No. 21-10199

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JUAN ENRIQUE PINTO,
Objector-Appellant,
v.
SUSAN DRAZEN, et al.,
Plaintiffs-Appellees,
v.
GODADDY.COM, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Alabama
(Case No. 1:19-00563-KD-B)

FLORIDA JUSTICE REFORM INSTITUTE, INC.'S MOTION FOR LEAVE TO FILE EN BANC AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLEE GODADDY.COM, LLC, WITH FJRI IN FAVOR OF VACATING

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 and 26.1-2, amicus curiae Florida Justice Reform Institute, Inc. (FJRI), submits the following Certificate of Interested Persons and Corporate Disclosure Statement:

Corporate Disclosure Statement

Florida Justice Reform Institute, Inc. is a not-for-profit corporation that has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Certificate of Interested Persons

In addition to the persons and entities named in the certificates of interested persons included in the parties' panel and en banc briefs, the following individuals or entities may have an interest in the outcome of this case:

1. Bandas, Christopher A. (Counsel for Objector-Appellant)
2. Bandas Law Firm, P.C. (Counsel for Objector-Appellant)
3. Bennett, Jason (Plaintiff-Appellee)
4. Bivins, The Honorable Sonja F. (United States District Magistrate Judge, Southern District of Alabama)
5. Bock, Phillip A. (Counsel for Plaintiffs-Appellees)
6. Bock Hatch & Oppenheim, LLC (Counsel for Plaintiffs-Appellees)

7. Clore, Robert W. (Counsel for Objector-Appellant)
8. Cox, John R. (Counsel for Plaintiffs-Appellees)
9. Cozen O'Connor (Counsel for Defendant-Appellee)
10. Criscuolo, Matthew B. (Counsel for Defendant-Appellee)
11. Deen, Thomas Jefferson, III (Counsel for Objector-Appellant)
12. Desert Newco, LLC
13. Drazen, Susan (Plaintiff-Appellee)
14. DuBose, The Honorable Kristi K. (United States District Court for the Southern District of Alabama)
15. Florida Justice Reform Institute, Inc. (Prospective Amicus)
16. Go Daddy Operating Company, LLC
17. GoDaddy Inc.
18. GoDaddy.com, LLC (Defendant-Appellee)
19. Gonzalez, Jason (Counsel for Prospective Amicus FJRI)
20. Hatch, Robert M. (Counsel for Plaintiffs-Appellees)
21. Helfand, Steven F. (Objector)
22. Herrick, John (Plaintiff)
23. Kenneth J. Reimer Attorney at Law (Counsel for Plaintiffs-Appellees)
24. Kent Law Offices (Counsel for Plaintiffs-Appellees)
25. Kent, Trinette G. (Counsel for Plaintiffs-Appellees)

26. Law Offices of John R. Cox (Counsel for Plaintiffs-Appellees)

27. Lawson Huck Gonzalez, PLLC (Counsel for Prospective Amicus FJRI)

28. Large, William W. (President and Counsel for FJRI)

29. Mark K. Wasvary, P.C. (Counsel for Plaintiffs-Appellees)

30. Meyers, Evan M. (Counsel for Plaintiffs-Appellees)

31. McGuire Law, P.C. (Counsel for Plaintiffs-Appellees)

32. McGuire, Miles (Counsel for Plaintiffs-Appellees)

33. McMorrow Law, P.C. (Counsel for Plaintiffs-Appellees)

34. McMorrow, Michael J. (Counsel for Plaintiffs-Appellees)

35. Monhait, Jeffrey M. (Counsel for Defendant-Appellee GoDaddy.com, LLC)

36. Nunnally, Amber Stoner (Counsel for Prospective Amicus FJRI)

37. Pinto, Juan Enrique (Objector-Appellant)

38. Reimer, Kenneth J. (Counsel for Plaintiffs-Appellees)

39. Slatten, Jessica (Counsel for Prospective Amicus FJRI)

40. Turin, Yevgeniy Y. (Counsel for Plaintiffs-Appellees)

41. Underwood & Riemer, P.C. (Counsel for Plaintiffs-Appellees)

42. Underwood, Earl Price, Jr. (Counsel for Plaintiffs-Appellees)

43. Wasvary, Mark K. (Counsel for Plaintiffs-Appellees)

44. Zecchini, Paula L. (Counsel for Defendant-Appellee)

Dated: May 13, 2023

Respectfully submitted,

/s/ Jessica Slatten
Counsel for Amicus FJRI

FLORIDA JUSTICE REFORM INSTITUTE, INC.'S MOTION FOR LEAVE TO FILE EN BANC AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT-APPELLEE GODADDY.COM, LLC, WITH FJRI IN FAVOR OF VACATING

Under Federal Rule of Appellate Procedure 29 and Eleventh Circuit Rules 29-1 and 35-8, Amicus Curiae Florida Justice Reform Institute, Inc. (FJRI), hereby moves the Court for leave to file an en banc amicus curiae brief in support of Defendant-Appellee GoDaddy.com, LLC (GoDaddy). FJRI supports vacating the final judgment below. The proposed brief is attached to this motion, which is filed without objection from GoDaddy. In the event the Court concludes that the proposed brief is untimely, FJRI asks the Court to grant leave to file the proposed brief out of time. In support of this motion, FJRI states as follows:

1. **As to movant's interest**, FJRI is a not-for-profit corporation dedicated to reforming Florida's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in civil justice. FJRI represents a broad range of participants in the business community that are united in their interest for a balanced litigation environment that treats plaintiffs and defendants evenhandedly. To protect Florida's businesses from abusive and predatory lawsuits, FJRI routinely advocates for tort reform and changes to legal liability. FJRI also frequently files amicus curiae briefs in cases where courts address issues that impact Florida businesses and implicate the separation of powers foundational to our government.

