

TAKING A STAND ON STANDING? THE MISSED OPPORTUNITY IN *GADELHAK v. AT&T SERVICES, INC.* TO CLARIFY TCPA STANDING REQUIREMENTS

Introduction

In 2019, Ali Gadelhak received five text messages from AT&T’s “Customer Rules Feedback Tool,” despite not being an AT&T customer.¹ In response to the messages, Gadelhak brought a putative class action against AT&T for purported violations of the Telephone Consumer Protection Act (“TCPA”).² The TCPA includes a provision forbidding the use of an “automatic telephone dialing system” to contact cell phones without the recipient’s consent.³ The District Court held that AT&T’s Feedback Tool could not be classified as an automatic telephone dialing system because it could not randomly generate numbers.⁴ On appeal, the Seventh Circuit first confirmed that Gadelhak had Article III standing, a previously uncontested issue.⁵ The court then affirmed the District Court’s ruling on the merits, holding that the language of the TCPA did not extend to AT&T’s Feedback Tool.⁶

Gadelhak provides a critical delineation of consumer rights in the rapidly growing field of electronic telemarketing.⁷ The decision seeks to untangle the complex web formed by the TCPA’s statutory language in order to define the scope of acceptable telemarketing practices.⁸ *Gadelhak* also tackles the issue of Article III standing in TCPA cases, considering which TCPA violations give rise to harms sufficiently “concrete” to be heard in federal court.⁹

This comment focuses on the standing analysis utilized in the *Gadelhak* decision, investigating the missed opportunities to clarify standing issues that have divided federal courts.¹⁰ Part I examines the standing doctrine and its meaning for TCPA litigants. Part II unpacks the Seventh Circuit’s reasoning for finding Gadelhak had Article III standing. Part III

explores how *Gadelhak*'s cursory standing analysis failed to resolve TCPA standing issues, especially those articulated in the Eleventh Circuit's decision in *Salcedo v. Hanna*.¹¹

I. Background

The United States Constitution was designed to limit the judicial branch's power through a series of checks and balances with the political bodies of government.¹² The standing doctrine provides one such limitation, allowing federal courts to preside over only "cases" or "controversies".¹³ This constitutional requirement checks the judiciary by preventing extrajudicial rulings that usurp the power of the government's political bodies.¹⁴ Federal courts have sought to define the Constitution's standing language through a series of multi-factor tests that must be satisfied before a case is heard. A frequently implemented test grants standing only if: a) the plaintiff suffered an injury in fact, b) the injury is fairly traceable to the conduct of the defendant, and c) the injury is likely to be redressed by a favorable judicial decision.¹⁵

Within this test, there exists further jurisprudence concerning what alleged harms satisfy the injury in fact prong.¹⁶ To qualify as an injury in fact, courts have held that an injury must be sufficiently concrete.¹⁷ Concrete harms are "real" and not "bare procedural violations" or "abstract" injuries.¹⁸ The notion of a concrete harm has been tested by recent technological advancements. Increasingly remote modes of communication and advertisement have resulted in new types of intangible harms, challenging courts to draw the line on concreteness.¹⁹ Courts recognize that both tangible and intangible harms may satisfy the injury in fact requirement.²⁰ However, intangible harms are often subject to increased scrutiny. Two considerations are consistently relied on to determine whether an intangible harm should grant standing.²¹ The first consideration is whether the harm alleged is sufficiently related to common law crimes that have historically provided standing in American or English courts.²² This factor derives from the

separation of powers doctrine and the notion that it is the legislature's responsibility to define crime.²³ The second consideration is evidence of congressional intent for the alleged harm to provide a cause of action.²⁴ Courts consider intent because they recognize that Congress is well positioned to decide which intangible harms should provide standing in Article III courts.²⁵ Neither of these considerations are dispositive but provide for "instructive" considerations.²⁶

Prior to *Gadelhak*, federal TCPA cases using the foregoing analyses conflicted over which TCPA violations provide for Article III standing. Decisions in the Second and Ninth Circuits afforded plaintiff's standing as a result of telemarketing text messages in violation of the TCPA.²⁷ Conversely, the Eleventh Circuit has been inconsistent with its TCPA standing jurisprudence, determining standing based on fine distinctions such as mode of solicitation.²⁸ These opposing decisions have raised nuanced standing questions, including whether TCPA violations should be analyzed qualitatively or quantitatively²⁹ and whether increased risks of data breaches represent a concrete harm.³⁰

II. Case Description

In *Gadelhak*, the Seventh Circuit applied the two intangible harm considerations to determine whether the injury resulting from five text messages satisfied the injury in fact prong of Article III standing.³¹ The court found that both the historical crime and congressional intent factors weighed in favor of granting Article III standing.³² Rejecting the Eleventh Circuit's holding in *Salcedo*, *Gadelhak* held that unsolicited text messages were sufficiently related to the common law offense of "intrusion upon seclusion," to provide injured parties with standing.³³ The Court found that "irritating intrusions" not rising to the level of eavesdropping or spying were covered under the offense.³⁴ Therefore, irritating intrusions from unwanted text messages were analogous to harms providing standing at common law.³⁵ The court then found that

Congress manifested the unambiguous intent to allow standing for the type of harm alleged by Gadelhak.³⁶ With both of the intangible harm considerations supporting Gadelhak’s standing, the court held that the unsolicited messages were a concrete harm creating an injury in fact.³⁷

After finding that Gadelhak had Article III standing, the court spent the bulk of its decision explaining that AT&T’s Customer Feedback Tool did not qualify as an automatic telephone dialing system.³⁸ The TCPA defines automatic telephone dialing systems as equipment with the capacity to “store or produce telephone numbers to be called, using a random or sequential number generator.”³⁹ The court held that the second clause modified both “store” and “produce.”⁴⁰ Because the Feedback Tool did not use a random or sequential number generator to store or produce numbers, *Gadelhak* held that the device did not fall under the statutory definition.⁴¹ The court favored this reading based on textual analysis employing complex grammatical concepts.⁴² The decision further argued that policy implications undermined the utility of competing interpretations.⁴³ The court’s TCPA interpretation is uncontroversial in light of other appellate and Supreme Court decisions and will not be considered further.⁴⁴

III. Analysis

Although the Seventh Circuit correctly awarded Gadelhak standing, the discussion was cursory and failed to offer insight into key issues regarding standing in TCPA cases. Given the proposed standing requirements suggested by commentators as well as the Eleventh Circuit, *Gadelhak* should have seized the opportunity to clarify the boundaries of TCPA standing.⁴⁵ Specifically, the Seventh Circuit should have explicitly addressed whether the quantity of violating communications is a factor in standing decisions. Additionally, the court should have drawn upon the insights of modern studies in data to support its decision on Gadelhak’s standing.

A. The Court's Application of the Intangible Harm Considerations Comports with the Technological Nature of Modern Society

The main point of contention between *Gadelhak* and the Eleventh Circuit's decision in *Salcedo* is whether unsolicited text messages provide standing by virtue of being sufficiently related to the common law crime of intrusion upon seclusion.⁴⁶ *Salcedo* appears to impose a physical proximity requirement in order to assert a violation of one's private affairs.⁴⁷ *Salcedo* implicates Restatement examples such as "looking through one's personal documents" to advance the notion that the common law contemplated a different nature privacy invasions than what text messages cause.⁴⁸ This position fails to account for the technological revolution undergone by society since the time of the Restatement. Data disclosures akin to "looking through one's personal documents" can now be achieved remotely and are often initiated through seemingly benign text messages.⁴⁹ Financial losses stemming from malicious electronic messages have reached alarming levels.⁵⁰ As the reliance on technology has increased, privacy concerns in modern times have become inextricable from electronic communications.⁵¹ In light of this reality, *Gadelhak*'s conclusion that unsolicited text messages are analogous to intrusion upon seclusion reflects a superior understanding of the modern technological landscape.

Gadelhak and *Salcedo* also differ as to the congressional intent factor for intangible harms.⁵² *Salcedo* asserts that Congress was silent regarding text messages in the TCPA, reflecting insufficient congressional intent for standing purposes.⁵³ However, this argument again fails to recognize the rapid technological developments of recent times. The TCPA was originally enacted in 1991, prior to the explosion of cell phone use in America.⁵⁴ Thus, it is understandable that violations resulting from text messages would not be explicitly addressed in the statute. Furthermore, the TCPA grants the Federal Communications Commission (FCC) the

power to enact regulations needed to ensure the efficacy of the statute.⁵⁵ Subsequent FCC regulations make clear that text messages are covered under the provisions of the TCPA.⁵⁶ *Gadelhak* was correct to reject the Eleventh Circuit's assertion that congress was silent on the matter of infringing text messages. The TCPA's language combined with subsequent FCC regulations reflect the necessary congressional intent to allow standing for citizens receiving offending text messages.⁵⁷

B. The Court Failed to Clarify Whether Quantitative Analyses are Necessary in TCPA Standing Decisions

While the Seventh Circuit correctly evaluated the ultimate standing question in *Gadelhak*, the decision could have offered more precedential guidance by addressing the subtleties of TCPA standing. An unsettled standing question concerns whether the appropriateness of utilizing a quantitative consideration for determining whether a plaintiff's harm is sufficient to grant standing.⁵⁸ In its analysis, the court does not suggest that *Gadelhak* receiving five messages from AT&T contributed to the court's decision to grant standing. However, the court does not contend that standing would have been granted if *Gadelhak* had only received one message.⁵⁹ The court's decision seems to suggest that because *Gadelhak* suffered the type of injury Congress intended to remedy, it was unnecessary for him to make any further showing of harm.⁶⁰ However, no circuit level court has ever granted standing on the basis of one illegal text message.⁶¹ It is therefore unclear how future courts will interpret the existing TCPA case law. As *Salcedo* represents the only appellate decision addressing a single-text TCPA case, future courts may read the existing opinions as requiring multiple offending messages to grant standing.⁶² Without a prior decision definitively allowing standing in single-text cases, future courts may be hesitant to make a novel

extension. As a result, courts considering single-text TCPA cases may fall in line with *Salcedo*, despite *Gadelhak* having the better position on the intangible harm considerations.⁶³

C. The Seventh Circuit Should Have Utilized Empirical Evidence to Support its Position on TCPA Standing

Gadelhak should have attempted to increase its precedential value by supplementing its standing analysis with evidence that one text message can create an appreciable injury. Although the court provides an accurate analysis of the intangible harm factors, some will still find it difficult to accept that a single text message can give rise to an injury in fact.⁶⁴ *Gadelhak* could have preempted these concerns by invoking numerous sources detailing the mental and financial harms that arise from a single text message. For example, the court could have relied on psychological studies discussing the interrelationship between electronic messaging and modern privacy concerns.⁶⁵ Data suggests that America's use of landlines is rapidly decreasing, leaving cell phones as the primary source of communication for the majority of citizens.⁶⁶ This data could have been used in tandem with the psychological analyses to support the idea that text messages are more invasive than the *Salcedo* court suggests.⁶⁷ Such an analysis would have provided credibility to the court's conclusion that a concrete harm was present.

