like the Telephone Consumer Protection Act (the “TCPA”) are fully enforced. Article III standing has become a major hurdle for TCPA plaintiffs, as circuit courts are split on which types of modern communication constitute an “injury-in-fact.”⁴ This Note examines the conflicting Article III standing analyses of the Ninth and Eleventh Circuits for TCPA plaintiffs when the alleged injury is the receipt of only a few text messages. To that end, this Note argues that a TCPA claim based on a single text message is a sufficient “injury in fact” for Article III standing purposes.⁵

Part II of this Note will first examine the TCPA and its legislative history, and then will review the problems posed by modern communication technology. Then, Part II will review the Article III standing requirements imposed by federal courts and the United States Constitution. Next, Part II analyzes two divergent applications of the TCPA in the Ninth and Eleventh Circuits, particularly in their analysis of a consumer’s standing when attempting to prove injury. Finally, Part III argues that the Eleventh Circuit’s approach directly defies the will of Congress, while the Ninth Circuit’s approach keeps consumers at the

1. STEPHEN J. BLUMBERG & JULIAN V. LUKE, NAT’L CTR. HEALTH STAT., WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY–DECEMBER 2006 4 (May 14, 2007), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless200705.pdf> [<https://perma.cc/P2MF-K3R5>].

2. STEPHEN J. BLUMBERG & JULIAN V. LUKE, NAT’L CTR. HEALTH STAT., WIRELESS SUBSTITUTION: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JULY–DECEMBER 2018 5 (June 2019), available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf> [<https://perma.cc/B3CB-BLMJ>].

3. See generally Michael DeGusta, *Are Smart Phones Spreading Faster Than Any Technology in Human History?*, MIT TECH. REV. (May 9, 2012), <https://www.technologyreview.com/2012/05/09/186160/are-smart-phones-spreading-faster-than-any-technology-in-human-history/> [<https://perma.cc/8MH8-NSNE>] (discussing the rapid rise of the smart phone use across the world with 1.4 billion mobile phones sold annually).

4. U.S. CONST. art. III, § 2 (extending judicial power of the federal courts to “cases” and “controversies”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding “injury in fact” to be the first requirement of the “irreducible constitutional minimum to establish standing). *Id.*

5. *Lujan*, 504 U.S. at 560.

forefront and is true to the aims of the TCPA. Part III concludes with a proposed framework for courts to ensure consumers are protected under the TCPA.

II. BACKGROUND

While federal courts have some catching up to do, Congress and regulators have largely faced the robocall⁶ challenge head-on. This Part frames the overall landscape of the effort to curb robocalls and highlights the roles of Congress, regulators, and federal courts. First, Section A will review the history of telemarketing legislation leading up to and including the TCPA. Section B will then provide an overview of the robocalling and robotexting⁷ landscape and explain why it is problematic for consumers. Next, Section C will discuss the role of Article III Standing in TCPA claims. Finally, Section D will analyze TCPA decisions by the Ninth and Eleventh Circuit Courts of Appeals.

A. *The Legislative History of the TCPA*

Consumer frustration over telemarketing made one of its first appearances in Congress in 1988 with the Telemarketing Fraud Prevention Act (“TFPA”).⁸ Congressman Thomas A. Luken⁹ introduced the bipartisan bill in the House of Representatives, goaded by the growth of the telemarketing industry and the rise of “fraudulent telemarketing.”¹⁰ Luken argued the fraudulent telemarketing industry was generating upwards of twenty billion dollars annually, while the Federal Trade Commission (“FTC”) was recovering less than one percent.¹¹ Luken reinforced six main features of the legislation, including:

- (1) ordering the FTC to promulgate rules on telemarketing;

6. A robocall is defined by the FCC as a call “made with an autodialer or that contain[s] a message made with a prerecorded or artificial voice.” FCC, FCC CONSUMER GUIDE: STOP UNWANTED ROBOCALLS AND TEXTS 2 (Feb. 5, 2020), available at https://www.fcc.gov/sites/default/files/stop_unwanted_robocalls_and_texts.pdf [https://perma.cc/89T8-3MP6].

7. A robotext is defined by the FCC as a “text message[] sent to a mobile phone using an autodialer” without consent. *Id.* at 3.

8. 134 CONG. REC. 15970 (daily ed. June 27, 1988).

9. Congressman Tom Luken served Cincinnati as a Democratic Congressman, Mayor, and City Councilmember. *Luken, Thomas Andrew*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, [https://history.house.gov/People/Listing/L/LUKEN,-Thomas-Andrew-\(L000508\)/](https://history.house.gov/People/Listing/L/LUKEN,-Thomas-Andrew-(L000508)/) [https://perma.cc/C8XB-25QA]; (last accessed Apr. 15, 2020) *see also* Chris Wetterich, *Political giant Thomas Luken dies at age 92*, CINCINNATI BUS. COURIER (Jan. 10, 2018), <https://www.bizjournals.com/cincinnati/news/2018/01/10/political-giant-thomas-luken-dies-at-age-92.html>.

10. 134 CONG. REC. 15972 (daily ed. June 27, 1988) (statement of Rep. Luken).

11. *Id.*

(2) authorizing state Attorneys General to file suit in federal court for violations of the Act;

(3) authorizing private citizens to file suit in federal court for violations of the Act;

(4) prohibiting harassment by telemarketers;

(5) directing the FTC to establish a clearinghouse on telemarketing; and

(6) directing the FTC to study autodialing and report the findings to Congress.¹²

Perhaps the most important feature of the bill was that it authorized private citizens to file claims under the TFPA in federal court.¹³ Luken argued that “[t]he structure of having . . . private citizens sue in Federal court to enforce Federal regulations is not new.”¹⁴ Congressmen Luken cited other federal laws with similar private causes of action, such as the Solid Waste Disposal Act and the Noise Control Act, along with antitrust legislation.¹⁵ Republican Congressman Michael Oxley¹⁶ followed Luken and supported the bill. Further, Oxley argued that allowing private parties to sue “with certain important limitations,” would result in more effective enforcement of the targeted telemarketing practices.¹⁷ Moreover, by providing access to federal courts, the bill would “promote nationwide enforcement and uniformity of decision-making.”¹⁸ Ultimately, the TFPA was held in committee in the Senate and was never brought to a vote.¹⁹ Although the TFPA was never enacted, the bill set the foundation for a critical component of the TCPA claims: the private right of action.