FJRI has a strong interest in the important Article III standing issue in this case. The Court has requested en banc briefing on the following issue: "Does the receipt of a single unwanted text message constitute a concrete injury sufficient to confer Article III standing under the TCPA?" The question posed jeopardizes *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), where a panel of this Court—consistent with the Supreme Court's Article III standing precedent—already said no. A potential sea change in the law should be tested by adversarial briefing. Yet, because of the odd procedural posture of this case and their incentive to save a single class action settlement, nominally adverse parties (the Objector-Appellant and the Plaintiffs-Appellees) have positioned themselves on the same side of the "v." Their briefs will fail to meaningfully address the relevant constitutional considerations and the vast consequences of overturning *Salcedo*. A future without *Salcedo* would not only be contrary to the United States Constitution and the Supreme Court's Article III standing precedent, but it would be ruinous to the Florida businesses that FJRI exists to protect from abusive and predatory lawsuits.

2. **FJRI's amicus curiae brief is desirable and relevant.** In its proposed brief, FJRI first answers this Court's question, by explaining why, under precedent from the Supreme Court and this Court, *Salcedo* correctly held that the receipt of a single text message in violation of the TCPA is not sufficient to establish the concrete injury necessary for Article III standing. Not to hide the

ball, the reason is because this bare statutory violation is missing elements essential to liability under the alleged common-law comparator torts. The view that *Salcedo* is correct, plus a detailed analysis of the Article III precedent that proves this to be true is certain to be underrepresented in the parties' briefs, as the Objector-Appellant and Plaintiffs-Appellees have united in urging the Court to overturn *Salcedo*. Moreover, FJRI's brief "alerts the [Court] to possible implications of the appeal," *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002)—including providing a Florida-specific perspective unlikely to be addressed by any other party or amicus. There is so much more at stake in this case than a single settlement, and FJRI's brief shows specific examples as to why the outcome here will deeply and directly impact the businesses FJRI serves. As FJRI's brief will assist the Court by addressing underrepresented (or possibly not represented) Article III arguments as to why the Court should uphold *Salcedo* and by pressing the consequences of failing to do so that will otherwise go unsaid, FJRI's brief meets the relevance and desirability criteria required for an amicus curiae brief. *See Neonatology Assocs.*, 293 F.3d at 131 (emphasizing "the fundamental assumption of our adversary system that strong (but fair) advocacy on behalf of opposing views promotes sound decision making" in evaluating the desirability and relevance showings required of a proposed amicus curiae brief); *see also Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003)

(explaining "the criterion for deciding whether to permit the filing of an amicus brief" as "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs").

3. **FJRI's motion is timely.** Under Eleventh Circuit Rule 35-8, the deadline for filing a motion requesting leave to file an en banc amicus curiae brief, with the proposed brief attached, is "no later than the due date of the principal en banc brief of the party being supported." This Court's en banc briefing order set a deadline of May 15, 2023, for the appellees' en banc principal briefs. Counsel for Defendant-Appellee GoDaddy has confirmed to the undersigned that GoDaddy does not object to FJRI's seeking leave to file an en banc amicus brief. The undersigned in good faith believes that FJRI and GoDaddy are aligned on how the Court should answer the question it asked the parties to address in this en banc rehearing and further aligned in arguing that the Court should uphold *Salcedo*. FJRI makes no representation as to the relief that GoDaddy will seek in this case. FJRI is stating that its proposed brief supports vacating to comply with Federal Rule of Appellate Procedure 29(a)(4), which requires the cover of an amicus brief to "indicate whether the brief supports affirmance or reversal." After conferring with counsel for GoDaddy, FJRI moved to withdraw the motion it had filed on May 1, 2023. *See* Dkt. 101. In the May 1 motion, FJRI had requested until May 15 to seek leave to file an out of time amicus curiae brief not supporting either

party (that would have otherwise been due on April 14, 2023), because FJRI had not (as of May 1) been able to confirm GoDaddy's position and whether FJRI could in good faith represent that its proposed amicus curiae brief is in support of GoDaddy. *See* Dkt. 93 at 3 n.1. Since then, after obtaining confirmation that GoDaddy does not object to this motion, FJRI believes this motion seeking leave to file the attached brief is timely filed in support of GoDaddy. The Objector-Appellant Pinto objects to this motion and to FJRI's being granted leave to file an amicus brief for the reasons expressed in his response to FJRI's withdrawn May 1 motion. *See* Dkt. 95. Counsel for the Plaintiffs-Appellees has not responded to the undersigned's inquiry for a position, but the undersigned in good faith believes that the Plaintiffs-Appellees also object. Notwithstanding any objection by the Objector-Appellant or the Plaintiffs-Appellees, however, FJRI's motion is timely filed by May 15 because FJRI seeks leave to file an amicus curiae brief supporting Defendant-Appellee GoDaddy, with no objection by GoDaddy.