Additionally, the court could have pointed to the financial consequences of spam messages to demonstrate an injury in fact. Statistics reveal that a significant percentage of Americans have lost money through texting scams.⁶⁸ Scammers often masquerade as a reputable entity in order to trick their victims into providing personal information.⁶⁹ Thus, any telemarketing text message carries a potential threat, requiring careful evaluation of each message by the recipient.⁷⁰ Furthermore, cell phone users are often subject to additional charges to have known spam numbers blocked.⁷¹ Therefore, TCPA plaintiffs may have incurred a

preliminary financial harm to avoid the precise harm caused by the offending messages in question. Considering the plethora of evidentiary sources available, the Seventh Circuit should have utilized empirical data to validate its holding in *Gadelhak*.

Conclusion

In *Gadelhak*, the Seventh Circuit held that text messages sent in violation of the TCPA afforded the recipient with Article III standing.⁷² The court held that unsolicited texts satisfy the intangible harm considerations of common law relation and congressional intent, thereby creating a concrete injury.⁷³

While the court's ultimate holding was correct, the standing analysis was too superficial to afford the decision certain precedential value. *Gadelhak* failed to address TCPA standing doubts raised by commentators as well as the Eleventh Circuit decision in *Salcedo*. In order to better guide future courts, *Gadelhak* should have rejected quantitative distinctions by affirmatively stating that the holding is applicable to one-text cases. Additionally, the court should have supported its holding through the available empirical data concerning the mental and financial harms attributable to text messages. These measures would have promoted future TCPA cases to be decided on the basis of the court's correct application of the intangible harm considerations rather than other ambiguous criteria.

¹ *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 460 (7th Cir. 2020).

² *Id.*

³ Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(1).

⁴ *Gadelhak*, 950 F.3d at 465.

⁵ *Id.* at 461.

⁶ *Id.* at 463–69.

⁷ See TRANSACTION NETWORK SERVS., 2018 ROBOCALL INVESTIGATION REPORT 3, 5 (2018) (stating that the FTC received over one million additional robocall complaints from the prior year); see also, e.g., S. REP. NO. 102-178, at 1 (1991) (acknowledging that several federal agencies were receiving increased consumer complaints regarding telemarketing calls).

⁸ *Gadelhak*, 950 F.3d at 463–68. See generally Justin W. Aimonetti & Christian Talley, *What’s the Buzz about Standing?*, 88 GEO. WASH. L. REV. 175, 178 (2020) (providing background on the intricacies of the TCPA’s statutory text).

⁹ *Gadelhak*, 950 F.3d at 461–63.

¹⁰ Compare *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270–71 (9th Cir. 2019) (allowing standing for plaintiffs who had biomarkers taken without prior consent), *Florence Endocrine Clinic v. Arriva Med.*, 858 F.3d 1362, 1366–67 (11th Cir. 2017) (providing standing for recipients of unsolicited fax advertisements), and *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (finding standing for plaintiff who had received multiple advertising messages), with *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (holding a single message did not result in a concrete injury), and *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063 (S.D. Fla. 2020) (denying standing to a plaintiff who received multiple text message advertisements).

¹¹ *Salcedo*, 936 F.3d at 1166-71.

¹² Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881 (1983) (emphasizing the foundational nature of the separation of powers in the constitution).

¹³ U.S. CONST. art. III, § 2.

¹⁴ See JOHN JAY ET AL., LETTER TO GEORGE WASHINGTON FROM SUPREME COURT JUSTICES (1793) (declining to issue the president an advisory opinion); ALEXANDER HAMILTON, THE FEDERALIST PAPERS: NO. 78 *reprinted in* The Avalon Project: Documents in Law, History and Diplomacy (McLean ed., n.d.) (noting that the judiciary is the weakest branch, having neither the power to enforce its laws nor the ability to fund itself).

¹⁵ See, e.g., Brief of Defendant-Appellee at 16, *Cranor v. 5 Star Nutrition*, No. 19-51173, 2020 WL 308924, at*8 (5th Cir. June 11, 2020) (quoting *Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1547 (2016)).

¹⁶ See, e.g., Initial Brief of Appellants at 5, *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (No. 17-14077), 2017 WL 6387352, at *1.

¹⁷ *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461 (7th Cir. 2020) (quoting *Spokeo*, 136 S. Ct. at 1548).

¹⁸ *Id.*

¹⁹ See Blake Dowling, *Smishing? Yeah, it's a thing*, FLORIDA POLITICS (Feb. 3, 2020), <https://floridapolitics.com/archives/317741-blake-dowling-smishing-yeah-its-a-thing/> (discussing the practice of deceiving cell phone users with fake contest prize hyperlinks). See generally *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling and Order, 33 FCC Rcd 12075, 12076–80 (2018) (discussing classifications of various electronic services).

²⁰ See, e.g., *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1269 (9th Cir. 2019).

²¹ See *Gadelhak*, 950 F.3d at 461; see also *Salcedo*, 936 F.3d at 1171.

²² *Salcedo*, 936 F.3d at 1171 (quoting *Spokeo*, 136 S. Ct. at 1549).

²³ See Scalia, *supra* note 12, at 885–95.

²⁴ *Salcedo*, 936 F.3d at 1172 (quoting *Spokeo*, 136 S. Ct. at 1549)

²⁵ *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1043 (9th Cir. 2017) (quoting *Spokeo*, 136 S. Ct. at 1549).

²⁶ *Gadelhak*, 950 F.3d at 462 (quoting *Spokeo*, 136 S. Ct. at 1549).

²⁷ *Id.* at 461 (citing *Van Patten*, 847 F.3d at 1043 and *Melito v. Experian Mtkg. Sols., Inc.*, 923 F.3d 85, 92–93 (2d Cir. 2019)).

²⁸ *Compare Salcedo*, 936 F.3d 1162, with *Florence Endocrine Clinic v. Arriva Med.*, 858 F.3d 1362 (11th Cir. 2017).

²⁹ *Salcedo*, 936 F.3d 1162, at 1174 (Pryor, J., concurring in the judgment only) (stating that the lack of standing was primarily due to only one text message being received); *see also* Angela Turturro, *Standing in TCPA Cases: How Many Texts Are Enough?*, NEW YORK L. J. (2020), <https://www.law.com/newyorklawjournal/2020/02/14/standing-in-tcpa-cases-how-many-texts-are-enough> (concluding that it is unclear whether New York courts will adopt a quantitative analysis for TCPA standing decisions).

³⁰ *See* Jennifer M. Joslin, Note, *The Path to Standing: Asserting the Inherent Injury of the Data Breach*, 3 UTAH L. REV. 735, 736–55 (2019).

³¹ *Gadelhak*, 950 F.3d at 461–62.

³² *Id.* at 461–63.

³³ *Id.* at 462 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

³⁴ *Gadelhak*, 950 F.3d at 462 (citing *e.g.*, *Household Credit Servs., Inc. v. Driscoll*, 989 S.W.2d 72, 84–85 (Tex. App. 1998)).

³⁵ *Gadelhak*, 950 F.3d at 462. *But see* *Salcedo v. Hanna*, 936 F.3d 1162, 1171 (11th Cir. 2019) (holding that a text message does not invade upon one’s private affairs in the manner contemplated by the tort of intrusion upon seclusion).

³⁶ *Gadelhak*, 950 F.3d at 462. *Contra Salcedo*, 936 F.3d at 1172 (finding Congress’ silence as to the alleged harm did not provide an avenue to standing).

³⁷ *Gadelhak*, 950 F.3d at 463.

³⁸ *Id.* at 463–69.

³⁹ Telephone Consumer Protection Act, 47 U.S.C. § 227(a)(1).

⁴⁰ *Gadelhak*, 950 F.3d at 465.

⁴¹ *Id.* at 460.

⁴² *Id.* at 465 (citing *Glasser v. Hilton Grand Vacations Co.*, 948 F.3d 1301, 1306 (11th Cir. 2020)) (invoking the rule that a modifier applies to both verbs when they share a direct object immediately preceding the modifier); *Gadelhak*, 950 F.3d at 465 (citing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 150 (2012) (stating that when a comma precedes a modifier, the modifier applies to the entire preceding clause).

⁴³ *Gadelhak*, 950 F.3d at 467 (arguing that the statutory reading advanced by *Gadelhak* would cover every iPhone user who called or texted someone without the recipient’s consent).

⁴⁴ *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021) (holding that “random or sequential number generator” applies to both “store” and “produce”); *see also Gadelhak*, 950 F.3d at 463–64 (citing *Dominguez v. Yahoo, Inc.* 894 F.3d 116, 119 (3d Cir. 2018) and *Glasser*, 948 F.3d at 1306). *But see Gadelhak*, 950 F.3d at 464 (citing *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1049–50 (9th Cir. 2018) (holding the statute only covers equipment that dials random numbers)).

⁴⁵ *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019); *see* Canada Anti-Spam Act, S.C. 2010, c. 23 (Can.), <https://laws-lois.justice.gc.ca/eng/acts/E-1.6/FullText.html> (requiring no actual harm or damage for a violation but allowing for an additional affidavit to be submitted if victim alleges financial harm); *see also* Kirsty Hughes, *A Behavioral Understanding of Privacy and its Implications for Privacy Law*, 75 MOD. L. REV. 816–36 (2012) (discussing how violations of physical, behavioral, or normative barriers constitute a privacy invasion).

⁴⁶ *Compare Gadelhak*, 950 F.3d at 462, *with Salcedo*, 936 F.3d at 1171.

⁴⁷ *Salcedo*, 936 F.3d at 1171.

⁴⁸ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

⁴⁹ Memorandum from the Unsolicited Commc’ns Enf’t Network to UCENet Organizations (May 3, 2017) (on file with author) (acknowledging the increasingly negative impact of cross-border electronic spam messaging).

⁵⁰ TRANSACTION NETWORK SERVS., 2018 ROBOCALL INVESTIGATION REPORT 3 (2018) (stating that one in ten Americans lost money in phone scams during a one year period).

⁵¹ *Id.*; *see also* Dowling, *supra* note 19.

⁵² *Compare Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020), *with Salcedo*, 936 F.3d at 1171.

⁵³ *Salcedo*, 936 F.3d at 1171–72.

⁵⁴ Telephone Consumer Protection Act, 47 U.S.C. § 227.

⁵⁵ *Id.* at § 227(b)(2).

⁵⁶ *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, Declaratory Ruling and Order, 33 FCC Rcd 12075, 12082 (2018) (“We find that SMS and MMS wireless messaging services are information services . . . and they are not commercial mobile

services . . . will enable wireless providers to continue in their efforts to protect American consumers from unwanted text messages.”); *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115 (2003); *Robotext Consumer Protection*, Public Notice, Enf’t Advisory No. 2016-06 (Nov. 18 2016), <http://www.fcc.gov>; *Rules for Political Campaign Calls and Texts*, FED. COMM’NS COMM’N, <https://www.fcc.gov/rules-political-campaign-calls-and-texts> (last visited Apr. 30, 2021) (outlining regulations for campaign text messages under the TCPA).