Several iterations of what is now the TCPA were proposed in the Senate, but it was ultimately democratic Senator Fritz Hollings who introduced the final bill in 1991 as an amendment to the Communications Act of 1934.²⁰ Senator Hollings characterized the disturbance of uninvited telemarketing as “telephone terrorism,” saying “computerized calls are

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Another Ohioan, Congressman Oxley served Ohio’s 4th congressional district from 1981 until 2007. *Oxley, Michael Garver*, HISTORY, ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES, [https://history.house.gov/People/Listing/O/OXLEY,-Michael-Garver-\(O000163\)/\[https://perma.cc/HYB2-DYWU\]](https://history.house.gov/People/Listing/O/OXLEY,-Michael-Garver-(O000163)/[https://perma.cc/HYB2-DYWU]). (last accessed Apr. 15, 2020)

17. 134 CONG. REC. 15973 (June 27, 1988) (statement of Rep. Oxley).

18. *Id.*

19. *See All Actions, H.R. 4101*, CONGRESS.GOV, <https://www.congress.gov/bill/100th-congress/house-bill/4101/all-actions?q=%7B%22search%22%3A%5B%22100+hr+4101%22%5D%7D&s=6&r=1> (last accessed Apr. 30, 2020) (the TFPA was held in the Senate Commerce Committee and was never passed).

20. 137 CONG. REC. 30820 (daily ed. Nov. 7, 1991); Automated Telephone Consumer Protection Act, S. Res. 1462, 102nd Cong. (1991).

the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”²¹ The Senate passed the TCPA on the day it was introduced and it was sent to the House for consideration and vote.

The House moved quickly and passed the TCPA, relying in part on survey data that found Americans were increasingly annoyed by salespeople.²² The surveys found that people were “very annoyed [by] phone calls from people selling things,” and even more so by “phone calls from a computer trying to sell something.”²³ The TCPA was signed into law on December 20, 1991 by President George H.W. Bush²⁴ and aimed to curb “intrusive invasion[s] of privacy” into the home at a time when dinnertime telemarketer interruptions were becoming commonplace; leaving consumers “outraged.”²⁵

In its current form, the TCPA generally restricts the use of automatic telephone dialing systems (“ATDS”), artificial and prerecorded messages, and fax machines to send unsolicited advertisements.²⁶ The TCPA provides exceptions for calls made to collect government debts and calls to landlines for non-commercial purposes, including political calls.²⁷ A valid TCPA claim, for purposes of this analysis, requires the plaintiff to prove the following:

- (1) the call or text was received on a cell phone, home phone, or any other service where the receiver is charged for the call;
- (2) the call or text was placed using an automatic telephone dialing system or features a prerecorded message or artificial voice; and
- (3) the call or text was made without the recipient’s consent.²⁸

While not explicitly included in the text of the TCPA, the Federal Communications Commission (“FCC”) and the Supreme Court have acknowledged that text messages fall within the bounds of the TCPA and are synonymous with the term “call.”²⁹ Justice Ruth Bader Ginsburg,

21. 137 CONG. REC. 30821 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

22. H.R. REP. NO. 102-317, at 9 (1991).

23. *Id.*

24. Presidential Statement on Signing the Telephone Consumer Protection Act of 1991, 2 PUB. PAPERS 1651 (Dec. 20, 1991); Automated Telephone Consumer Protection Act, S. Res. 1462, 102nd Congress (1991).

25. Telephone Consumer Protection Act, Pub L. No. 102-243, § 2, ¶¶ 5-6, 105 Stat. 2394 (1991).

26. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 68 Fed. Reg. 44144 5 (July 3, 2003).

27. 47 U.S.C.S § 227(b)(1)(A)(iii); 47 U.S.C.S § 227(b)(2)(B)(i).

28. 47 U.S.C. S § 227(b)(1)(A)-(B).

29. *In re* Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 7964 n.3 (2015) available at <https://docs.fcc.gov/public/attachments/FCC-15->

writing for the 6-3 majority in a 2016 decision, characterized it as “undisputed,” that a text message sent with an autodialer “qualifies as a call within the TCPA.”³⁰

Violations of the TCPA are enforced through a private right of action in “an appropriate court of that state,”³¹ with state courts and federal courts sharing concurrent jurisdiction.³² Under the section of the TCPA concerning robocall violators, a plaintiff can seek an injunction, financial compensation, or both after just one violation.³³ Available financial compensation includes any actual monetary loss suffered from a violation or, more typically, \$500 per violation—whichever is greater.³⁴ If a defendant is found to have violated the TCPA “willfully or knowingly,” the court can elect to award treble damages to a prevailing plaintiff.³⁵

The FCC retains rulemaking and enforcement authority over the TCPA, stemming from the agency’s creation in the Communications Act of 1934.³⁶ The FTC plays a supporting role in enforcing the TCPA as well, given their enforcement role with other telemarketing legislation like the Do-Not-Call registry³⁷ and the Telemarketing and Consumer Fraud and Abuse Prevention Act.³⁸ Demonstrating their collaborative approach and commitment towards preventing harmful robocalls, the two agencies signed a Memorandum of Understanding in 2003 pledging to share data and support each other’s work.³⁹

72A1_Red.pdf (“[e]xcept where context requires otherwise, our use of the term call includes text messages”) (internal quotations omitted).

30. *Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 667 (2016) (finding receipt of a single text message included within reach of TCPA prohibition; *see also* *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) (“We hold that a voice message or a text message are not distinguishable in terms of being an invasion of privacy.”). *Id.*

31. 47 U.S.C.S § 227(b)(3).

32. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012) (holding state courts and federal courts have concurrent jurisdiction over private TCPA claims).

33. 47 U.S.C.S § 227(b)(3); *But see* 47 U.S.C.S. § 227(c)(5) (concerning the creation of a “Do-Not-Call-List” and requiring “more than one telephone call within any 12-month period” to trigger availability of a private right of action) *Id.*

34. 47 U.S.C.S § 227(b)(3)(B).

35. 47 U.S.C.S § 227 (b)(3).

36. 47 U.S.C. § 227(b)(2); *see also* Communications Act of 1934, S. 3040, 73d Cong. § 1 (1934) (creating the Federal Communications Commission).

37. Do-Not-Call Implementation Act, H.R. 395, 108th Cong. (2003) (establishing a Do-Not-Call registry).

38. Telephone Telemarketing and Consumer Fraud and Abuse Prevention Act, H.R. 868, 103rd Cong. (1994) (establishing rules for telemarketers including calling times and mandatory disclosures to prevent deceptive calling practices).