4. **Alternatively, should the Court view FJRI's request for leave as untimely**, FJRI would respectfully request leave to file this brief out of time. As explained above, FJRI in good faith believes that its alignment with GoDaddy on the way the Court should answer the question on which it requested en banc briefing qualifies its brief as being in support of GoDaddy. And, as also explained above, the Article III standing issue presented in this case has vast implications

beyond a single settlement that are deserving of consideration and otherwise unlikely to be briefed.

For these reasons, FJRI respectfully requests that the Court grant this motion for leave to file an en banc amicus curiae brief in support of Defendant-Appellee GoDaddy and accept FJRI's attached brief for filing, including if necessary, granting leave to file out of time.

Dated: May 13, 2023

Respectfully submitted,

/s/ Jessica Slatten

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Counsel for Amicus Curiae FJRI

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A), the typeface requirements of Rule 32(a)(5), and the type-style requirements of Rule 32(a)(6) because the motion has been prepared in a proportionally spaced typeface, Times New Roman 14-point font, and because according to the word processor program used to prepare the motion, Microsoft Word for Mac version 16.71, it contains 1,329 words, excluding the parts of the document exempted by Rule 32(f).

/s/ Jessica Slatten
Counsel for Amicus Curiae FJRI

CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Jessica Slatten
Counsel for Amicus Curiae FJRI

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1. Florida Justice Reform Institute, Inc. (Amicus Curiae)
2. Gonzalez, Jason (Counsel for FJRI)
3. Large, William W. (President and Counsel for FJRI)
4. Lawson Huck Gonzalez, PLLC (Counsel for FJRI)
5. Nunnally, Amber Stoner (Counsel for FJRI)
6. Slatten, Jessica (Counsel for FJRI)

Dated: May 13, 2023

Respectfully submitted,

/s/ Jessica Slatten
Counsel for Amicus FJRI

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Florida Justice Reform Institute, Inc. (FJRI), is a not-for-profit corporation dedicated to reforming Florida's civil justice system through the restoration of fairness, equality, predictability, and personal responsibility in civil justice. FJRI represents a broad range of participants in the business community that are united in their interest for a balanced litigation environment that treats plaintiffs and defendants evenhandedly. To that end, FJRI regularly advocates for tort reform and changes to legal liability. FJRI also frequently files amicus curiae briefs in cases where courts address issues that impact Florida businesses and implicate the separation of powers foundational to our government.

FJRI has a significant interest in the Article III standing issue before this Court, which raises an important and fundamental question of how courts are to analyze whether statutory violations of the Telephone Consumer Protection Act (TCPA) constitute the concrete harm necessary to bring a lawsuit. In jeopardy here is *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), where a panel of this Court held that the receipt of a single unwanted text message in violation of the

1. Under Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae FJRI states that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.

TCPA is insufficient to establish the concrete harm required for Article III standing. *Salcedo* is of critical importance to both businesses and the justice system because *Salcedo* stops nuisance class actions seeking bet-the-company damages based on technical statutory violations that cause no constitutionally cognizable harm to anyone. And it does so by faithfully adhering to the text of Article III, which is "built on a single basic idea—the idea of separation of powers." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2202 (2021) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

Without *Salcedo*'s protection, Florida's businesses will be left near defenseless to nuisance lawsuits—in the TCPA context and beyond. Florida's state courts, which are increasingly looking to federal Article III standing decisions for their standing analyses, also will be impacted if this Court charts a divergent standing course. If *Salcedo* falls, Florida's federal courts are likely to experience a rush of filings and removals of nuisance class action lawsuits by uninjured plaintiffs and their counsel forum shopping for sure settlements.

FJRI's interest in filing an en banc amicus brief in this case is even more pronounced because nominally adverse parties (the Objector-Appellant and the Plaintiffs-Appellees), have united themselves on the same side of the "v" to attempt to save their settlement. The implications of the Article III standing inquiry before the Court stretch well beyond the confines of a single settlement.

The prospect of conferring Article III standing on plaintiffs who suffered no concrete injury strikes at the heart of the Florida businesses that FJRI exists to protect from predatory lawsuits, and it cuts to the core of FJRI's efforts to reform Florida's civil justice system.

SUMMARY OF ARGUMENT

In this en banc rehearing, the Court requested briefing that answers this question: Does the receipt of a single unwanted text message constitute a concrete injury sufficient to confer Article III standing under the Telephone Consumer Protection Act (TCPA)? The answer is no, as a panel of this Court already held in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019). Recent Article III standing decisions from the Supreme Court and this Court underscore that *Salcedo* got it right. The reason why is because the alleged statutory harm (the receipt of a single unwanted text message) lacks elements essential to liability under the alleged common-law comparator torts—a failure that is fatal to showing the concrete injury required for Article III standing. This Court should thus uphold *Salcedo*. And because not all members of the class have the concrete injury required for Article III standing, the Court should follow the panel's lead and vacate, for lack of subject matter jurisdiction, the district court's order approving the class action settlement in this case.