⁵⁷ *Gadelhak*, 950 F.3d at 462 (citing *Melito v. Experian Mtkg. Sols., Inc.*, 923 F.3d 85, 92–93 (2d Cir. 2019) for the proposition that *Gadelhak* suffered the very harm Congress meant to prevent through the TCPA).

⁵⁸ See Turturro, *supra* note 29; see also Justin W. Aimonetti & Christian Talley, *What’s the Buzz about Standing?*, 88 GEO. WASH. L. REV. 175, 181 (2020).

⁵⁹ See generally *Gadelhak*, 950 F.3d 458.

⁶⁰ *Id.* at 461-63.

⁶¹ Compare *Gadelhak*, 950 F.3d at 463 (allowing standing in a case with five violating text messages), and *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1042–43 (9th Cir. 2017) (providing standing in a case with alleging multiple offending text messages), and Turturro, *supra* note 29 (noting that the Second Circuit’s decision to grant standing in *Melito v. Experian Mtkg. Sols., Inc.*, 923 F.3d 85, 92–93 (2d Cir. 2019) involved a case with numerous text messages), with *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (denying standing for a TCPA case alleging a single illegal text message).

⁶² Turturro, *supra* note 29 (noting that the *Salcedo* decision may influence jurisprudence beyond the Eleventh Circuit and require TCPA plaintiffs to assert the receipt of multiple text messages for standing).

⁶³ *Id.*

⁶⁴ *See, e.g., Salcedo*, 936 F.3d at 1166-70.

⁶⁵ *See* Marcelline R. Fusilier & Wayne D. Hoyer, *Variables Affecting Perceptions of Invasion of Privacy in a Personnel Selection Situation*, 65 J. OF APPLIED PSYCH. 625 (1980) (describing the increased perception of a privacy violation when individuals lacked control over the method of information disclosure); *see also* Hughes, *supra* note 45, at 814 (noting that new forms of technology require individuals to take extraordinary measures to prevent unwanted access).

⁶⁶ *Salcedo*, 936 F.3d at 1170 (“We realize that Congress in 1991 could not have foreseen the explosion in personal cell phone use, the popularity of text messaging, and the near-extinction of the residential telephone line”).

⁶⁷ *Salcedo*, 936 F.3d at 1171 (describing the harm from text messages as “isolated, momentary, and ephemeral”).

⁶⁸ TRANSACTION NETWORK SERVS., 2018 ROBOCALL INVESTIGATION REPORT 3, 5 (2018).

⁶⁹ Dowling, *supra* note 19.

⁷⁰ *Id.*

⁷¹ Elizabeth Harper, *How to Block Calls & Texts on Android & iPhone*, TECHLICIOUS (Apr. 14, 2021), <http://techlicious.com/how-to/how-to-identify-block-telemarketers-on-your-android-iphone>.

⁷² *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 (7th Cir. 2020).

⁷³ *Id.* at 461-63.

STANDING ROOM ONLY: CONCRETE INJURY-IN-FACT LEFT WITH NOWHERE TO
SIT IN COURT FOLLOWING *GADELHAK V. AT&T SERVICES, INC.*

Introduction

Ali Gadelhak placed his telephone number on the national “Do Not Call Registry” but subsequently received five automated text messages—in Spanish—from AT&T requesting that he answer customer service survey questions.¹ As neither a Spanish speaker nor an AT&T customer Gadelhak was annoyed by this interaction and brought suit.² The District Court held that the system AT&T used to contact Gadelhak did not fit the statutory definition required to be in violation of the Telephone Consumer Protection Act of 1991 (“TCPA”)³ and dismissed the case. Gadelhak appealed and the Seventh Circuit affirmed the judgment.⁴

The TCPA was enacted in large part to protect the privacy of telephone subscribers.⁵ The issue in courts today surrounds whether phone technology that did not exist at the time of enactment (text messaging) should be covered in the same way by the TCPA. This involves two issues: (1) when courts have jurisdiction to hear TCPA texting claims and (2) how to interpret the statutory definition of “automatic telephone dialing system.”⁶

This Comment shows that the court correctly decided *Gadelhak* given the constraints of the TCPA but argues that there is a need to update the TCPA. Part I lays out modern standing doctrine, the purpose of the TCPA, and their turbulent relationship in the Circuit Courts. Part II details the reasoning and holding of *Gadelhak*. Part III examines the potential fallout of the precedent set by *Gadelhak* and argues for new efforts by the FCC and Congress.

I. Background

A. Modern Standing Doctrine

The United States was founded on a principle of separate but co-equal branches of government.⁷ The judicial branch was founded on the principle that it only has the power to resolve “Cases” and “Controversies.”⁸ Since the 1700s, the Supreme Court has expressed it would not state its opinion on simply any issue requested.⁹ In the modern era, every federal court has an independent obligation to confirm it has jurisdiction to hear the case before it.¹⁰ This has come to be known as standing, through Supreme court cases it’s become a three-part test, with a focus on looking for a concrete injury-in-fact.¹¹ When an injury is intangible the court considers both common law history and legislative judgment in determining whether it’s sufficiently concrete.¹²

B. The TCPA

Congress enacted the TCPA in 1991 with the purpose of protecting the privacy of consumers from being bothered by telemarketing.¹³ The act makes it illegal “to make any call ... using any automatic telephone dialing system ... to any telephone number assigned to a ... cellular telephone service.”¹⁴ One of the issues in recent claims surrounds the definition of “automatic telephone dialing system”¹⁵ and what modern technology falls within that interpretation.¹⁶ Specifically which portion of the definition is modified by “using a random or sequential number generator.”¹⁷

Part of the issue surrounding the definition is that the TCPA was enacted prior to the first Short Media Service (“SMS” or “text message”) being sent.¹⁸ However, through both FCC rulings and court cases, “text messages” are considered “calls” for purposes of the TCPA.¹⁹ This juxtaposition results in needing to determine how the dialing system interacts with text messages.

C. TCPA Standing

More divisive among the Circuit Courts is determining under what circumstances a TCPA claim has standing, specifically if the claim is based on a varying number of text messages.²⁰ The disagreement depends in part on whether text messages causing harm similar enough to other types of harm protected under the TCPA.²¹ As well as whether text messages themselves are harmful in the way that Congress intended the TCPA to prevent.²² Ultimately the process will come down to looking to the future risks of texting weighed against the ease of consumers preventing issues themselves.²³

II. Case Description

In *Gadelhak* the Seventh Circuit used the standing doctrine described by the Supreme Court in *Lujan* and *Spokeo* to determine that unwanted text messages have standing as a TCPA claim in federal court.²⁴ Looking to history, the Court found that text messaging is analogous to “intrusion upon seclusion” as a historical invasion of privacy at common law.²⁵ In reviewing legislative judgment the Court found that the TCPA was enacted to prevent invasions of privacy and that by claiming the same harm, *Gadelhak* had Article III standing.²⁶ Notably, the court in *Gadelhak* went as far as to say that the standing related to text messages was not dependent on the number of texts sent.²⁷

After determining there was standing, the court analyzed how to read the statutory definition of “automatic telephone dialing system.”²⁸ The court looked at four possible interpretations and found that although “admittedly imperfect,” the Court’s decision was the best option available.²⁹ The court held that the phrase “using a random or sequential number generator” modified both “store” and “produce,” meaning that AT&T’s system—lacking the ability to store or produce with a number generator—is excluded from the statute.³⁰

III. Analysis

A. The Court Correctly Decided Standing for Text Messages

The court came to the correct conclusion in finding standing for text messages regardless of quantity. However, the analysis left something to be desired in its explanation for why the number of texts shouldn't matter. Understandably, the Court can be forgiven for being short in its standing analysis because the appeal from the District Court was only about the statutory interpretation.³¹ However, without more of a pronouncement, this type of analysis will likely lead to Circuit Courts continuing to go back and forth arguing that the other view missed something. In various circuits looking at TCPA standing, all claim to look towards finding the same *type* of harm but focus differently on whether that means *kind* of harm or *degree* of harm. For example, *Salcedo* claimed to be focusing on the qualitative instead of quantitative aspects of texting, but that the *degree* of harm Congress was looking to protect consumers against was numerous calls.³² However, that's not how these arguments have been presented to the Eleventh Circuit by parties, where the arguments are largely quantitative.³³ Additionally that type of reasoning goes against the standing analysis required of the courts.³⁴

In *Duguid* the Supreme Court successfully avoided discussing the chalk-line of standing based on text messages. The court implicitly accepts that there can be standing by deciding on the case but did not state in what scenario there would not be standing in the future.³⁵ Under FCC rule, text messages and voice messages are both considered calls. By making these equivalent under the TCPA, and the standing doctrine requiring looking to the *kind* of harm, that should be sufficient to find harm based on invasion of privacy. That text messages are viewed as potentially *less* invasive—but still invasive—should not change standing analysis.³⁶

B. The Court Correctly Interpreted the Modifier

The Seventh Circuit in *Gadelhak* and the Supreme Court in *Duguid* came to the same conclusion regarding the interpretation for an automatic telephone dialing system.³⁷ This is the most logical interpretation with the current language of the TCPA. The technology available when the TCPA was enacted is vastly different than present day technology.³⁸ It should come as no surprise that the definition leaves something to be desired now thirty years after its enactment.

C. This Precedent Leaves Consumers Unprotected

As suggested in *Patel*, it's paramount to take the future development of the technology into account when determining invasions of privacy.³⁹ Courts have generally found that unwanted texts appear to be the type of harm that Congress intended to prevent with the TCPA and are concrete injuries-in-fact. The antiquated language of the statute itself prevents those harms from being truly protected at law.

The TCPA should protect against automated texts. There are many forms of text messages that in modern day language would be considered automated, but under the current statutory definition will not be covered by lacking the “random or sequential number generator.”⁴⁰ There is a high likelihood of future harm to consumers with the increased sophistication of smishing attacks and an increase in the number of automated texts.⁴¹ To adequately protect consumers from these invasions of privacy the FCC should look to issue a clarification on how to view text message communication under the TCPA. This may not be the final step as something similar has been overruled previously by the courts.⁴² Finally, Congress should strongly consider amending the TCPA to redefine what it means to automatically contact consumers by phone to fully protect consumers from these emerging technology threats.

Conclusion

Based on the ambiguity on standing for text messages in *Duguid* and the contradictions between *Salcedo* and *Gadelhak*, Congress and the FCC should take a hard look at the definition of an automatic telephone dialing system. Text messages that are sent to consumers, without their consent, with intent to defraud them, should be covered under the TCPA. As the law stands now, those automated texts will fail to have a valid claim under the TCPA, either from jurisdictions that find the texts lack standing or that the sender's methods do not count under the statutory definition. The admittedly imperfect—and debated⁴³—definition should be replaced to better protect the privacy of consumers.

¹ *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461 (7th Cir. 2020).

² *Id.*

³ 42 U.S.C. § 227.

⁴ *Gadelhak*, 950 F.3d at 469.