39. *Memorandum of Understanding between FCC and FTC on Consumer Protection*, FEDERAL TRADE COMMISSION (Nov. 2015), https://www.ftc.gov/system/files/documents/cooperation_agreements/151116ftcfcc-mou.pdf [<https://perma.cc/98V7-EJ7G>] (establishing areas of agreement, cooperation and data sharing between the FCC and FTC on consumer protection matters and acknowledging their prior MOU regarding telemarketing); Press Release, Federal Trade Commission, FTC and FCC Sign Memorandum of

B. Communication technology continues to evolve.

The communication landscape has changed drastically since the TCPA's passage in 1991. Arcane automated dialers have transformed into complex operations that "spoof" Caller ID numbers and include hyper-realistic recorded voices.⁴⁰ This has led to a rapid increase in the amount of robocalls and robotexts received by consumers every day. Nearly fifty billion robocalls were placed in the U.S. in 2018.⁴¹ In 2019 that number increased to nearly sixty billion—or nearly 230 robocalls per adult each year.⁴² While the FCC warns many sources of robocalling data include both legal and welcome calls, such as school closures and prescription drug pickup reminders,⁴³ they have also acknowledged and continue to address the "scourge" of the illegal and unwanted calls.⁴⁴ In fact, one source cited by the FCC estimated that 44.6% of *all* calls to mobile phones in 2019 would be illegal and unwanted scams.⁴⁵ Scams regarding health insurance, low interest rates, and student loans remain the most prevalent types of robocalls.⁴⁶

Robotexts present an entirely new challenge for both regulators and consumers.⁴⁷ On the surface, robotexts appear to be dwarfed by

Understanding For Continued Cooperation on Consumer Protection Issues (Nov. 16, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/11/ftc-fcc-sign-memorandum-understanding-continued-cooperation> [<https://perma.cc/6LUS-64YQ>].

40. *See, Caller ID Spoofing*, FCC, <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> [<https://perma.cc/RA2C-P733>] ("Spoofing is when a caller deliberately falsifies the information transmitted to your caller ID display to disguise their identity.")

41. *Historical Robocalls by Time*, YOUMAIL, ROBOCALL INDEX, <https://robocallindex.4com/history/time> [<https://perma.cc/N4M7-V3RW>] (last visited Feb. 20, 2020) (58,536,224,700 robocalls made in 2019).

42. *Id.*; *U.S. Census Data*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?q=United%20States&g=0100000US&tid=ACSDP1Y2018.DP05> [<https://perma.cc/32YW-RM7J>] (last visited Feb. 20, 2020) (U.S. 18+ population was 253,881,933 in 2018).

43. FCC, CONSUMER AND GOV. AFFAIRS BUREAU, REPORT ON ROBOCALLS CG DOCKET NO. 17-59 2 (Feb. 2019), *available at* <https://docs.fcc.gov/public/attachments/DOC-356196A1.pdf> [<https://perma.cc/2SHK-LNF6>].

44. Press Release, FCC, FCC Chairman Proposes Call Blocking By Default To Help Combat The Scourge Of Robocalls (May 15, 2019), *available at* <https://docs.fcc.gov/public/attachments/DOC-357464A1.pdf> [<https://perma.cc/63FC-7MG3>].

45. FIRST ORION, SCAM CALL TRENDS AND PROJECTIONS REPORT 2 (Fall 2018), *available at* [https://ecfsapi.fcc.gov/file/109272058817712/FirstOrion_Scam_Trends_Report_FINAL%20\(002\)%20\(002\).pdf](https://ecfsapi.fcc.gov/file/109272058817712/FirstOrion_Scam_Trends_Report_FINAL%20(002)%20(002).pdf) [<https://perma.cc/68F9-8ADQ>].

46. Press Release, YouMail, Nearly 48 Billion Robocalls Made in 2018, According to YouMail Robocall Index (Jan. 23, 2019) <https://www.prnewswire.com/news-releases/nearly-48-billion-robocalls-made-in-2018-according-to-youmail-robocall-index-300782638.html>.

47. *See generally Political Campaign Robocalls & Robotexts*, FCC, <https://www.fcc.gov/political-campaign-robocalls-robotexts> [<https://perma.cc/JSC7-VYP7>] (last visited Feb. 20, 2020).

robocalls, amounting to only three percent of all text messages.⁴⁸ However, with nearly 285 million smartphones in the U.S. and an estimated two trillion text messages exchanged in 2018, this means that over sixty billion robotexts were sent in 2018 alone.⁴⁹ Cell carriers are attempting to thwart this flood of messages directly by blocking the texts before they reach consumers. In 2018, consumers filed over 93,000 complaints about unwanted text messages—up from 71,776 the year prior.⁵⁰ In 2019, T-Mobile experienced a twenty percent increase *each month* in blocked robotexts.⁵¹ Despite this rapid increase in the number of robotexts impacting U.S. consumers, and the seemingly widespread understanding that text messages are included within the TCPA,⁵² some courts have neglected to confer Article III standing to plaintiffs bringing text message-based TCPA claims.

In practice, TCPA claims are often very difficult for individual consumer plaintiffs to initiate, given the significant commitments of time and money for a relatively modest payout.⁵³ As a result, a TCPA class-action industry has quietly developed.⁵⁴ Damages can add up quickly in these class action claims with seemingly no upper limit. For instance, a multi-level marketing company, ViSalus Inc., found itself on the wrong end of a \$925 million judgment in 2019 after placing nearly two million unauthorized robocalls—each resulting in a \$500 fine.⁵⁵

48. Katherine Bindley, *Prepare for Robocall's Evil Twin: Robotext*, WALL ST. J., Aug. 22, 2019, at B4.

49. CELLULAR TELECOMMUNICATIONS AND INTERNET ASSOCIATION (CTIA), 2019 ANNUAL SURVEY HIGHLIGHTS 4 (2019), available at <https://api.ctia.org/wp-content/uploads/2019/06/2019-Annual-Survey-Highlights-FINAL.pdf> [<https://perma.cc/SZ72-74GH>].

50. Bindley, *supra* note 48.

51. *Id.*

52. *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7964 n.3, available at https://docs.fcc.gov/public/attachments/FCC-15-72A1_Rcd.pdf.

53. *But see* Forman v. Data Transfer, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (arguing the remedy provided in TCPA is “designed to provide adequate incentive for individual plaintiffs to bring suit on their own behalf”).

54. *See SPB's Unprecedented Podcast: Episode 2: Todd Friedman*, SQUIRE PATTON BOGGS (Apr. 9, 2019), <https://soundcloud.com/user-296303717/episode-2-todd-friedman-atds-definition-willfulness-fcc-developments> (interviewing TCPA class action attorney Todd Friedman about his process and efforts to seek out TCPA violators); *see also Telephone Consumer Protection Act: Text Message Harassment*, LAW OFFICES OF TODD M. FRIEDMAN, P.C., <https://www.toddfilaw.com/consumer-rights/telephone-consumer-protection-act/text-message-harassment/> [<https://perma.cc/8XFN-XAU6>] (last accessed Apr. 15, 2020).

55. Maxine Bernstein, *Record \$925 million verdict upheld in ViSalus unlawful recorded robocall case*, THE OREGONIAN/OREGONLIVE (Aug. 11, 2020), <https://www.oregonlive.com/business/2020/08/federal-judge-in-oregon-upholds-record-925-million-damages-verdict-in-unlawful-recorded-robocall-case.html> [<https://perma.cc/TTS7-LVEN>].