But the stakes in this case are much bigger than a single settlement. Ensuring that the en banc Court sticks to *Salcedo* and thereby stays in sync with the Supreme Court's Article III standing precedent is critical to the survival of the Florida businesses that FJRI exists to protect from abusive and predatory lawsuits, and to ensuring their due process rights. Upholding *Salcedo* will also prevent chaos in Florida state courts that are increasingly applying a standing analysis consistent with that of Article III, and it will prevent the forum shopping that is likely to result if this Court adopts a divergent standing approach.

ARGUMENT

I. This Court should uphold *Salcedo v. Hanna* because the receipt of a single unwanted text message in violation of the Telephone Consumer Protection Act does not constitute a concrete injury sufficient to confer Article III standing.

Salcedo v. Hanna correctly held that the receipt of a single unwanted text message in violation of the TCPA does not constitute a concrete injury sufficient to confer Article III standing. Recent decisions from the Supreme Court and this en banc Court underscore why: this technical statutory violation does not share the elements essential to liability of any of the alleged common-law comparator torts. Because there is no injury, there is no standing, and the Court should therefore uphold *Salcedo*. And because not all members of the class have Article III standing, the Court should vacate, for lack of subject matter jurisdiction, the district court's approval of the class action settlement.

A. Under precedent from the Supreme Court and this Court, a bare statutory violation does not establish the concrete harm required for Article III standing unless it shares the elements essential to liability under a common-law comparator tort.

Explaining why *Salcedo* rightly held, in 2019, that the receipt of a single text message in violation of the TCPA is insufficient to establish the concrete injury required for Article III standing requires the consideration of two key Article III standing decisions handed down since then. The first is from the Supreme Court in 2021, and the second is from this en banc Court last year.

In *TransUnion LLC v. Ramirez*, the Supreme Court ruled that "[e]very class member must have Article III standing in order to recover individual damages." 141 S. Ct. 2190, 2208 (2021). In doing so, the Supreme Court reiterated longstanding precedent that Article III standing—which is essential to separation of powers—demands that "[o]nly those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *Id.* at 2205. To analyze whether a statutory violation causes concrete harm, *TransUnion* reaffirmed its prior decision in *Spokeo v. Robins* that "courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.* at 2204 (quoting *Spokeo Inc. v. Robins*, 578 U.S. 330, 340 (2016)). But *TransUnion* provided additional guidance for how to tell if the necessary relationship exists that is particularly important for determining

whether an intangible harm is concrete: "That inquiry asks whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Id.*

After *TransUnion*, this Court, sitting en banc in *Hunstein v. Preferred Collection & Management Services, Inc.*, explained that *TransUnion* "cut a straightforward path" for determining whether the dispositive close relationship between a new statutory harm and a traditionally recognized harm exists. 48 F.4th 1236, 1239 (11th Cir. 2022). That path, *Hunstein* explained, is an "element-for-element approach" that mandates measuring the statutory harm alleged against the common-law comparator tort. *Id.* at 1248. "Although an 'exact duplicate' of a traditionally recognized harm is not required, the new allegations cannot be missing an element 'essential to liability' under the comparator tort." *Id.* at 1242 (quoting *TransUnion*, 141 S. Ct. at 2209). Where an element is missing, so too is the close relationship necessary to show the concrete injury required for Article III standing. *See Hunstein*, 48 F.4th at 1245 ("Because the [statutory] harm *Hunstein* now asserts lacks an element essential to its only plausible historical comparator, it lacks a close relationship with a traditional common-law tort. *Hunstein* has alleged no other basis for standing and his case must be dismissed."); *see also id.* at 1256 (Pryor, C.J., concurring) (stating "*TransUnion*'s simple rule that an element must be present if that element is necessary for the presence of the *harm* that was traditionally actionable").

Hunstein also said something else likely to impact how the Court views *Salcedo*, namely that *TransUnion* had "ratified" the Eleventh Circuit's element-for-element approach for "consider[ing] common-law torts as sources of information on whether a statutory violation had caused a concrete harm." *Id.* at 1239. *Hunstein* pointed not to *Salcedo* in example, but to *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020) (en banc), explaining that *Muransky* had evaluated whether a statutory violation caused a concrete harm sufficient to confer Article III standing "by comparing" the alleged statutory harm "to traditional common-law tort claims." *Hunstein*, 48 F.4th at 1240-41 (citing *Muransky*, 979 F.3d at 926). Yet, *Salcedo* took that same approach too, and despite not mentioning *Salcedo* by name, the *Hunstein* Court seemed to signal that *Salcedo* also syncs with the Supreme Court's Article III standing precedent. It did so by rejecting the dissent's argument that certain of the Eleventh Circuit's prior decisions cited by the dissent—including *Salcedo*—create a "circuit split" over the standard for deciding whether a bare statutory violation causes the concrete harm required for Article III standing. *Hunstein*, 48 F.4th at 1249.

With that backdrop in place, on to why *Salcedo* syncs with the Article III standing precedent of the Supreme Court and this Court.