⁵ S. REP. NO. 102-178, at 9 (1991).

⁶ 42 U.S.C. § 227(a); *see Gadelhak*, 950 F.3d at 460.

⁷ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983) (explaining that judges are not the branch of government designed to solve societal issues and standing prevents that from occurring).

⁸ U.S. CONST. art. III, § 2; *see* THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he judiciary ... will always be the least dangerous to the political rights of the Constitution.”).

⁹ Letter from Supreme Court Justices to George Washington (Aug. 8, 1793)

<https://founders.archives.gov/documents/Washington/05-13-02-0263> (explaining that the

Supreme Court would not answer a question presented by the President unless brought through the course of judicial proceedings).

¹⁰ *See, e.g.*, *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)).

¹¹ Justin W. Aimonetti & Christian Talley, *What's the Buzz About Standing?*, 88 GEO. WASH. L. REV. 175 (2020) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)), (“[T]he plaintiff must fulfill three elements to satisfy Article III standing: (1) an injury in fact that is (a) ‘concrete and particularized’ and (b) ‘actual or imminent;’ (2) ‘fairly traceable to the challenged conduct of the defendant;’ and (3) ‘likely to be redressed by a favorable judicial decision.’”).

¹² *E.g.*, *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1270 (2019) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)), (“In determining whether an intangible injury is sufficiently concrete, we consider both history and legislative judgment.”).

¹³ S. REP. NO. 102-178, at 1 (1991) (“The purposes of the bill are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home.”).

¹⁴ 42 U.S.C. § 227(b)(1)(A)(iii).

¹⁵ 42 U.S.C. § 227(a) (“The term ‘automatic telephone dialing system’ means equipment which has the capacity-- (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”).

¹⁶ *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020) (holding there was standing under the TCPA for claim based on text messages); *see Facebook, Inc. v. Duguid*, 114 S. Ct. 1163 (2021) (ruling on TCPA involving text messages and not ruling there was not standing); *see also Florence Endocrine Clinic, P.L.L.C., v. Arriva Medical, L.L.C.* 858 F.3d 1362 (11th Cir.

2017) (finding standing for claim based on faxes). *But see* Salcedo v. Hanna, 836 F.3d 1172 (11th Cir. 2019) (holding no standing for single unwanted text message).

¹⁷ 42 U.S.C. 227(a)(1)(A).

¹⁸ Brief for Appellant, Salcedo v. Hanna, 936 F.3d 1162 (11th Cir. 2019) (No. 17-14077), 2017 WL 6387352, at *17 (quoting Keating v. Peterson’s Nelnet, LLC, 615 F. App’x 365, 370 (6th Cir. 2015)) (“[T]he first text message was not sent until December 3, 1992, almost a full year after the December 20, 1991 enactment of the TCPA.”).

¹⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd. 14014, 14115 (2003) [hereinafter “2003 Order”]; *see also* Van Patten v. Vertical Fitness Grp., L.L.C., 847 F.3d 1037, 1041–42 (9th Cir. 2017) (citing 2003 Order).

²⁰ *See Duguid*, 114 S. Ct. at 1167 (ruling on a case involving multiple text messages but not directly addressing the issue of standing based on text messages). *Compare* Van Patten v. Vertical Fitness Grp., L.L.C., 847 F.3d 1037 (9th Cir. 2017) (holding there’s standing for two text messages), *and* Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 463 n.2 (7th Cir. 2020) (finding the number of texts irrelevant to determination of standing), *with* Salcedo v. Hanna, 936 F.3d 1162, 1172–73 (11th Cir. 2019) (finding no standing for a single unwanted text message but claiming it was not quantity based), *and* Eldridge v. Pet Supermarket Inc., 446 F.Supp. 3d 1063, 1070 (S.D. Fla. 2020) (citing *Salcedo*, 936 F.3d at 1167), (holding that five text messages over three months was insufficient for an injury-in-fact).

²¹ *E.g.*, Florence Endocrine Clinic, P.L.L.C., v. Arriva Medical, L.L.C. 858 F.3d 1362 (11th Cir. 2017) (holding that faxes have standing for TCPA claim).

²² *See, e.g.*, Blake Dowling, *Smishing? Yeah It’s a Thing*, FLA. POLS. (Feb. 3, 2020), <https://floridapolitics.com/archives/317741-blake-dowling-smishing-yeah-its-a-thing>

(highlighting the spam texts that are being sent from random phone numbers and the likelihood that they will increase in sophistication over time); Angela Turturro, *Standing in TCPA Cases: How Many Texts Are Enough?*, N.Y. L.J. (2020)

<https://www.law.com/newyorklawjournal/2020/02/14/standing-in-tcpa-cases-how-many-texts-are-enough> (pointing out the ambiguities remaining between circuits on how many texts are needed to have TCPA standing).

²³ *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1273 (9th Cir. 2019) (stating that future risk of harm from technology is enough for standing); *see, e.g.*, Elizabeth Harper, *How to Block Calls & Texts on Android & iPhone*, TECHLICIOUS, <http://techlicious.com/how-to/how-to-identify-block-telemarketers-on-your-android-iphone> (July 14, 2017) (describing multiple options for how consumers can easily block a number from texting their cell phone); TRANSACTION NETWORK SERVS., 2018 ROBOCALL INVESTIGATION REPORT (2018) (reporting that there was an increase in number of robocall complaints from 3.4 million in 2016 to 4.5 million in 2017).

²⁴ *Gadelhak*, 950 F.3d at 462 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1549 (2016)) (pointing out that *Spokeo* requires the court to look to the *kind* of harm and not the degree).

²⁵ *Gadelhak*, 950 F.3d at 462 (“Courts have also recognized liability for intrusion upon seclusion for irritating intrusions.”).

²⁶ *Gadelhak*, 950 F.3d at 462 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. at 1549 (2016)) (“[W]e are meant to look for a ‘close relationship’ in kind, not degree.”).

²⁷ *Gadelhak*, 950 F.3d at 463 n.2 (“[T]he number of texts is irrelevant to the injury-in-fact analysis.”).

²⁸ 42 U.S.C. 227(a)(1)(A) (“to store or produce telephone numbers to be called, using a random or sequential number generator”); *Gadelhak*, 950 F.3d at 464–65 (deciding whether the phrase

modifies both “store” and “produce,” the “telephone numbers themselves,” only the word “produce,” or the manner the telephone numbers are to be called).

²⁹ *Gadelhak*, 950 F.3d at 468.

³⁰ *Id.* at 465.

³¹ *Id.* at 461 (“AT&T does not challenge Gadelhak’s standing.”).

³² *See Salcedo v. Hanna*, 936 F.3d 1162, 1170–72 (11th Cir. 2019).

³³ *Cf.* Brief for Defendant-Appellee, *Cranor v. 5 Star Nutrition, L.L.C.*, No. 19-51173 (5th Cir. filed June 1, 2020), 2020 WL 3089024, at *16 (stating repeatedly throughout brief the number of texts alleged in claim); Brief for Appellant, *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (No. 17-14077), 2017 WL 6387352, at *4–5 (focusing brief on the single text message and its alleged minimal harm).

³⁴ *See, e.g., Gadelhak*, 950 F.3d at 463.

³⁵ *See Facebook, Inc. v. Duguid*, 114 S. Ct. 1163 (2021).

³⁶ *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, 33 FCC Rcd. 12075, 12085–86 para. 25 n.76 (2018) (“63% of millennials prefer to receive texts because they are less disruptive than a voice call.”).

³⁷ *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020); *Facebook, Inc. v. Duguid*, 114 S. Ct. 1163 (2021).

³⁸ *See generally* *Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service*, 33 FCC Rcd. 12075, 12075 ¶ 1 (2018) (discussing “tremendous growth” in wireless communicating).

³⁹ See *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1273 (9th Cir. 2019) (citing *Carpenter v. United States*, 138 S. Ct. 2206, 2215 (2018)) (considering the future development of the technology when finding standing).

⁴⁰ See generally *Duguid*, 114 S. Ct. at 1163 (finding standing but dismissing the claim); *Van Patten v. Vertical Fitness Grp., L.L.C.*, 847 F.3d 1037 (9th Cir. 2017) (finding standing but dismissing claim); *Gadelhak*, 950 F.3d at 458 (finding standing but dismissing claim).

⁴¹ See Blake Dowling, *Smishing? Yeah It's a Thing*, FLA. POLS., (Feb. 3, 2020), <https://floridapolitics.com/archives/317741-blake-dowling-smishing-yeah-its-a-thing> (explaining that while present scams are easy to spot it is almost certain that scammers will get better).

⁴² *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 463 (7th Cir. 2020) (citing *ACA Int'l v. FCC*, 885 F.3d 687, 695 (D.C. Cir. 2018)) (pointing out that the previous FCC interpretation was thrown out).

⁴³ *Gadelhak*, 950 F.3d at 464 (citing *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1052 (9th Cir. 2018)) (stating that the Ninth Circuit held that only “produce” was modified).

TEXTS ARE NOT CALLS: *GADELHAK V. AT&T SERVS., INC.* DEPARTS FROM THE
TCPA'S PLAIN MEANING AND JUDICIALLY CREATES A NEW CAUSE OF ACTION

Introduction

Is a text message a “call” under the Telephone Consumer Protection Act of 1991 (“TCPA”)?¹ According to the Seventh Circuit in *Gadelhak*, it is.² After Ali Gadelhak received five text messages from AT&T asking customer service survey questions in Spanish due to a typographical error, Gadelhak brought a putative class action suit against AT&T alleging that AT&T had violated the TCPA.³ After the district court held that AT&T’s system did not qualify as an “automatic telephone dialing system” (“autodialer”) under the TCPA because it lacked the capacity to generate random or sequential numbers, Gadelhak appealed.⁴ On appeal the Seventh Circuit found the Gadelhak had standing to sue but affirmed the district court’s construction.⁵

The *Gadelhak* opinion addresses two important issues: whether a recipient of an unwanted text message has standing to sue and the proper construction of the TCPA’s definition of an autodialer. These issues are crucial in a TCPA suit because there is a circuit split regarding standing for alleged injuries arising from unwanted text messages⁶ and because only calls sent by an autodialer are prohibited by the TCPA.⁷

This Comment focuses on the first issue of standing and argues that the *Gadelhak* court ignored the plain meaning of the TCPA and common understanding of what constitutes a “call” and engaged in faulty reasoning regarding historical causes of action to find standing for the plaintiff to sue. Part I briefly introduces the cases and principles relevant to analyses of standing under the TCPA. Part II situates *Gadelhak* within the current state of the law and summarizes its holding. Part III dissects the Seventh Circuit’s reasoning and demonstrates how it is misguided, representing a departure from the TCPA’s plain meaning and creating a new cause of action.