C. Article III Standing

Although Congress has provided a remedy for the “scourge” of automated calls and text messages, Article III limits the power of federal courts to “cases” or “controversies.”⁵⁶ Federal courts are often wary of granting jurisdiction derived from acts of Congress, in an effort to safeguard separation of powers principles.⁵⁷ *Lujan v. Defenders of Wildlife*⁵⁸ and *Spokeo, Inc. v. Robins*⁵⁹ frame the doctrine of standing for purposes of the TCPA.

In *Lujan*, the Supreme Court was confronted with a standing issue when wildlife conservationists challenged the Secretary of the Interior’s interpretation of the Endangered Species Act of 1973.⁶⁰ The Court held the “irreducible constitutional minimum of standing” was subject to a three-part test.⁶¹ The test requires plaintiffs to prove:

- (1) they suffered an “injury-in-fact;”
- (2) the injury is “fairly . . . trace[able] to the challenged act;” of the defendant,⁶² and
- (3) the injury is “likely to be redressed by a favorable decision.”⁶³

Rather than applying a lower pleading standard, the Court noted these elements are subject to the same standard of review as other elements of the case.⁶⁴

Moreover, in order to satisfy the injury prong under *Lujan* the injury must be: (a) “concrete and particularized” and (b) “actual or imminent, not ‘conjectural or hypothetical.’”⁶⁵ The injury requirement was addressed extensively in *Spokeo* where the Court overturned the affirmative standing determination of the Ninth Circuit, holding that injury-in-fact required a concreteness finding, in addition to a separate finding of particularity.⁶⁶ An injury is particularized if it “affect[s] the

56. U.S. CONST. art. III, §§ 1-2.

57. See *Salcedo v. Hanna*, 936 F.3d 1162, 1166 (11th Cir. 2019); see also THE FEDERALIST NO. 78, at 465 (Alexander Hamilton), (“there is no liberty is the power of judging be not separated from the legislative and executive powers.”).

58. 504 U.S. 555 (1992).

59. 136 S. Ct. 1540 (2016).

60. *Lujan*, 504 U.S. at 558-59 (the new interpretation of the Endangered Species Act limited its application to only “actions taken in the United States or on the high seas,” compared to its original application in foreign nations).

61. *Id.* at 560.

62. *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016).

plaintiff in a personal and individual way.”⁶⁷ An injury is concrete, the Court directed, when it “actually exist[s]” and is “not abstract.” While an injury need not necessarily be tangible to be concrete, intangible injuries often require a closer look.⁶⁸ In instances of intangible injuries, Congress’ judgment is “instructive and important” in determining whether an injury rises to the level of conferring Article III standing.⁶⁹ However, this does not mean that a “bare procedural violation” that does not harm the plaintiff will suffice in demonstrating an Article III injury-in-fact.⁷⁰ For instance, in *Spokeo*, the defendant’s publication of an incorrect zip code in an online profile was akin to a “bare procedural violation” and was not a sufficient injury-in-fact for Article III standing purposes, even though it did violate the Fair Credit Reporting Act of 1970.⁷¹ The Court also indicated that in instances where harm is difficult to quantify, the “violation of a [statutory] procedural right” *could* be a sufficient injury-in-fact under Article III.⁷²

D. The Application of the TCPA

The Ninth and Eleventh Circuit Courts of Appeals approach TCPA claims in different ways. The first part of this Section reviews the Ninth Circuit’s decision to grant Article III standing to a plaintiff who received two unwanted text messages. The second part then reviews the Eleventh Circuit’s refusal to grant standing to a plaintiff in similar circumstances.

1. The Ninth Circuit’s decision to grant standing to a recipient of two unwanted text messages.

In *Van Patten v. Vertical Fitness Group*, the Ninth Circuit held that receipt of two automated text messages was a sufficient injury to obtain standing under Article III, but rejected the plaintiff’s claim on other grounds.⁷³ In so holding, the court affirmed the district court’s grant of summary judgment in favor of the defendant.⁷⁴ In this case, plaintiff Bradley Van Patten received two automated text messages in two months from defendant Gold’s Gym, of which he was no longer a member.⁷⁵

67. *Id.* at 1548.

68. *Id.* at 1549.

69. *Id.*

70. *Id.* at 1550.

71. *Id.*

72. *Id.* at 1549 (“In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”) (emphasis in original).

73. 847 F.3d 1037, 1043 (9th Cir. 2017).

74. *Id.* at 1049.

75. *Id.* at 1041.

The Ninth Circuit addressed whether the plaintiff had standing by first determining whether there was an injury-in-fact, defined as an “‘invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’”⁷⁶ Following the logic in *Spokeo*, the Ninth Circuit asserted that a “bare procedural violation, divorced from any concrete harm,” would not satisfy the injury-in-fact requirement of Article III.⁷⁷ However, despite the absence of text messaging from the text of the TCPA itself, the Ninth Circuit largely deferred to congressional judgment, focusing on the “unwanted intrusion” of telemarketing.⁷⁸ The court characterized the plaintiff’s injury as “unsolicited contact,” which it argued was concrete and precisely the type of injury Congress intended to prevent with the TCPA.⁷⁹

According to the Ninth Circuit, standing was proper because receiving unwanted calls and text messages, unlike other statutory violations, “present[s] the precise harm and infringe[s] the same privacy interests Congress sought to protect in enacting the [TCPA].”⁸⁰ Therefore, the court concluded that TCPA claims “need not allege any additional harm beyond the one Congress has identified.”⁸¹ In this case, plaintiff’s receipt of two text messages was a sufficient concrete injury for standing under Article III.⁸² While the court found that the plaintiff had standing, it ultimately affirmed the district court’s dismissal because the plaintiff had not revoked his original consent to be contacted by the defendant.⁸³

2. The Eleventh Circuit requires a heightened level of injury for TCPA claims.

In *Salcedo v. Hanna*, the Eleventh Circuit held that, while the plaintiff’s claim facially stated a claim under the TCPA, the plaintiff did not suffer a “concrete injury” and did not have standing under Article III.⁸⁴ The appellate court’s decision reversed the district court with

76. *Id.* at 1042 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

77. *Id.* at 1042.

78. *Id.* at 1043.

79. *Id.* at 1043; *see also* *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 959 (8th Cir. 2019) (finding receipt of two answering machine messages without prior consent to be a concrete injury).

80. *Van Patten*, 847 F.3d at 1043.

81. *Id.* (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *see also* *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017) (finding receipt of single phone call violated the TCPA saying “in asserting ‘nuisance and invasion of privacy’ resulting from a single prerecorded telephone call, her complaint asserted the very harm that Congress sought to prevent, arising from prototypical conduct proscribed by the TCPA.”).

82. *Van Patten*, 847 F.3d at 1043.

83. *Id.* at 1048.