B. The receipt of a single unwanted text message contrary to the TCPA does not establish the concrete injury required for Article III standing because this bare statutory violation is missing elements essential to liability under the alleged common-law comparator torts.

Despite not having the benefit of *TransUnion* and *Hunstein*, the panel in *Salcedo* correctly held that the receipt of a single unwanted text message in technical violation of the TCPA is insufficient to establish the concrete injury required for Article III standing. *See Salcedo*, 936 F.3d at 1165. And, consistent with the element-for-element approach that *Hunstein* and *TransUnion* require, the *Salcedo* panel did so by comparing the alleged statutory harm of receiving a single unwanted text message to torts actionable at common law. *See id.* at 1170-72. *Salcedo* addressed a laundry list of torts: invasion of privacy under an intrusion upon seclusion theory; trespass; private nuisance; conversion; and trespass to chattel. *See id.*

In addressing "invasion of privacy," *Salcedo* analyzed "the generally accepted tort of intrusion upon seclusion"—noting that this is the only common-law comparator tort "that bears any possible relationship" to an invasion of privacy allegedly caused by receiving a single unwanted text message. *Id.* at 1171 n.10. As *Salcedo* explained, this tort "creates liability for invasions of privacy that would be 'highly offensive to a reasonable person.' " *Id.* at 1171 (quoting *Restatement (Second) of Torts* § 652B). To establish liability, the intrusion on privacy must be

"objectively serious and universally condemnable." *Id.* (citing *Restatement* § 652B cmt. d). And the intrusion must be "upon the solitude or seclusion of another or his private affairs or concerns." *Id.* (quoting *Restatement* § 652B). The subjective annoyance of receiving a single text message is not, as *Salcedo* held, the "objectively intense interference" essential to establishing liability under this tort. *Id.*

Salcedo's analysis of other common-law torts shows that the bare statutory violation of receiving a single unwanted text message on a cell phone misses the mark for concrete harm when measured against them, too. "Trespass requires intentionally 'enter[ing] land in the possession of the other[.]' " *Id.* (quoting *Restatement* § 158(a)). And "private nuisance is 'a nontresspassory invasion of another's interest in the private use and enjoyment of land.' " *Id.* (quoting *Restatement* § 158(a)). A text message is not an invasion of an interest in real property. Nor is receiving a single text message a conversion or trespass to chattel; these torts include elements like serious interference with the right of control over chattel and depriving a person of the use of the chattel for a substantial amount of time. *See Salcedo*, 936 F. 3d at 1171-72 (citing *Restatement* §§ 217(b), 218(c) & cmt. e, 222A).

Although public nuisance (which the Appellant-Objector mentions in his brief) was not among the list of common-law torts that *Salcedo* addressed, it is not

an apt common-law comparator either. To establish liability for public nuisance requires showing an "unreasonable interference with a right common to the general public." *Restatement (Second) of Torts* § 821B (emphasis added). Far from being objectively unreasonable or interfering with the exercise of a public right, receiving a single unwanted text message, in *Salcedo*'s words, "is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts." 936 F.3d at 1172.

This case, like *Salcedo*, involves class members who allege they were harmed by the bare statutory violation of receiving a single unwanted text message. How, exactly, they do not say. So far, the briefing does not point to allegations from the complaint that purport to identify the exact harm caused by a single unwanted text message; nor do the briefs cite allegations from the complaint that attempt to explain how the harm alleged bears a close relationship to a traditionally recognized harm. Instead, the parties cobble together a list of common-law torts and urge the Court to find the close relationship with a bare violation of the statute required for Article III standing.

Armed with just the parties' list, how is the Court supposed to compare harms or stake the edges of the possible common-law analogues when the complaint only alleges a bare statutory violation? *See Drazen v. Pinto*, 41 F.4th

1354, 1355-56 (11th Cir. 2022) (explaining that the complaint in this case alleged "that GoDaddy had violated the [TCPA] when it allegedly called and texted Drazen solely to market its services and products through a prohibited automatic telephone dialing system. *See* 47 U.S.C. § 227(a)(1), (b)(1)(A)"), *vacated*, 61 F.4th 1297 (11th Cir. 2023). Were the class members who received the single unwanted text at home when they got the text? Were they otherwise in private? Or were they in public? Were their phones silenced? If so, did they even know they received a text? Or, if their phones were not silenced, were their lives interrupted in any way? And, whatever the answers to these questions might be, should the parties be permitted, on appeal, to throw common-law analogues against a statute—instead of harms that were actually alleged in their complaint to have been caused by the violation of the statute—to see if any stick?

Nevertheless, comparing the elements to the alleged common-law comparators, as the Court largely already did in *Salcedo*, shows that the bare statutory violation of receiving a single unwanted text comes up short of the concrete harm required by Article III. That is true because the alleged harm is missing at least one element "essential to liability" when measured against each of the alleged common-law comparator torts. *TransUnion*, 141 S. Ct. at 2209.