I. Background

The TCPA makes it unlawful “to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice.”⁸ It defines an autodialer as “equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”⁹ If a person violates the TCPA, the statute provides for a private right of action, allowing for the recovery of “actual monetary loss” or “\$500 in damages for each such violation, whichever is greater.”¹⁰

Despite this statutory cause of action, a plaintiff must still allege a concrete injury in order to have standing to sue.¹¹ Article III of the Constitution limits the federal judiciary to hearing “Cases” and “Controversies,”¹² dictating that courts only “declare the sense of the law” and should not “exercise WILL instead of JUDGMENT.”¹³ The Court first committed to this requirement when respectfully denying President George Washington’s request for an advisory opinion.¹⁴ Since then, the Court has interpreted this as requirement that a plaintiff have “standing,” which Justice Scalia, as a judge on the D.C. Circuit Court of Appeals, described as “a crucial and inseparable element of that principle, whose disregard will inevitably produce—as it has during the past few decades—an overjudicialization of the processes of self-governance.”¹⁵ In other words, an essential element of the separation of powers. Standing requires a showing that the plaintiff has: “(1) suffered an injury in fact that is (a) ‘concrete and particularized’ and (b) ‘actual or imminent;’ (2) ‘fairly traceable to the challenged conduct of the defendant;’ and (3) ‘likely to be redressed by a favorable judicial decision.’”¹⁶

To be sufficiently “concrete,” the injury must be more than a “bare procedural violation” and must be “real,” not “abstract.” In other words, it must “actually exist.”¹⁷ Then-Judge Scalia described a “concrete injury” as “an injury apart from the mere breach of the social contract . . .

[in which] a person is ‘adversely affected or aggrieved.’”¹⁸ If a harm appears intangible, the Court has provided two *Spokeo* factors to consider in determining whether it is concrete: (A) the history of analogous actions at common law, and (B) the judgment of Congress to elevate a harm previously inadequate in law through the creation of a new statutory cause of action.¹⁹

Several federal courts have struggled to apply these factors to suits under the TCPA, resulting in a circuit court split. In 2016, the Ninth Circuit found standing for a plaintiff who received two texts after consenting to receive them as part of his gym membership and failing to revoke his consent, arguing that “the telemarketing text messages here, absent consent, present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA,” but failing to address the difference between texts and calls.²⁰ The court affirmed the district court’s grant of summary judgment for the defendants, however, because the plaintiff failed to revoke his consent, rendering the court’s standing analysis dicta.²¹ In 2017, the Eleventh Circuit found that a clinic suffered a concrete injury where the plaintiff received an unwanted fax, reasoning that faxes create tangible costs of printer and ink and also occupy the fax line and machine for a tangibly harmful amount of time.²² In early 2019, the Second Circuit found standing for plaintiffs who alleged receipt of multiple unwanted texts,²³ establishing its position that *multiple* unwanted texts, if not a single text, are sufficient for standing.

Later that year, the Eleventh Circuit broke from the Ninth and Second Circuits.²⁴ In *Salcedo*, it found no standing where the plaintiff alleged a single text message for lack of a concrete injury because text messages do not impose any cost on the recipient or temporarily impede a phone’s capabilities, unlike fax machines.²⁵ Subsequently, the Southern District of Florida, implementing the Eleventh Circuit’s reasoning in *Salcedo*, found no standing for multiple texts over the course of three months.²⁶ Finally, in 2021 the Supreme Court’s opinion in

in *Facebook v. Duguid* resolved the autodialer issue in *Galdehak* identically to the Seventh Circuit, effectively resolving that issue.²⁷ However, the Court explicitly left the standing issue unresolved and kept the circuit split in place, stating “[n]either party disputes that the TCPA’s prohibition also extends to sending unsolicited text messages . . . We therefore assume that it does without considering or resolving that issue.”²⁸

II. Case Description

Gadelhak was decided by the Seventh Circuit in 2019, after *Salcedo* but before *Duguid*, with then-Circuit Judge Barret writing the opinion countering the Eleventh Circuit’s standing analysis and siding with the Second and Ninth Circuits.²⁹ The *Gadelhak* opinion meticulously analyzes four different possible constructions of the autodialer definition, likely heavily influencing the *Duguid* opinion of the Supreme Court—to which now-Justice Barrett was appointed and confirmed in the intervening time between the cases.³⁰ Since the Supreme Court left the issue of standing for text messages unresolved in *Duguid*, the *Gadelhak* opinion could be highly influential on the issue if it comes before the Court.

The Seventh Circuit first identifies the circuit split as the motivation for addressing the question.³¹ The court explains that an injury must be “concrete,” and that a court should consider the *Spokeo* factors: “whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit” and whether Congress has identified an intangible harm that meets “minimum Article III requirements.”³² Examining history, the court argues that “[t]he harm posed by unwanted text messages is analogous to” the common law tort of intrusion upon seclusion because “courts have also recognized liability . . . 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,’” rebutting the Eleventh Circuit’s

suggestion in *Salcedo* that intrusion upon seclusion is limited to invasions of privacy like eavesdropping and spying.³³ Examining Congress’s judgment, the court then finds that “texts [] pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.”³⁴ The court notes that “the number of texts is irrelevant to the injury-in-fact analysis”³⁵ because the court does not share the Eleventh Circuit’s view that text messages and calls are “categorically distinct.”³⁶ The court concludes that “unwanted text messages can constitute a concrete injury-in-fact” and finds the plaintiff has standing to sue.³⁷

III. Analysis

Gadelhak misses the mark when analyzing the standing issue, departing from the statutory text by finding that texts are “calls” and judicially creating a novel cause of action.

A. *Spokeo* Factor 1: History of Analogous Actions at Common Law

The *Gadelhak* court dismisses the *Salcedo* court’s claim that the tort of intrusion upon seclusion addressed only invasions of privacy like eavesdropping and spying by merely arguing that “[c]ourts have also 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,’” relying on a restatement and three state court opinions to support its tenuous argument.³⁸ It is unclear whether a common law right to privacy actually encompasses short disturbances such as text messages, but common understanding of the right to privacy does not necessarily include the right not to be contacted—more so, common understanding conceptualizes the right to privacy as the ability to avoid disclosing information.³⁹ Even if intrusion upon seclusion does extend beyond eavesdropping and unwanted disclosures to a right not to be bothered, the *Gadelhak* court’s argument ultimately relies on its assertion that

receiving unwanted text messages is a harm analogous “in kind” to historical common law actions because text messages can amount to a “course of hounding.”⁴⁰

Text messages can hardly amount to a “course of hounding”⁴¹ when a text message ringtone lasts a second at most, unlike calls, whose rings last for significantly longer. The amount of ringing caused by five text messages likely is still less than a single call. Thus, if it took as little as ten phone calls to qualify as being “repeated with such frequency as to amount to a course of hounding the plaintiff,” the number of text messages would likely have to be greater than fifty to qualify as a “course of hounding”—the same *kind* of harm.⁴² It is incredibly simple today to block a phone number from sending additional texts, thereby preventing any kind of harm that could possibly be conceived as a “course of hounding.”⁴³ Claiming that a few text messages qualifies as a “course of hounding” is akin to claiming that a scout, who comes by a neighbor’s door year after year despite that neighbor never buying any cookies (but also never telling the scout not to return), has engaged in a “course of hounding” the neighbor—absurd. The general kind of harm associated with robotexts is also quite different from those associated with calls and the harm that the TCPA intended to address. For example, modern concerns associated with texting are focused on “online fraud and deception, phishing, and dissemination of viruses and malware,” not the mere annoyance of an unwanted text.⁴⁴ The *Gadelhak* court’s reasoning, that five texts amount are the same *kind* of harm as a “course of hounding” from repeated phone calls and are therefore a cognizable injury under the common law, is a far stretch at best.⁴⁵

B. *Spokeo* Factor 2: Judgment of Congress to Elevate a Harm Previously Inadequate in Law Through the Creation of a New Statutory Cause of Action

The *Gadelhak* court also mistakenly brushes past the question of Congress’s intent.⁴⁶ Like almost all other courts, the *Gadelhak* court takes the forest as given without looking at the trees, positing that Congress chose to make unwanted automated texts a legally cognizable injury

under the TCPA without even referencing the statutory text. The court merely explains in a footnote that it believes text messages are indistinct from phone calls, since they both come with an unwanted buzzing that “is an intrusion into the peace and quiet in the realm that is private and personal.”⁴⁷ This conclusory analysis significantly departs from Congressional intent and ignores the strong textual argument that the TCPA categorically does *not* cover autodialed text messages.

The mistake is understandable given that the FCC, the agency designated to implement the Act, found that text messages are covered by the TCPA⁴⁸ and that the Supreme Court has previously written that “a text message to a cellular phone, it is undisputed, qualifies as a ‘call’ within the compass of § 227(b)(1)(A)(iii).”⁴⁹ Neither of these sources, however, is dispositive on the text message issue. The Supreme Court’s passing reference merely states that the issue is “undisputed”—likely meant that the parties simply failed to raise the issue—not that such a construction of the statute is clearly established. In *Duguid* the Supreme Court definitively clarified that it has *not* resolved the text message issue.⁵⁰

Though the FCC has interpreted the TCPA as covering text messages, oddly choosing to describe text messages as “text calls,”⁵¹ the FCC’s interpretation is not binding in any way on the courts—particularly if the courts find that the FCC’s reasoning, or lack thereof, is arbitrary and capricious. In its oft-cited ruling, the FCC provides no explanation whatsoever for how texts can qualify as “calls” under the TCPA, limiting the entirety of its reasoning to the conclusory statement: “This encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls.”⁵² The FCC has also contradicted itself, recently finding that text messaging is an “information service” like email and internet—not a “telecommunications service,” like voice calling.⁵³ The FCC even notes that “consumers view [text] messaging services as less disruptive and intrusive than voice calls”⁵⁴ and allows “political

text messages without the intended recipient’s prior consent if the message’s sender does not use autodialing technology to send such texts and instead manually dials them”⁵⁵—rebutting the idea that the FCC truly believes that texts pose the same kind of harm as calls. In other words, the FCC has found that texts and calls are categorically distinct. Finally, the chairman of the FCC himself has described the TCPA under the FCC’s interpretation as being a “poster child for lawsuit abuse” having “strayed far from its original purpose.”⁵⁶ The FCC’s interpretation of the TCPA is hardly authoritative, and the Seventh Circuit was mistaken to accord it any deference.

The better interpretation adheres to the text and history of the TCPA itself and concludes that the TCPA categorically does *not* cover text messages. The TCPA provision defining autodialers specifies that it applies to “telephone numbers to be *called*,” not telephone numbers to be texted.⁵⁷ In ordinary usage, I have never heard anyone say that someone called them after receiving a text. Likewise, the restrictive provision of the TCPA specifies restrictions on “call[s]” using an autodialing system or an “artificial or prerecorded *voice*.”⁵⁸ The only logical interpretation of this statutory text is that it is specific to voice calls,⁵⁹ making it quite peculiar that any court has found that it covers texts.