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

instructions to dismiss on remand.⁸⁵ In this case, plaintiff John Salcedo, on behalf of a class, sought relief under the TCPA after he received a single promotional text message from his former attorney.⁸⁶ He sought treble damages of \$1,500 per message sent willfully or knowingly.⁸⁷ The district court held the plaintiff had standing, but it granted the defendant's petition for interlocutory appeal for the Eleventh Circuit to review the same issue.⁸⁸

The court first noted that rights created by Congress or executive agencies are not “automatically enforceable in the federal courts.”⁸⁹ The court then applied the three-part test to establish the “irreducible constitutional minimum” for standing under *Lujan*.⁹⁰ This case turned on the first element of that test—whether receipt of a single text message was a sufficient injury-in-fact.⁹¹ The Eleventh Circuit also followed the guidance of *Lujan* and *Spokeo* in its analysis of whether the injury was concrete⁹² and particularized.⁹³ The court accepted the plaintiff's showing that the receipt of the promotional message was a particularized harm,⁹⁴ while noting that the concreteness prong required a more thorough analysis.⁹⁵ The court set a low bar for the required showing at “only an ‘identifiable trifle.’”⁹⁶

The plaintiff characterized his injury as wasted time addressing the message and that “[w]hile doing so, both plaintiff and his cellular phone were unavailable for otherwise legitimate pursuits.”⁹⁷ The plaintiff argued this was fundamentally aligned with a prior standing decision from the Eleventh Circuit regarding the receipt of a single junk fax.⁹⁸ The court distinguished that case on the grounds that the process of receiving a fax was fundamentally differently than receiving a text message.⁹⁹ A fax

85. *Id.* at 1173.

86. *Id.* at 1165.

87. *Id.*; 47 U.S.C. § 227(b)(3).

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

89. *Id.* at 1166.

90. *Id.*

91. *Id.*

92. *Id.* at 1167.

93. *Id.* at n.3.

94. *Id.* (noting that in TCPA class actions, each member of the class must establish their own particularized harm).

95. *Id.* at 1167.

96. *Id.* (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973)) (sufficiently concrete injuries for standing purposes have included \$1.50 poll tax) *Id.*

97. *Id.*

98. *Id.* at 1167-68 (discussing *Palm Beach Golf Club Center-Boca, Inc. v. Sarris*, 781 F.3d 1245, 1252 (11th Cir. 2015)).

99. *Id.*

machine is unable to both send and receive other messages during receipt of the junk fax and incurs immediate costs for the recipient.¹⁰⁰ In this case, however, the plaintiff could continue to use all functions of his phone, suffered no “loss of opportunity,” and incurred no additional costs.¹⁰¹

Next, the court proceeded to the direction of Congress, noting that “only through the rulemaking authority of the FCC” does the TCPA extend to text messaging.¹⁰² The court argued that receiving a text message is “qualitatively different” than the types of contact Congress intended to guard against with the passage of the TCPA, particularly “intrusive invasions[s] of privacy into the home.”¹⁰³ In support of this idea, the court noted that, unlike landlines, cell phones are often silenced and carried with people outside of their homes.¹⁰⁴

Finally, the court turned to history to determine whether the injury was concrete.¹⁰⁵ The court compared the receipt of a text message to torts such as intrusion upon seclusion, nuisance, conversion, and trespass to chattel.¹⁰⁶ Perhaps not surprisingly, the court found receipt of a single text message to be “isolated, momentary, and ephemeral,” and not comparable to these historical tort actions.¹⁰⁷ Receiving a text message, the court concluded, is more akin to having a flyer briefly waved in your face and “not a basis for invoking the jurisdiction of the federal courts.”¹⁰⁸ The court argued that the ultimate inquiry for a concrete injury analysis should be about the quality of the communication, *not* the quantity.¹⁰⁹ In this case the court held that the quality of the injury—receipt of a single text message—did not constitute an injury-in-fact and the plaintiff, therefore, did not have standing under Article III.¹¹⁰

III. DISCUSSION

Guidance from both the Supreme Court and Congress demands that a single text message should satisfy Article III standing requirements. First, Section A argues the Eleventh Circuit erred when it did not confer standing in *Salcedo*. Next, Section B argues the Ninth Circuit’s analysis in *Van Patten* was correct and properly applies the principles set out in

100. *Id.* at 1168.

101. *Id.*

102. *Id.*

103. *Id.* at 1169 (internal quotation marks omitted).

104. *Id.*

105. *Id.* at 1170.

106. *Id.* at 1171-72.

107. *Id.*

108. *Id.*

109. *Id.* at 1172-73.

110. *Id.* at 1173.

Lujan and *Spokeo*. Finally, Section C proposes a modern approach to TCPA claims that honors both Supreme Court guidance and the concerns raised by the Eleventh Circuit, while prioritizing consumer protection.

A. The Eleventh Circuit Rejects Congress and the Supreme Court in Salcedo

The Eleventh Circuit’s decision to dismiss Salcedo’s complaint for lack of Article III standing fails to consider the evolution of communication technology and the high risk of fraud associated with robotexting. First, Part 1 argues the court’s inquiry into the guidance of Congress ignores the true intent to the TCPA. Part 2 then argues the Supreme Court showed a willingness to allow Congress to elevate injuries even without a historical parallel in tort.

1. The Eleventh Circuit’s examination of congressional guidance does not go far enough.

The Eleventh Circuit missed the mark when it neglected to confer Article III standing on plaintiff John Salcedo. Just as the receipt of two text messages was sufficient for standing in *Van Patten*, the receipt of a single text message should also suffice. The court focused its analysis on the “injury-in-fact” requirement, particularly the concreteness of the alleged injury.¹¹¹ While the court examined the guidance of Congress, as directed by *Spokeo*, for an intangible injury, the court’s analysis is shallow and misses the true aims of the TCPA.¹¹² In short, the plaintiff’s injury was both *concrete* and *particularized* and fell squarely within the grasp of the TCPA.¹¹³

However, the court argued “a single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does.”¹¹⁴ The court went further, asserting that the portability of cell phones and a person’s ability to silence them results in *less* of an intrusion when contact is made.¹¹⁵ This argument raises more questions than answers. Cell phones now play a central role in our lives. They are omnipresent and, although the technology is relatively new, they store information that has historically been shielded from government intrusion. A cell phone, beyond merely making calls in a home, travels everywhere with a person and stores

111. *Id.* at 1166.

112. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

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

114. *Id.* at 1170.