Decisions that go the other way, like the Seventh Circuit's decision in *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458 (7th Cir. 2020), should not cause

the Court to conclude otherwise and overturn *Salcedo*. For one thing, as this Court has already noted, the vast majority were decided without the benefit of *TransUnion*'s explanation that the harm alleged should be compared to the harm actionable under the purported common-law analogue using an element-for-element approach. *See Hunstein*, 48 F.4th at 1249. For another, in distinguishing *Salcedo*, the Seventh Circuit in *Gadelhak* hit on the very point that renders the receipt of a single unwanted text message in violation of the TCPA *insufficient* to confer Article III standing when measured against harms actionable at common law. That point was this: "Courts have . . . recognized liability for intrusion upon seclusion for irritating intrusions—such as when 'telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff.' " *Gadelhak*, 950 F.3d at 462 (quoting *Restatement (Second) of Torts* § 652B cmt. d (Am. Law Inst. 1977)). Under the element-to-element approach, where objectiveness versus subjectiveness is qualitative because it goes to an essential element of the common-law tort, "the number of texts" surely cannot be, as *Gadelhak* said before *TransUnion*, "irrelevant to the injury-in-fact analysis." *Gadelhak*, 950 F.3d at 463 n.2.

Rather, as *Salcedo* correctly recognized, while alleging a course of hounding is qualitatively sufficient to satisfy the element of highly offensive to an objectively reasonable person, alleging the receipt of a single unwanted text

message without more is not. *See Salcedo*, 936 F.3d at 1171 (explaining that under the common-law standard requiring an intrusion upon seclusion to be "highly offensive to a reasonable person" there would be "no liability for one, two, or three phone calls") (citing *Restatement* § 652B cmt. d); *cf. also Hunstein*, 48 F.4th at 1254 (Pryor, C.J., concurring) ("Taking personal offense has long been insufficient to constitute a legal injury.").

Considered element-for-element against the alleged common-law comparator torts, the bare statutory violation of receiving a single unwanted text message is missing elements essential to liability. This Court should therefore uphold *Salcedo*'s ruling that the receipt of a single unwanted text message in technical violation of the TCPA is insufficient to establish the concrete injury required for Article III standing. And because not all members of the class in this case have Article III standing, the Court should vacate, for lack of subject matter jurisdiction, the district court's approval of the class action settlement.[2]

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2. It is worth noting that there is no magic number of texts, and that the context matters greatly. But this case involves a bare statutory violation from a single text, and as *Hunstein* recognized, the conclusion of "[n]o concrete harm, no standing" marks the end of the Court's inquiry since Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." 48 F.4th at 1243 (quoting *TransUnion*, 141 S. Ct. at 2200, 2205). Moreover, even if *Hunstein* had not already cautioned against "treat[ing] as either a second or a separate stage in evaluating concrete injury [whether the plaintiff] had the judgment of Congress on his side," *id.* at 1241, *Salcedo* was right about the judgment of Congress, too. It is

II. Overturning *Salcedo* would ruin businesses, deprive class action defendants of due process, and cause chaos in Florida's courts.

In this case alone, overturning *Salcedo* would confer standing on 91,000 class members who suffered no concrete injury. *See Drazen*, 41 F.4th at 1357 n.3. Extrapolating that result, a future without *Salcedo*'s protection against class actions made up of members who lack constitutionally cognizable injuries would devastate businesses in Florida and beyond. Defendants will be pushed into nuisance settlements designed primarily to benefit the plaintiff's bar. And, depending on how the class is defined, in many cases, they will be forced to forfeit their due process right to present individualized defenses against the few class members who can make the showing of concrete harm required by Article III. Where Florida specifically is concerned, overturning *Salcedo* would do all this plus cause chaos in state courts that, as illustrated by the four examples below, are increasingly applying a "case or controversy" standing requirement that tracks the "Cases" and "Controversies" requirement of Article III. The result will be a run on Florida's federal courts for a more favorable forum.

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not on the side of the uninjured class members in this case who received a single unwanted text message. *See Salcedo*, 936 F.3d at 1168-70.

A. *Salcedo* stops no-injury class actions from ruining businesses and depriving defendants of due process.

In the Eleventh Circuit, *Salcedo* stops no-injury class actions. And for good reason. Class actions that include no-injury claims break from the intended mold of allowing a few representative plaintiffs to hold a defendant accountable for concrete harms that are individually small but collectively large. No-injury class actions are not socially useful, deprive defendants of their due process rights to present individualized defenses, and are potentially ruinous to businesses. *See generally* Stuart L. Pardu, *Good Intentions and the Road to Regulatory Hell: How the TCPA Went from Consumer Protection Statute to Litigation Nightmare*, 2018 U. Ill. J.L. Tech. & Pol'y 313, 321-23 (2018) (explaining how the aim of the TCPA—"to stop telephone terrorism"—has been transformed by "over-aggressive lawyers and serial TCPA plaintiffs" into a tool for "hold[ing] legitimate, well-intentioned businesses hostage with the ever-present threat of litigation") (quotation omitted).

Examples of class action abuse in the TCPA context run the gamut from plaintiffs who take steps to trigger technical TCPA violations to plaintiffs who sue over texts sent to help them from businesses with whom they have relationships. *See, e.g.*, *Stoops v. Wells Fargo Bank, N.A.*, 197 F. Supp. 3d 782, 798-99 (W.D. Pa. 2016) (purchasing dozens of cell phones with area codes from economically depressed areas, where numbers are often reassigned, to increase the likelihood of

receiving calls or texts from businesses that the prior owner of the number had consented to receive); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 487 (N.D. Ill. 2015) (suing a pharmacy for technical violations caused by calling customers to pick up their prescriptions).