The statute’s history also dictates that texts were not within Congress’s intent, since text messaging did not exist when Congress passed the statute in 1991.⁶⁰ Congress could not have even contemplated a concrete harm arising from the receipt of a text message. Notably, the Senate Committee on Commerce, Science, and Transportation’s report on the TCPA explicitly listed the consumer complaints it was trying to address⁶¹—none of which would be fixed by prohibitions on text messaging and all of which cause a harm very different in kind from the mere fleeting annoyance from “[t]he undesired buzzing of a cell phone from a text message.”⁶² Further, the statute as a whole should be read *not* to prohibit the sending of autodialed text

messages since it fully defines text messages in a later subsection,⁶³ demonstrating that Congress contemplated text messages in its later amendments and chose not to prohibit them in the autodialing provision. Further, the TCPA explicitly permits the FCC to exempt telemarketing calls to cellular phones from the TCPA’s prohibitions, demonstrating an intent only to regulate home phones—devices which tend not to be text-enabled.⁶⁴ The *Gadelhak* court’s assertion that text messages are within Congressional intent for the TCPA’s autodialing prohibition is contrary to both the statute’s text and history, calling the entire holding into question.⁶⁵

IV. Conclusion

The current circuit split regarding standing in TCPA cases for unwanted text messages is a concerning problem which should be addressed by the Supreme Court. Unfortunately, the *Gadelhak* opinion does not provide a template for the correct outcome. The Seventh Circuit’s decision represents an unfortunate departure from the plain meaning of “call” and the clear intent of Congress. The court’s tenuous analogy to the historical tort of intrusion upon seclusion judicially creates a new cause of action for a categorically distinct harm, representing inappropriate judicial activism. The Supreme Court should hold that texts are not covered by the TCPA and that there is no standing for harms associated with unwanted texts. It may even incentivize Congress to pass a better, modern statute, following an example like Canada’s.⁶⁶

¹ 47 U.S.C. § 227.

² *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461 (7th Cir. 2020).

³ *Id.* at 460.

⁴ *Id.* at 469 (quoting 47 U.S.C. § 227(a)(1)(A)).

⁵ *Id.*

⁶ *Id.* at 461–462.

⁷ 47 U.S.C. § 227(a)(1)(A)–(B).

⁸ 47 U.S.C. § 227(b)(1)(A).

⁹ 47 U.S.C. § 227(a)(1)(A)–(B).

¹⁰ 47 U.S.C. § 227(b)(3)(B).

¹¹ *See, e.g.*, Angela Turturro, *Standing in TCPA Cases: How Many Texts Are Enough?*, N.Y. L.J., <https://www.law.com/newyorklawjournal/2020/02/14/standing-in-tcpa-cases-how-many-texts-are-enough> (Feb. 14, 2020).

¹² U.S. CONST. art. III, § 2, cl. 1.

¹³ THE FEDERALIST NO. 78 (Alexander Hamilton).

¹⁴ Letter from Supreme Court Justices Jay, J., Wilson, J., Blair, J., Iredell, J., & Paterson, J., to President George Washington (Aug. 8, 1793), <https://founders.archives.gov/documents/Washington/05-13-02-0263>.

¹⁵ Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 881 (1983).

¹⁶ Justin W. Aimonetti & Christian Talley, *What’s the Buzz About Standing?*, 88 GEO. WASH. L. REV. ARGUENDO 175, 180 (2020) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

¹⁷ *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461–62 (7th Cir. 2020) (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

¹⁸ Scalia, *supra* note 14, at 895–96 (1983).

¹⁹ Aimonetti & Talley, *supra* note 15, at 182 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016)).

²⁰ *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1042–43 (9th Cir. 2016).

²¹ *Id.* at 1048–49.

²² Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC, 858 F.3d 1362, 1365–67 (11th Cir. 2017).

²³ Turturro, *supra* note 10 (citing Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85 (2d Cir. 2019)); Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 461 (citing Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 92–93 (2d Cir. 2019)).

²⁴ Salcedo v. Hanna, 936 F.3d 1162, 1167–68 (11th Cir. 2019).

²⁵ *Id.*

²⁶ Eldridge v. Pet Supermarket, Inc., 446 F. Supp. 3d 1063, 1069–73 (S.D. Fla. 2020).

²⁷ Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1173 (2021) (“We hold that a necessary feature of an autodialer under § 227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called.”).

²⁸ *Id.* at 1167 n.1.

²⁹ Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 462–462 (7th Cir. 2020).

³⁰ *See, e.g., Duguid*, 141 S. Ct. at 1166 (listing Justices for the majority opinion, including Justice Barrett); *Gadelhak*, 950 F.3d at 459 (noting the opinion was written by Barrett, Circuit Judge).

³¹ *Gadelhak*, 950 F.3d at 461.

³² *Id.* at 461–62 (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)).

³³ *Id.* at 462 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

³⁴ *Id.* at 463.

³⁵ *Id.* at 469 n.2.

³⁶ *Id.* at 469 n.1.

³⁷ *Id.* at 463.

³⁸ *Id.* at 462 (quoting RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

³⁹ *See, e.g.*, Marcelline R. Fusilier & Wayne D. Hoyer, *Variables Affecting Perceptions of Invasion of Privacy in a Personnel Selection Simulation*, 65 J. APPLIED PSYCH. 623, 623–625 (1980) (conceptualizing invasion of privacy as disclosure of information and finding that perceived control over disclosure and outcome of information disclosure are what affect a person’s perception of invasion of privacy); *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1267 (9th Cir. 2019) (finding a concrete injury-in-fact under a common law right to privacy for violation of an Illinois statute when Defendant collected Plaintiff’s information using facial-recognition technology without Plaintiffs’ consent, *not* for contacting Plaintiffs); Jennifer M. Joslin, Note, *The Path to Standing: Asserting the Inherent Injury of the Data Breach*, 2019 UTAH L. REV. 735–755 (arguing for inherent standing in cases of data breach leading to unwanted disclosures of information). *But see* Kristy Hughes, *A Behavioural Understanding of Privacy and Its Implication for Privacy Law*, 75 MOD. L. REV. 806, 808 (summarizing privacy theory as encompassing “four types of theories: those that protect private places; those that seek to establish a realm of private decision-making; those that are based upon managing private information, and those that encompass limiting access to self”).

⁴⁰ *Gadelhak*, 950 F.3d at 462–63.

⁴¹ *Gadelhak*, 950 F.3d at 462 (quoting RESTATEMENT (SECOND) OF TORTS § 652 B (AM. L. INST. 1977)).

⁴² *Id.*

⁴³ *See, e.g.*, Elizabeth Harper, *How to Block Calls & Texts on Android & iPhone*, TECHLICIOUS, <http://techlicious.com/ho-to/how-to-identify-block-telemarketers-on-your-android-iphone> (last visited Apr. 14, 2021).

⁴⁴ Memorandum of Understanding Among Pub. Auths. of the Unsolicited Communic'ns Enf't Network Pertaining to Unlawful Telecomms. and Spam (May 3, 2017) (on file with the Unsolicited Communications Enforcement Network); *see also, e.g.*, Transaction Network Servs., 2018 ROBOCALL INVESTIGATION REPORT 4–11 (2018) (outlining the presence of bad actors spoofing calls and defrauding consumers and the ability to block texts from mere nuisance businesses); Blake Dowling, *Smishing? Yeah, It's a Thing*, FLA. POL., <https://floridapolitics.com/archives/317741-blake-dowling-smishing-yeah-its-a-thing/> (Feb. 3, 2020) (describing use of fraudulent texts to gain solicit private information from text recipients).

⁴⁵ *Gadelhak*, 950 F.3d at 462–63.

⁴⁶ *Id.*

⁴⁷ *Id.* at 469 n.1.

⁴⁸ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14115 (2003).

⁴⁹ *Salcedo v. Hanna*, 936 F.3d 1162, 1166 (11th Cir. 2019) (quoting *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 667 (2016)).

⁵⁰ *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 n.1 (“Neither party disputes that the TCPA’s prohibition also extends to sending unsolicited text messages . . . We therefore assume that it does without considering or resolving the issue.”).

⁵¹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14115 (2003).

⁵² *Id.*; *see also* FCC, FCC ENF’T ADVISORY NO. 2016-06, ROBOTEXT CONSUMER PROTECTION: TEXT MESSAGE SENDERS MUST COMPLY WITH THE TELEPHONE CONSUMER PROTECTION ACT (2016).

⁵³ Declaratory Ruling on Regulatory Status of Wireless Messaging Service, 33 FCC Rcd. 12075, 12077–78 (comparing texts to emails, an information service, noting that “electronic mail is store-and-forward, and hence asynchronous; one can send a message to another person, via electronic mail, without any need for the other person to be available to receive it at that time”); *see also id.* at 12079 (finding that text messaging services reach a distinct set of users from voice calling services since text messages cannot go to telephones which are not designed to receive such messages); *id.* at 12094 (“[U]nder the functional equivalence standard, we find that wireless messaging today is not the functional equivalent of [calling].”). *But see id.* at 12089 (rejecting the argument that the FCC’s prior holding that texting is covered under the TCPA compels the FCC to find that texting is a telecommunications service, like calling).

⁵⁴ *Id.* at 12085.

⁵⁵ *Rules for Political Campaign Calls and Texts*, FCC, <https://www.fcc.gov/rules-political-campaign-calls-and-texts> (last visited Apr. 30, 2021).

⁵⁶ Brief for Petitioner-Appellant at 29 n.3, *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (No. 17-14077), 2017 WL 6387352 (quoting Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 30 FCC Rcd. 7961, 8073 (2015) (Pai, dissenting)).

⁵⁷ 47 U.S.C. § 227(a)(1)(A) (emphasis added).

⁵⁸ 47 U.S.C. § 27(b)(1)(A)–(B) (emphasis added).

⁵⁹ *E.g.*, *Salcedo v. Hannah*, 936 F.3d 1162, 1168–69 (11th Cir. 2019) (“We first note what Congress has said in the TCPA’s provisions and findings about harms from telemarketing via text messaging generally: *nothing*. The TCPA is completely silent on the subject of unsolicited text messages.”).

⁶⁰ *Id.* at 1169; *see also* Brief for Petitioner-Appellant at 17, *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) (No. 17-14077), 2017 WL 6387352 (citing *Keating v. Peterson’s Nelnet, LLC*, 615 F. App’x 365, 370 (6th Cir. 2015) (“Congress did not address, or even intend to address, the treatment of text messages when considering and passing the TCPA. In fact, the first text message was not sent until December 3, 1992, almost a full year *after* the December 20, 1991 enactment of the TCPA.”)).

⁶¹ S. REP. NO. 102-178, at 2 (1991) (listing six categories of consumer complaints, all of which would not be addressed by prohibitions on autodialed text messages, namely: calls to emergency lines, calls filling the entire tape of an answering machine, calls which occupy the line even after the consumer hangs up, calls that do not respond to commands to hang up, calls that tie up the lines of a business preventing outgoing calls, and calls that impose a cost on consumers through use of fax machine paper or paying for the incoming call).

⁶² *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 469 n.1 (7th Cir. 2020).

⁶³ 47 U.S.C. § 27(e)(8)(C).