115. *Id.*

personal documents, private correspondence, financial information, and more. The portability of a cell phone should, in fact, warrant *heightened* protection from unwanted intrusion. While the court seemed to elevate the importance of protecting against ringing landlines in a home, the prospect of a vibrating cellphone during a private conversation outside of the home is no different. Moreover district courts have suggested the ability to silence a device has no bearing on the quality of the injury, as demonstrated by recent decisions finding ringless voicemail technology to be within the grasp of the TCPA.¹¹⁶

While the Eleventh Circuit argues congressional silence on text messaging in the TCPA demonstrates it is not a sufficient injury for standing purposes, congressional debate over the TCPA and related telemarketing legislation reveals the opposite. First, Congress cited fraud prevention as a motivating factor in its introduction of the related Telemarketing Fraud Prevention Act in 1988.¹¹⁷ Spam text messages are increasingly used to commit fraud as well. In fact, in 2012, it was estimated that 92% of all robotexts were fraudulent.¹¹⁸ Dubbed “smishing” (SMS phishing), scammers target groups of cell phones in an attempt to gain personal information about as many users as they can, using fake links and requests for passwords.¹¹⁹ Common scams relate to banking, delivery services, and contest offers, and aim to catch unsuspecting users off guard as they go about their day—cellphone in hand.¹²⁰ The risk of fraud posed by these robotexts cannot be separated from the risk of fraud posed by a robocall to a landline. In fact, experts argue users are actually more susceptible to fraud on their mobile device than they are when using other devices due largely to small phone screens and the frequent downloading of applications.¹²¹ As texting continues to play a more prominent role in our lives, this risk continues to grow.

Next, as referenced in early congressional debates regarding

116. See *Saunders v. Dyck O'Neal, Inc.*, 319 F. Supp. 3d 907, 911 (W.D. Mich. 2018) (holding ringless voicemails to fall within the TCPA and arguing, “[t]he effect on [the Plaintiff] is the same whether her phone rang with a call before the voicemail is left, or whether the voicemail is left directly in her voicemail box”).

117. Congressmen Luken noted the rise in fraudulent marketing reaching \$20B in 1988. 134 CONG. REC. 15972 (daily ed. June 27, 1988) (statement of Rep. Luken.).

118. CLOUDMARK, SMS SPAM OVERVIEW 3 (2012), available at https://www.cloudmark.com/releases/docs/whitepapers/SMS_Spam_Overview.pdf [<https://perma.cc/U83L-8GFT>].

119. See generally S. Mishra & D. Soni, *SMS Phishing and Mitigation Approaches* 4, 2019 TWELFTH INTERNATIONAL CONFERENCE ON CONTEMPORARY COMPUTING (IC3), NOIDA, INDIA (Aug. 2019), available at <https://ieeexplore.ieee.org/document/8844920> [<https://perma.cc/3GPX-4PV4>].

120. *How to Recognize and Report Spam Text Messages*, FTC, <https://www.consumer.ftc.gov/articles/how-recognize-and-report-spam-text-messages> [<https://perma.cc/G6QW-LEX9>] (last visited Mar. 27, 2020).

121. Soni, *supra* note 119 (noting small screens make it difficult to see full URLs and user habit of downloading/installing smartphone applications makes cell phones an attractive target for scammers).

telemarketing regulation, nationwide enforcement plays a crucial role.¹²² Without the TCPA in place, fraudulent text messaging would be subject to the same patchwork of state based regulation that the TCPA sought to prevent. The Supreme Court has even recognized the high premium Congress placed on nationwide uniform enforcement, noting the importance of a federal law so telemarketers could not avoid punishment at the state level through multi-state operations.¹²³

Finally, Congress has granted regulatory authority to the FCC to enforce the legislation. The FCC, in turn, has recognized that a text message is synonymous with a “call” for purposes of the TCPA.¹²⁴ While this is not dispositive of standing, it surely supports the notion that federal courts should recognize a TCPA claim stemming from a single text message.

Recognizing that a statutory violation does not “automatically satisf[y] the injury-in-fact requirement,” congressional guidance nonetheless makes clear that robotexts can be a concrete injury-in-fact.¹²⁵ While communication largely occurred on landline telephones at the time the TCPA was passed, Congress’ motivation to curb fraudulent contact with consumers, combined with the inclusion of a private cause of action and their grant of regulatory authority to the FCC, demonstrates Congress’ intent to designate text messaging as a concrete injury-in-fact under Article III.

2. Examination of Historical Torts

The Eleventh Circuit’s examination of equivalent historical torts is also weak. The court argues receipt of a single text message is unlike intrusion upon seclusion, trespass, nuisance, conversion, and trespass to chattel.¹²⁶ While receiving a text message without consent may lack the “objectively intense”¹²⁷ quality traditionally sought by courts for intentional torts, the Supreme Court has directed that “Congress may ‘elevate to the status of legally cognizable injuries to concrete, *de facto* injuries, that were

122. Moreover, by providing access to federal courts, the Act “promote[s] nationwide enforcement and uniformity of decision-making.” 134 CONG. REC. 15973 (daily ed. June 27, 1988) (statement of Rep. Oxley) (discussing Telemarketing Fraud Prevention Act of 1988).

123. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371-72 (2012) (holding state and federal courts have concurrent jurisdiction over TCPA claims).

124. *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 30 FCC Rcd. 7961, 7964 n.3, available at https://docs.fcc.gov/public/attachments/FCC-15-72A1_Rcd.pdf.

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

126. *Salcedo v. Hanna*, 936 F.3d 1162, 1171 (11th Cir. 2019).

127. *Id.*

previously inadequate in law.”¹²⁸ Justice Kennedy went further in *Lujan*, arguing “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.”¹²⁹ Congress has done just that with the TCPA. Historical torts alone, therefore, should not prevent an injury from being deemed “concrete.”

B. The Ninth Circuit’s Modern Approach: One Text is Sufficient

The Ninth Circuit’s decision to grant Article III standing in *Van Patten* was correct because it comports with the guidance of the Supreme Court, is aligned with the legislative history of the TCPA, and is an appropriate response to the modern scourge of robotexting.

1. The Ninth Circuit’s analysis aligns with the Supreme Court’s standing guidelines.

First, the Ninth Circuit’s decision comports with the guidance of *Lujan* and *Spokeo*. The first *Lujan* prong requires a claimant to have suffered an “injury-in-fact.”¹³⁰ The plaintiff in *Van Patten* suffered an “injury-in-fact” when he received two promotional text messages from the defendant.¹³¹ The Supreme Court directs that an “injury-in-fact” must be both (a) “concrete and particularized” and (b) “actual or imminent, not ‘conjectural or hypothetical.’”¹³² In situations where the harm may be concrete, but intangible, the Supreme Court directs that history and the judgment of Congress, particularly any provided statutory rights, can be instructive but not dispositive of standing.¹³³ While there was no argument that the injury was hypothetical, there was doubt whether the injury was concrete.¹³⁴ However, the straightforward text of the TCPA makes clear that the receipt of two text messages is also concrete and particularized, satisfying the “injury-in-fact” requirement.