And no-injury class actions are not limited to TCPA cases. *See, e.g.*, *Muransky*, 979 F.3d at 930 (declining to find Article III standing based on a bare violation of the Fair and Accurate Credit Transactions Act); *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1334 (11th Cir. 2021) (concluding that because "[e]vidence of a mere data breach does not, standing alone, satisfy the requirements of Article III standing[,] [i]t follows that Tsao does not have standing . . . based on an 'increased risk' of identity theft").

With an increasing number of statutory incentives to sue, and with bet-the-company damages at stake, it is unsurprising that class actions take a staggering toll on businesses that no doubt reflects the significant and growing costs of defending against no-injury claims. Here are a few highlights of such impacts from a 2023 class action survey:

- "Companies increased the percentage of their legal budgets allocated to class actions to 14.4%, up from 13% two years ago. For the first time, spending on class actions increased to more than $3.5 billion. In 2023, class action spending is expected to be one of the fastest-growing areas of legal spending."

- "Spending on class actions increase[d] for the eighth straight year. Corporate legal spending on defending class actions is expected to

> grow 6.8% in 2023, one of the highest growth rates in legal spending. Spending on class actions grew 8% in 2022, an increase second only to 2021. Companies report that increased spending on class actions has two major drivers: claims are getting larger, and more companies are facing class actions."
>
> - In 2022, 59.2% of companies faced a class action.
>
> - In 2023, companies will spend a projected $3.89 billion defending class actions.

2023 Carlton Fields Class Action Survey, at 4-6, https://ClassActionSurvey.com.

Receding from *Salcedo* would aggravate and hasten these trends while simultaneously leaving businesses defenseless to near-boundless standing paradigms involving bare statutory violations that are completely divorced from the concrete harm Article III requires. Without *Salcedo*, class action abuse will increase, both in the TCPA context and beyond.

B. *Salcedo* shields Florida's courts from chaos caused by disparate standing analyses that promote forum shopping.

In Florida, the impacts of overturning *Salcedo* will be particularly acute because federal rulings on Article III standing are increasingly influencing standing analyses by Florida's state courts. *See generally* United States Chamber of Commerce Institute for Legal Reform, *TransUnion and Concrete Harm One Year Later*, at 54 & n.251 (June 2022)[3] (observing that "many state courts follow

3. Available at https://instituteforlegalreform.com/research/transunion-and-concrete-harm-one-year-later/

federal standing precedent, particularly when federal statutory claims are asserted," and including, as an example, a 2022 Florida circuit court decision ruling that the plaintiff lacked standing to pursue a TCPA claim).

Florida's state courts have long enforced a "case or controversy" standing requirement that, like the "Cases" and "Controversies" requirement of Article III, requires concrete injury. *See Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 116-17 (Fla. 2011) (holding that standing for a class action requires "a case or controversy" that "will continue throughout the existence of the litigation"); *see also Johnson v. State*, 78 So. 3d 1305, 1316 (Fla. 2012) (Canady, J., concurring in part and dissenting in part) ("In *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004), this Court identified three factors—based on decisions by the United States Supreme Court—to be considered regarding whether a litigant has standing to assert a cause of action."); *J.P.*, 907 So. 2d at 1113 n.4 (identifying "three requirements that constitute the 'irreducible constitutional minimum' for standing," the first of which is that "a plaintiff must demonstrate an 'injury in fact,' which is 'concrete,' 'distinct and palpable,' and 'actual or imminent' ") (quotations omitted). Four recent Florida state court decisions demonstrate the increasing importance of federal standing law in Florida—particularly in defining the concrete injury critical to Florida's "case or controversy" requirement.

The first is a brand new TCPA case alleging "seven unauthorized text messages" that underscores the importance of *Salcedo* to Florida's courts. *Pet Supermarket, Inc. v. Eldridge*, No. 3D21-1174, 2023 WL 3327267, at *1 (Fla. Dist. Ct. App. May 10, 2023). In *Pet Supermarket*, Florida's Third District Court of Appeal held that the putative class plaintiff had "failed to establish any harm from [the defendant's] alleged violation of the TCPA, either in the form of a pure procedural violation or an intrusion into his privacy." *Id.* at *5. After recognizing that Florida courts "are not constrained by the 'hard floor' of injury in fact imposed by Article III jurisdiction" and thus may apply a laxer standard, *id.* at *2 (quotation omitted), the court explained that Florida's standing law nevertheless requires "a concrete harm or injury" like that of Article III. *Id.* at *3. Employing *TransUnion*'s element-for-element approach, the court compared the plaintiff's attempt "to analogize the intangible injury he suffered from receiving the texts to a type of invasion of privacy known as intrusion upon seclusion" with "what [the Florida] state supreme court has said about the common law tort of intrusion upon seclusion." *Id.* at *4. In holding that the plaintiff had "not alleged a concrete injury" because the "alleged statutory injury is not akin to Florida's common law harm of intrusion upon seclusion," the court also relied on a *Salcedo*-progeny case from the Southern District of Florida. *Id.* The Court wrote:

> On appeal, Eldridge maintains that his allegations confirm his standing, including claims that the texts constituted a "barrage[ ] of

> messages," and that the texts caused him "to incur repeated aggravation by annoying him." Beyond this "conclusory recitation of harms," *Frater v. Lend Smart Mortgage, LLC*, 22-22168-CIV, 2022 WL 4483753, at *4 (S.D. Fla. Sept. 27, 2022), Eldridge argues that the texts "invaded [his] privacy, intruded upon his seclusion." But the only text reflected by the record arguably intruding on his private space was the February 24th text, which allegedly "had the effect of blasting through and disrupting [Eldridge's] domestic weekend peace." Even assuming the single February 24th text intruded into Eldridge's private quarters, Eldridge must still show that the intrusion was highly offensive to a reasonable person for the harm to be comparable to injury suffered by an intrusion upon seclusion under Florida common law. *See, e.g., TransUnion LLC*, 141 S. Ct. at 2209 (explaining that where element "essential to liability" for comparator common law tort is missing from plaintiff's alleged intangible harm, the asserted harm has no "close relationship" to harm associated with comparator). We find that Eldridge's receipt of one text message while at home, during the weekend, simply does not rise to the level of outrageousness required for an invasion of privacy, i.e., that it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency," and therefore, Eldridge's alleged statutory injury is not akin to Florida's common law harm of intrusion upon seclusion.

Id.

Second, just last year, Florida's Fourth District Court of Appeal rejected the argument that a bare violation of the Fair and Accurate Credit Transactions Act (FACTA) "without resulting harm" allowed the plaintiff to "sue for statutory damages." *Southam v. Red Wing Shoe Co.*, 343 So. 3d 106, 110 (Fla. Dist. Ct. App. 2022). In doing so, the Florida court ruled that "a purely illegal action in the absence of resulting harm does not confer standing on an individual," *id.*, and grounded its holding in both Florida and federal standing law. *Id.* at 110-13; *see*

also id. at 112 ("The United States Supreme Court in *TransUnion* recently reiterated its adherence to the three-part standing test, as cited in *State v. J.P.*")

Third, and similarly, Florida's Third District Court of Appeal earlier this year refused to "broaden Florida's standing requirement" beyond that of Article III to "exercise jurisdiction over [a] federal statutory claim" brought under FACTA, in a case where the plaintiff's counsel had "concede[d] his client did not and cannot establish he suffered actual harm" based on a technical statutory violation. *Saleh v. Miami Gardens Square One, Inc.*, 353 So. 3d 1253, 1255 (Fla. Dist. Ct. App. 2023). And the Florida court refused to do so because, like Article III, "Florida law also imports an injury in fact requirement under [its] standing framework." *Id.* (citing *J.P.*, 907 So. 2d at 1113 n.4).

Fourth, and coming full circle back to the TCPA, in a case that is currently pending before Florida's Sixth District Court of Appeal, a trial court in Florida's Ninth Judicial Circuit denied a motion for class certification on lack of standing grounds. In doing so, the trial court applied Florida's Article III analogous case or controversy requirement to rule that the plaintiff lacked standing to bring a TCPA claim predicated on a "purely legal" injury—the receipt of one ringless prerecorded voicemail. *Toney v. Advantage Chrysler-Dodge-Jeep, Inc.*, No. 2021-CA2428, at 2-4, 2022 WL 2679934 (Fla. Cir. Ct. Feb. 24, 2022).

Of course, these examples are not to say that Florida state courts are *required* to follow the Eleventh Circuit's standing law; they are not. *See Pet Supermarket*, 2023 WL 3327267, at *2. If the en banc Court recedes from *Salcedo*, Florida state courts may well decide—and they should decide—to comport their "case or controversy" standing analyses with the Supreme Court's reading of Article III's analogous standing requirement in *TransUnion*.

But the critical question for this Court is: Why would plaintiffs chance bringing nuisance lawsuits, potentially worth billions, in Florida state court only to be kicked out for lack of standing when they can walk across the street, file in federal court, and be virtually assured of a settlement when across the street they would get nothing? The answer, clearly, is that they will not. Slackening Article III standing in the Eleventh Circuit will increase federal filings and encourage a rush of removals from Florida state courts to take advantage of certain settlements in no-injury statutory violation cases—causing chaos in Florida's courts and toppling businesses in their wake.

CONCLUSION

The receipt of a single unwanted text message in technical violation of the TCPA does not establish the concrete injury required for Article III standing because this bare statutory violation is missing elements essential to liability when measured against the alleged common-law comparator torts. As a result, not all the

class members in this case have Article III standing, and the Court should vacate, for lack of subject matter jurisdiction, the district court's approval of the class action settlement.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(g)(1), the typeface requirements of Rule 32(a)(5), and the type-style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface, Times New Roman 14-point font, and because according to the word processor program used to prepare the brief, Microsoft Word for Mac version 16.71, the brief contains 5,395 words, excluding the parts of the document exempted by Rule 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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