⁶⁴ Brief for Defendant-Appellee at 28, *Cranor v. 5 Star Nutrition, LLC* (5th Cir. 2020), 2020 WL 3089024 (“In fact, the TCPA explicitly permits the FCC to *exempt* telemarketing calls to cellular phones, which demonstrates that Congress was focused on at-home privacy.”) (citing 47 U.S.C. § 227(b)(2)(C)).

⁶⁵ *Gadelhak*, 950 F.3d at 463.

⁶⁶ *See* Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities That Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, S.C. 2010, c 23 (Can.).

STANDARD MESSAGING RATES MAY APPLY: A CRITIQUE OF THE SEVENTH
CIRCUIT’S APPLICATION OF THE ARTICLE III STANDING FRAMEWORK IN
GADELHAK V. AT&T SERVICES, INC.

Introduction

In *Gadelhak v. AT&T Services, Inc.* (“*Gadelhak v. AT&T*”), Ali Gadelhak brought an action against AT&T for violation of the Telephone Consumer Protection Act (“TCPA”).¹ Gadelhak alleged that he received five unsolicited text messages from AT&T in violation of the TCPA.² The district court ruled in favor of AT&T finding that the “Customer Rules Feedback Tool” (“Feedback Tool”) was not an “automatic telephone dialing system” in violation of the Act.³ On appeal, the U.S. Court of Appeals for the Seventh Circuit (“Seventh Circuit”) affirmed.⁴

Gadelhak v. AT&T raises important issues regarding federal judicial jurisdiction and standing under Article III of the U.S. Constitution.⁵ The Supreme Court recently provided guidance on establishing standing in *Spokeo, Inc. v. Robins*, noting that the plaintiff must allege an injury-in-fact that is concrete and actual rather than abstract or simply a bare procedural violation.⁶ Whether plaintiffs like Gadelhak have standing has split the circuits, with the Seventh Circuit concluding that unsolicited, unwanted text messages pose an intangible harm sufficient to satisfy the concrete injury requirement of Article III standing. Alternatively, the Eleventh Circuit reached the opposite conclusion, holding that receipt of unwanted text messages is not necessarily a concrete injury.⁷ The Seventh Circuit’s decision raised important questions about consumer protections⁸ and what constitutes harm sufficient to establish a concrete injury satisfying Article III standing and the appropriate threshold for invoking federal jurisdiction.⁹

This comment examines the Seventh Circuit’s flawed reasoning in *Gadelhak v. AT&T* leading to the incorrect conclusion that unwanted text messages are sufficient to establish Article

III standing.¹⁰ The Supreme Court should provide additional guidance on the proper application of the *Spokeo* framework in order to resolve the circuit split and avoid erroneous holdings. Part I examines how various courts have addressed standing in TCPA cases and surveys applicable scholarship on privacy invasion. Part II reviews the court's reasoning and holding set forth in *Gadelhak v. AT&T*. Part III then analyzes the weaknesses of the court's decision and argues that the court did not adequately consider the history of the common law nor Congress's judgment as required under the *Spokeo* framework for purposes of evaluating Article III standing. This comment demonstrates that the holding of *Gadelhak v. AT&T* reveals that the Supreme Court has provided insufficient guidance for assessing whether an alleged intangible injury adequately satisfies the injury-in-fact requirement of Article III standing. This comment proposes that the Supreme Court adopt the Eleventh Circuit's thorough reasoning and proper application of the *Spokeo* framework for cases concerning the receipt of unwanted automated text messages.

I. Background

A. Overview of Article III Standing and the TCPA

The TCPA was enacted to protect consumers against the rising prevalence of intrusive nuisance communications such as telemarketing and debt collection calls.¹¹ The TCPA prohibits unsolicited automated telemarketing and advertising communications,¹² including text messages,¹³ and provides consumers a private right of action for its violation.¹⁴ In order to bring suit, the plaintiff must have standing under Article III.¹⁵

The Supreme Court set forth a framework in *Spokeo* to guide courts in evaluating plaintiff's Article III standing.¹⁶ The *Spokeo* framework provides that a plaintiff must have suffered an injury-in-fact that is caused by the defendant and likely to be redressed by a favorable judicial decision.¹⁷ To establish an injury-in-fact, a plaintiff must have suffered a harm

that is concrete and particularized, or in other words, an actual harm rather than a harm that is hypothetical or abstract.¹⁸ The *Spokeo* holding clarified that the concrete injury requirement is not necessarily satisfied where the harm is no more than a “bare procedural violation”.¹⁹ Rather, to satisfy the standing requirement, the plaintiff must claim to have suffered a tangible or intangible harm constituting a concrete injury.²⁰ For intangible harms, the framework instructs courts to analyze two probative, though not dispositive, factors; (1) history and whether the harm is analogous to harm actionable at common law and (2) the judgment of Congress.²¹ While a plaintiff may successfully assert a violation of the TCPA, they do not necessarily prevail if there is no concrete injury sufficient to establish Article III standing.²² Circuits are split on whether the receipt of an unwanted, unsolicited text message constitutes a concrete injury.²³

B. Inconsistent Application of *Spokeo* Standing Framework to TCPA Cases

In *Salcedo v. Hanna*, the Eleventh Circuit concluded that receiving an unsolicited text message sent in violation of the TCPA was not a sufficiently concrete injury to establish standing.²⁴ Applying the *Spokeo* framework, the Eleventh Circuit reasoned that neither history nor the judgment of Congress supported a finding that Salcedo had suffered a concrete injury-in-fact.²⁵ Similarly, in *Eldridge v. Pet Supermarket*, the court, applying the *Spokeo* framework, held that although the plaintiff received five text messages in violation of the TCPA, it was merely a procedural violation and did not satisfy the concreteness requirement for standing.²⁶ However, the Second, Ninth, and Seventh Circuits have come to the opposite conclusion.²⁷ For example, in *Van Patten v. Vertical Fitness Group*, the Ninth Circuit concluded that Congress enacted the TCPA to protect consumer’s right to privacy²⁸ and held that the receipt of two unsolicited text messages constituted a concrete injury sufficient to satisfy Article III standing.²⁹

These conflicting holdings³⁰ in addition to the decision in *Gadelhak v. AT&T*³¹ suggests that the *Spokeo* framework does not provide the guidance necessary for analyzing TCPA cases involving Article III standing and intangible harms such as nuisance and invasion of privacy.³² The present circuit split will persist unless the Supreme Court provides more precise direction. The Supreme court should clarify the appropriate analysis for assessing standing in such cases. This additional guidance would resolve the inconsistent application of the *Spokeo* framework to TCPA cases, promote predictability³³ and more clearly define when unwanted automated text messages create liability for the sender under the TCPA.³⁴

II. Case Description

In *Gadelhak v. AT&T*, the Seventh Circuit considered whether AT&T had violated the TCPA and whether Ali Gadelhak had standing to bring his claim.³⁵ Gadelhak received five automated text messages from AT&T's Feedback Tool containing survey questions in Spanish despite being neither an AT&T customer nor a Spanish speaker.³⁶ Gadelhak alleged that AT&T violated the TCPA which "prohibits the use of an 'automatic telephone dialing system' to call or text any cellular phone without the prior consent of the recipient" of the communication.³⁷

Before evaluating the merits of Gadelhak's claim, the court first addressed whether the claim satisfied the Article III standing requirement by applying the *Spokeo* framework.³⁸ The court considered whether unsolicited text messages caused concrete harm sufficient to constitute an injury-in-fact versus being merely a bare procedural violation.³⁹ Applying the framework, the court analyzed both history and Congress's judgment.⁴⁰ Starting with history, the court reviewed the long history of actionable offenses of invasion of privacy⁴¹ at common law and concluded that such harms are analogous to the harm caused by disruptive, unwanted text messages.⁴² Turning to Congress's judgment, the court recognized that Congress cannot statutorily turn a

non-injury into an injury, but nevertheless reasoned that by enacting the TCPA, Congress had indicated that automated telemarketing poses the same type of harm to privacy interests as long-established harms in common law.⁴³ Agreeing with the Second and Ninth Circuits, the court determined that although a few unsolicited text messages may not pose a harm actionable at common law, it is nevertheless the same *kind* of concrete harm courts recognize which Congress chose to make legally cognizable.⁴⁴ Therefore, the court concluded that unwanted text messages can satisfy the concreteness requirement of Article III standing.⁴⁵

After holding that Gadelhak satisfied the requirements for Article III standing, the court considered whether AT&T's Feedback Tool was an "automatic telephone dialing system" in violation of the TCPA⁴⁶ and ultimately concluded that AT&T did not violate the Act.⁴⁷

III. Analysis

The court reviewing *Gadelhak v. AT&T* rightfully decided that AT&T's Feedback Tool was not an automatic telephone dialing system and thus did not violate the TCPA.⁴⁸ However, the court should not have even considered the question because Gadelhak did not have standing.

Evaluating Article III standing, the court correctly recognized that Gadelhak did not have standing merely because he asserted a procedural violation.⁴⁹ The court then applied the *Spokeo* framework and concluded that both history and Congress's judgment supported that the alleged harm was a concrete injury.⁵⁰ However, the court's application of the *Spokeo* framework was flawed. The court failed to properly consider the history of the common law, overstated the liability for intrusion Congress sought to impose by enacting the TCPA, and erroneously concluded that Congress's purpose for enacting the TCPA was sufficient evidence of Congress's intent to make the intangible harm of receiving an unwanted text message legally cognizable and sufficient to satisfy the concrete injury requirement of Article III standing.

A. The Court’s Review of History is Insufficient to Support the Conclusion that Unwanted Text Messages are Analogous to Invasion of Privacy

Reviewing the history of the common law, the first prong of the *Spokeo* framework for evaluating intangible harms, the court reasoned that the common law has long recognized liability for “invasion upon seclusion” and irritating intrusions such as incessant telephone calls.⁵¹ Thus, the court concluded, receipt of an unsolicited, unwanted text message is analogous to the established, actionable tort of intrusive invasion of privacy.⁵²

However, this extremely brief survey of the history of the common law does not sufficiently connect the harm of an unsolicited text message with the harm giving rise to tort liability. As the court notes, the Eleventh Circuit also considered the tort of intrusion but came to the opposite conclusion.⁵³ The Eleventh Circuit held that the intrusion of an unwanted text message is *not* equivalent to conduct rising to the level of intrusion at common law, such as eavesdropping or wiretapping, and therefore does not create liability for the sender.⁵⁴ The Eleventh Circuit asserted that equating the two would be like equating “opening your private mail—a serious intrusion indeed—with mailing you a postcard.”⁵⁵ The Seventh Circuit simply responded that they “see things differently,”⁵⁶ and cited persistent and repeated *telephone calls* being an actionable offense of intrusion as their only evidence that text messages pose the same harm.⁵⁷

The court’s analysis of common law history failed to adequately analogize the harm of unwanted text messages with actionable offenses in intrusion of privacy. The Eleventh Circuit, following instruction⁵⁸ from the Supreme Court in *Spokeo*, thoroughly reviewed the types of harms historically recognized⁵⁹ and correctly concluded that the harm of receiving an unsolicited text message is “exactly the kind of fleeting infraction . . . that tort law has resisted

addressing.”⁶⁰ Therefore, history does not show an intangible harm sufficient to satisfy the standing requirement of a concrete injury.⁶¹

B. The Court’s Review of Congress’s Judgment Overstates the Harm Congress Sought to Make Actionable by Enacting the TCPA

The court then considered the second prong of the *Spokeo* framework for intangible harms—Congress’s judgment.⁶² The court reasoned that by passing the TCPA, Congress chose to recognize automated telemarketing as posing the same kind of harm to privacy interests as recognized at common law.⁶³ Quoting findings from the TCPA, the court found that Congress had identified unrestricted telemarketing as an invasion of privacy.⁶⁴ Thus, the court concluded, Gadelhak’s alleged harm was equivalent to the intangible harm the Act intended to prevent.⁶⁵

However, the court failed to conduct the proper inquiry under the *Spokeo* framework which instructs courts to analogize between intangible harms and harms recognized at common law and to “look for a ‘close relationship’ in *kind*, not degree”.⁶⁶ The court correctly noted that Congress can identify intangible harms and elevate them to legally cognizable.⁶⁷ However, the court failed to show how Congress recognized unwanted text messages as an intangible harm.