First, the injury in *Van Patten* was particularized because the messages in question were received by the plaintiff personally.¹³⁵ Next, the injury was concrete and not abstract. The plaintiff was not merely on a list of consumers to receive promotional messages, but actually received two

128. *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)).

129. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

130. *Id.* at 560.

131. *Van Patten v. Vertical Fitness Group*, 847 F.3d 1037, 1041 (9th Cir. 2017).

132. *Lujan*, 504 U.S. at 560.

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

134. *Van Patten*, 847 F.3d at 1042.

135. *Id.* at 1041.

text messages from the defendant.¹³⁶ While the harm of receiving a text message is surely intangible, it is nonetheless concrete given Congress' direct judgment of unsolicited communications as an injury demonstrated by the passage of the TCPA and further supported by the Supreme Court's judgment that a text "qualifies as a call."¹³⁷ Just as the *Spokeo* Court directed, the violation of a statutory right can be a sufficient Article III injury.¹³⁸ In cases like this, where an intangible harm has been clearly identified by Congress, the plaintiff is not required to "allege any *additional* harm beyond the one Congress has identified."¹³⁹

Next, the injury must also be "trace[able] to the challenged act."¹⁴⁰ In this case, the receipt of the text messages is directly tied to the challenged act of defendant sending the text messages. The injury is also "likely" to be "redressed by a favorable decision."¹⁴¹ A favorable decision for the plaintiff in this case would result in an injunction and a minimum of \$1,000 with a maximum penalty of \$3,000 if the court were to find that the defendant willfully or knowingly violated the TCPA.¹⁴²

2. The Ninth Circuit's decision aligns with the legislative history of the TCPA.

As discussed above, in cases of intangible injuries, courts are instructed to look at both legislative history and Congress for guidance, because "Congress is well positioned to identify intangible harms that meet minimum Article III requirements."¹⁴³ Again, the Ninth Circuit's decision to confer Article III standing on the plaintiff in *Van Patten* is directly and robustly supported by the guidance of Congress. In passing the TCPA, Congress made several specific findings, including: the rapidly increasing use of the technology by marketers, consumer outrage over the "proliferation of intrusive, nuisance calls," the inability of technology to

136. *Id.*

137. *Campbell-Ewald v. Gomez*, 136 S. Ct. 663, 667 (2016) (internal quotations omitted) (finding receipt of a single text message included within reach of TCPA prohibition; *see also* *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) ("We hold that a voice message or a text message are not distinguishable in terms of being an invasion of privacy.")) *Id.*

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

139. *Id.*

140. *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

141. *Id.*

142. 47 U.S.C.S § 227(b)(3); *Van Patten v. Vertical Fitness Group*, 847 F.3d 1037, 1041 (9th Cir. 2017)(defendant sent two text messages to plaintiff, penalized at \$500 each or treble damages if sent willingly and knowingly).

143. *Spokeo*, 136 S. Ct. at 1540.

combat the crisis, and safety risks that can be posed by robocalls.¹⁴⁴ All of these Congressional findings about automated calls are true for robotexts as well—even if a consumer receives just a single message.

While automated text messages are a different type of contact than was originally contemplated by the TCPA, their status as a concrete injury is equally supported by these Congressional findings. First, the use of automated text messaging by marketers has been rapidly increasing and shows no signs of slowing down.¹⁴⁵ Like the consumer outrage towards telemarketers highlighted by Congress in the TCPA, consumer sentiment towards robotexts remains equally strong. In 2018, consumers filed over 93,000 complaints about unwanted text messages, up from around 70,000 in 2017.¹⁴⁶ Moreover, just as Congress supported their legislation by citing the inability of technology to combat the scourge of telemarketing, current technology continues to lag behind. The FCC has been proactive in this regard—working with carriers to employ filters for some spam messages—but acknowledges there is still a 2.8% spam rate for text messages.¹⁴⁷

Finally, just as Congress recognized telemarketing risked tying up phone lines and interfering with emergency communication, the FCC also recognized the negative impacts robotexts can have on emergency communication.¹⁴⁸ Increases in the number of spam text messages threaten the legitimacy of texting as a whole, the National Emergency Number Association argues, and puts services like to Text-to-911¹⁴⁹ at risk by threatening the viability of the entire text messaging platform.¹⁵⁰

3. The Ninth Circuit's decision creates logical policy for a modern problem.

The Ninth Circuit's grant of Article III standing in *Van Patten* also makes for pragmatic policy. The Supreme Court has acknowledged

144. Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2, ¶¶1-4, 5, 6, 11, 105 Stat. 2394 (1991).

145. Bindley, *supra* note 48 (In 2019, T-Mobile reported a 20% increase *each month* in the number of robotexts they blocked—blocking 1M spam texts each day in July of that year.).

146. *Id.*

147. Press Release, FCC, FCC Chairman Proposes Measures To Reduce Unwanted Robocalls And Support Blocking Of Spam Robotexts 2 (Nov. 20, 2018), *available at* <https://docs.fcc.gov/public/attachments/DOC-355188A1.pdf> [<https://perma.cc/77GG-FUVV>].

148. *Id.*

149. Text-to-911 is a service available in select U.S. locations that allows users to text, rather than call 911. The service is used primarily by individuals with disabilities. *Text-to-911: What You Need to Know*, FCC (Jan. 6, 2020), https://www.fcc.gov/sites/default/files/text-to-911_-_what_you_need_to_know.pdf [<https://perma.cc/W8DU-4BPK>].

150. Letter from Nat'l Emergency No. Ass'n to Marlene H. Dortch, Secretary, FCC, (Dec. 21, 2015), *available at* [<https://perma.cc/XA86-W9QF>].

Congress' determination that the nuisance of uninvited telemarketing is an "intrusive invasion of privacy."¹⁵¹ When the TCPA was passed, this could only have been in reference to calls made to landline phones. But as technology has progressed, so too has our collective understanding of what constitutes an invasion of privacy.¹⁵² Many circuit courts have recognized this technological innovation for what it is and have held communications like prerecorded voicemail and ringless voicemails to be a concrete injuries under the TCPA.¹⁵³

The very same invasion of privacy and nuisance concerns are presented with robotexting claims. Modern life necessitates near constant connectivity for many people; for others, smartphone use has nonetheless become a part of their daily life.¹⁵⁴ This makes the invasion of privacy contemplated by Congress that much more problematic for cell phone users receiving a robotext. Rather than solely intruding into a consumer's home via their landline, a cell phone contact results in an intrusion into the home *and wherever the recipient is at the time*. This could result in an intrusive contact at work, in their car, in a private meeting, or in someone else's home, in addition to their own home. Marketers knowingly take advantage of this constant connectivity and intrude into consumers' lives when they send robotexts, far beyond the intrusion of a ringing landline in their home. This intrusive invasion into the lives of consumers is surely akin to historical torts related to privacy, particularly when considering the Supreme Court's guidance that Congress can "elevate . . . *de facto* injuries that were previously inadequate in law."¹⁵⁵

151. Telephone Consumer Protection Act, Pub. L. No. 102-243, § 2, ¶6 (1991) ("Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers."); *See also* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 372 (2012) (recognizing Congressional findings in the TCPA before holding that state and federal courts have concurrent jurisdiction over TCPA claims).

152. *See* Satterfield v. Simon & Schuster, 569 F.3d 946, 954 (9th Cir. 2009) (holding text messages fall within definition of call and likewise finding uninvited text messages to be identical to calls in terms of privacy invasion).

153. *See* Susinno v. Work Out World Inc., 862 F.3d 346, 351 (3d Cir. 2017) (finding prerecorded voicemails to be "the very harm that Congress sought to prevent"); *Saunders v. Dyck O'Neal, Inc.*, 319 F. Supp. 3d 907, 911 (W.D. Mich. 2018) ("use of direct to voicemail technology is a 'call' and falls within the purview of the TCPA"); *Gurzi v. Penn Credit Corp.*, No. 6:19-cv-823-Orl-31EJK, 2020 U.S. Dist. LEXIS 56582, at *10, *11 (M.D. Fla. Mar. 30, 2020) (finding "the broader context of the statute as a whole supports the Court's finding that direct-to-voicemail messages fall within the TCPA").

154. *See generally* Amy He, *Average US Time Spent with Mobile in 2019 Has Increased*, EMARKETER (June 4, 2019), <https://www.emarketer.com/content/average-us-time-spent-with-mobile-in-2019-has-increased> [<https://perma.cc/JJL2-EGZZ>] (the average U.S. adult spent 3 hours, 43 minutes using their phone each day in 2019).

155. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (internal quotations omitted); *see also Susinno*, 862 F.3d at 351. (elevating a single received call to intrusion upon seclusion given the guidance in *Spokeo*).

C. The Ideal Approach to a Modern Problem

This Section first provides a proposed framework to analyze modern text-based TCPA claims using the Supreme Court's standing guidance and the TCPA guidance provided by district courts. Then, this Section proposes a solution to the concern that federal district courts may become overwhelmed by an increased number of TCPA claims given the potential for an increased caseload.

1. The Proposed Framework

The early debate in Congress about the TCPA, makes clear that the law was enacted to protect consumers. Images of interrupted family dinners, grandparents being rushed out of bed, and fraud were all kept at the forefront when pushing the bill forward.¹⁵⁶ The ideal approach for courts to assess TCPA claims must do the same: put consumers first. The Ninth Circuit's approach in *Van Patten* serves as a good starting point for this analysis. In practice, this should include a common-sense analysis of the legislation and relevant Congressional testimony to determine the following: first, whether the alleged injury falls within the scope of the TCPA's intended protection. For text messages, this is widely understood to be true. As new technology is developed and weaponized against consumers, courts should focus on the core elements of the communication. If a communication targets a personal device and is automated, commercial, and nonconsensual, it should fall within the grasp of the TCPA and be a sufficient injury-in-fact.

The standing analysis should then follow the consumer-friendly guidance of the Ninth Circuit in assessing whether (1) the plaintiff suffered an injury-in-fact, (2) that is fairly traceable to the challenged conduct, and (3) that is likely to be redressed by a favorable judicial decision.¹⁵⁷ The focus of the court's analysis, as was the focus of this Note, will likely be the "injury-in-fact" requirement, particularly whether the harm is "concrete."¹⁵⁸ While not dispositive of a concrete injury, if a communication is found to fit the proposed definition of a TCPA communication as provided above, the plaintiff should, more often than not, satisfy the Article III injury-in-fact requirements.¹⁵⁹ In short, a

156. *See supra* Part II.A.

157. *Van Patten v. Vertical Fitness Group*, 847 F.3d 1037, 1042 (9th Cir. 2017) (citing *Lujan*, 504 U.S. at 560-61).

158. While not discussed at length in this proposed framework, the analysis must also ensure the injury-in-fact is traceable to the challenged conduct and is likely to be redressed by a favorable decision. *Id.*

159. *See Van Patten*, 847 F.3d at 1043 ("A plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified.") (quoting *Spokeo*, 136 S. Ct. at

plaintiff receiving an automated, commercial, and nonconsensual contact on a personal device “need not allege any *additional* harm beyond the one Congress has identified” to satisfy the injury-in-fact requirement.¹⁶⁰ While historical parallels in tort may also be considered, they should not weigh heavily in this analysis given the rapid innovation in communication technology in recent years.

2. A Proposed Shift to FCC Administrative Law Judges

A significant concern for granting standing to plaintiffs alleging a TCPA violation of a single text message is the potential for federal courts to become overburdened and backlogged with a high number of low-value TCPA cases. This concern can be alleviated by processing cases below a certain threshold through the FCC’s Office of Administrative Law Judges.¹⁶¹ Not only would this shift to Administrative Law Judges alleviate the already burdened federal courts, but it would also provide an increased level of uniformity in the enforcement of TCPA claims¹⁶²

IV. CONCLUSION

As cell phones continue to play an increased role in the lives of consumers, so too will automated text messages aimed at defrauding our nation’s most vulnerable and downright annoying the rest of us. Congress enacted the TCPA to combat this intrusion and, as technology has evolved, so too should federal courts to ensure a full-powered TCPA is in force. To ensure consumers are protected under the TCPA as Congress intended, courts must find automated, unwanted text messages to be a concrete injury-in-fact for purposes of Article III standing. TCPA claims should be assessed on their merits, not on gatekeeping principles in direct conflict with the guidance of Congress, the Supreme Court, and the realities of modern technology.

While the FCC continues to develop new technology to combat robotexts, Congress can, and should, pass an amendment to explicitly include receipt of a robotext as a concrete harm under the TCPA. Courts like the Eleventh Circuit may still choose to dismiss the case for lack of

1549) (emphasis in original).

160. *Spokeo*, 136 S. Ct. at 1549 (emphasis in original).

161. See generally *Office of Administrative Law Judges*, FCC, <https://www.fcc.gov/administrative-law-judges> [https://perma.cc/DHT4-NYUS].

162. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012) (acknowledging Congressional desire for uniformity as support for a federal cause of action); see 134 CONG. REC. 15973 (daily ed. June 27, 1988) (statement of Rep. Oxley) Congressman Oxley argued a federal private cause of action would “promote nationwide enforcement and uniformity of decision-making” for the Telemarketing Fraud Prevention Act of 1988.

standing, but an explicit inclusion of the harm within the TCPA would make it much more difficult to ignore these claims. In the meantime, the approach proposed in this Note ensures the TCPA is enforced to its full potential by honoring the aims of Congress, following the Article III standing guidance of the Supreme Court, and above all, protecting consumers.