Congress has not unequivocally identified unwanted text messages as posing the same harm as unsolicited telephone calls to the home that are likely to be more intrusive.⁶⁸ The Eleventh Circuit noted that “privacy and nuisance concerns about residential telemarketing are less clearly applicable to text messaging,” because a cellphone is carried outside of the home, often has the ringer silenced, and the brief chirp or buzz of an incoming text message is less irritating.⁶⁹ The FCC has also recognized that text messages have a relatively low spam rate.⁷⁰ Further, consumers perceive text messages as “less disruptive and intrusive than voice calls,”⁷¹ and carrier services have measures to combat spam and unwanted messages.⁷²

The Eleventh Circuit properly applied the *Spokeo* framework by recognizing that Congress is silent on whether unsolicited text messages are an intangible harm.⁷³ Further, the harm of such text messages is “qualitatively different” from the harm Congress sought to prevent by enacting the TCPA.⁷⁴ Thus, the Eleventh Circuit rightly concluded Congress’s judgment does not show unsolicited text messages constitute a concrete injury sufficient to establish Article III standing.⁷⁵

C. Further Guidance on the Proper Application of the *Spokeo* Framework is Necessary

The Supreme Court should provide additional guidance on the proper application of the *Spokeo* framework in order to standardize outcomes in TCPA cases involving unsolicited text messages across circuit courts.⁷⁶ The Seventh Circuit failed to engage deeply with the history of the common law or properly assess Congress’s judgment and erroneously concluded that the alleged harm supports finding a concrete injury sufficient to establish Article III standing.⁷⁷

The Supreme Court should instead adopt the thorough and well-reasoned application of the *Spokeo* framework to intangible harms by the Eleventh Circuit in *Salcedo*. This would clarify liability and promote predictability for TCPA cases involving unwanted text messages.⁷⁸

IV. Conclusion

In *Gadelhak v. AT&T*, the Seventh Circuit applied the Supreme Court’s *Spokeo* standing framework to evaluate whether the intangible harm of receiving unsolicited text messages poses a concrete injury sufficient to establish Article III standing.⁷⁹ The court considered both history and Congress’s judgment.⁸⁰ The court then concluded that the intangible harm of unwanted text messages constitutes a concrete injury.⁸¹ However, the court’s holding relied upon an inadequate analysis of history and erroneously equated the harm of unwanted text messages with the actionable tort of intrusive invasion of privacy.⁸² Further, the court did not sufficiently support its conclusion that Congress recognized unwanted text messages as an intangible harm.⁸³

The Supreme Court should resolve the circuit split by providing additional guidance on the proper application of the *Spokeo* standing framework to intangible harms. The Supreme Court could do so by adopting the Eleventh Circuit’s well-reasoned analysis.⁸⁴ This would provide much-needed clarification on the correct application of the *Spokeo* standing framework and foster predictability in TCPA cases involving unwanted text messages.

¹ *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 460 (7th Cir. 2020).

² *Id.*

³ *Id.* at 460, 469.

⁴ *Id.*

⁵ *See, e.g.*, Angela Turturro, *Standing in TCPA Cases: How Many Texts are Enough?*, N.Y. L.J., (Feb. 14, 2020), <https://www.law.com/newyorklawjournal/2020/02/14/standing-in-tcpa-cases-how-many-texts-are-enough> (discussing conflicting court decisions on whether unsolicited text messages in violation of the TCPA is a concrete injury sufficient to satisfy Article III standing).

⁶ *Gadelhak*, 950 F.3d at 461 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016)).

⁷ *Id.* (citing *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019)).

⁸ *See generally* TRANSACTION NETWORK SERVICES, 2018 ROBOCALL INVESTIGATION REPORT (2018) (summarizing the frequency of complaints about robocalls and their economic cost to consumers); Blake Dowling, *Smishing? Yeah, It’s a Thing*, FLORIDA POLITICS (Feb. 3, 2020), <https://floridapolitics.com/archives/317741-blake-dowling-smishing-yeah-its-a-thing/> (warning consumers that text message scams a will likely become more deceptive and convincing). *But cf.* Elizabeth Harper, *How to Block Calls & Texts on Android & iPhone*, TECHLICIOUS, <http://techlicious.com/how-to/how-to-identify-block-telemarketers-on-your-android-iphone> (last

visited Apr. 14, 2021) (demonstrating that consumers can easily block spam calls or texts using cellular applications or built-in features offered by carrier service).

⁹ Justin W. Aimonetti & Christian Talley, *What's the Buzz About Standing?*, 88 GEO. WASH. L. REV. ARGUENDO 175, 181–83 (2020).

¹⁰ *Gadelhak*, 950 F.3d at 463.

¹¹ Turturro, *supra* note 5.

¹² S. REP. NO. 102–178, at *3–6 (1991) (“[L]egislation is necessary to protect the public from automated calls. These calls can be an invasion of privacy . . . and a disruption to . . . public safety services.”).

¹³ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 18 FCC Rcd. 14014, 14115 (2003) (“[I]t is unlawful to make *any call* using an automatic telephone dialing system . . . including, for example, short message service (SMS) calls . . .”).

¹⁴ Aimonetti & Talley, *supra* note 9, at 178–79.

¹⁵ *Gadelhak*, 950 F.3d at 461 (citing U.S. CONST. art. III, § 2). *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894–95 (1983) (arguing that a concrete injury apart from procedural violations is an essential component of standing and preserves the separation of powers); U.S. CONST. art. III, §§ 1–2 (granting the judiciary the power to hear “Cases” and “Controversies”).

¹⁶ *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (citing *Spokeo, Inc. v. Robins* 136 S. Ct. 1540, 1547 (2016)).

¹⁷ *Id.*

¹⁸ *Id.* at 1042 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

¹⁹ *Id.* (quoting *Spokeo, Inc. v. Robins* 136 S. Ct. 1540, 1549 (2016)).

²⁰ *Gadelhak*, 950 F.3d at 461 (citing *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 333 (7th Cir. 2019)).

²¹ *Aimonetti & Talley*, *supra* note 9, at 182.

²² *See Gadelhak*, 950 F.3d at 461 (quoting *Spokeo*, 136 S. Ct. at 1549); *see also* Brief for Appellant, *Hanna v. Salcedo*, No. 17–14077 (11th Cir. Dec. 11 2017), 2017 WL 6387352 at *4 (quoting *Nicklaw v. Citimortgage*, 855 F.3d 1265, 1266 (11th Cir. 2017)) (explaining that bare procedural violations do not inflict concrete injury necessary to satisfy the Article III standing).

²³ *Aimonetti & Talley*, *supra* note 9, at 176.

²⁴ *Salcedo v. Hanna*, 936 F.3d 1162, 1165 (11th Cir. 2019).

²⁵ *Id.* at 168. (reasoning that Congress was concerned about intrusive, unsolicited calls to the home in enacting the TCPA which is not necessarily equivalent to an unwelcome texts); *see also* Brief of Defendant-Appellee, *Cranor v. 5 Star Nutrition, L.L.C.*, No. 19–51173 (5th Cir. June 1, 2020), 2020 WL 3089024, at *22–25 (citing *Salcedo*, 936 F.3d at 1169) (arguing that receipt of an unsolicited text message is merely a procedural violation, insufficient for Article III standing).

²⁶ *Eldridge v. Pet Supermarket Inc.*, 446 F. Supp. 3d 1063, 1071–72 (S.D. Fla. 2020).

²⁷ *Aimonetti & Talley*, *supra* note 9, at 176. *See also* *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1273 (9th Cir. 2019) (holding that the development of a facial-recognition technology without consent is an invasion of privacy similar to conduct actionable at common law).

²⁸ *See generally* Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2018) (restricting use of telephone equipment in order to protect the privacy of telephone subscribers).

²⁹ *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).

³⁰ *Compare* *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019) (holding that Salcedo’s allegations of annoyance resulting from the “chirp, buzz, or blink” of his cellphone receiving a

text message differed from intangible harms satisfying the concreteness requirement for Article III standing), *with Van Patten*, 847 F.3d at 1043 (holding that the harm of an unsolicited text message is identical to the harm Congress intended to prevent by enacting the TCPA, satisfying the injury-in-fact requirement for standing).

³¹ *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 463 (7th Cir. 2020).

³² *See Aimonetti & Talley*, *supra* note 9, at 183 (noting the *Spokeo* framework provides minimal instruction to lower courts and “sparse guidance” has left unanswered whether receipt of a text message in violation of the TCPA is an injury-in-fact to support a finding of standing under Article III); *cf.* Jennifer M. Joslin, Note, *The Path to Standing: Asserting the Inherent Injury of the Data Breach*, 3 UTAH L. REV. 735, 736–38 (arguing courts should modify the injury-in-fact inquiry of *Spokeo* framework to ensure more predictable outcomes for data breach plaintiffs).

³³ *Cf.* Joslin, *supra* note 31, at 738.

³⁴ *Cf.* Turturro, *supra* note 5 (“The issue of standing in text-related TCPA cases remains in flux.”).

³⁵ *Gadelhak*, 950 F.3d at 461.

³⁶ *Id.* at 460.

³⁷ *Id.* (citing 47 U.S.C. § 227(b)(1)).

³⁸ *Id.* at 461.

³⁹ *Id.* at 461–62 (citing *Spokeo, Inc. v. Robins* 136 S. Ct. 1540, 1548 (2016)).

⁴⁰ *Id.* at 462.

⁴¹ *See generally* Kirsty Hughes, *A Behavioural Understanding of Privacy and its Implications for Privacy Law*, 75 MOD. L. REV. 806, 822 (“[R]espect for privacy facilitates social interaction. As privacy plays a fundamental role in facilitating social interaction, the preservation of privacy is

of value to . . . society generally.”); Marcelline R. Fusilier, *Variables Affecting Perceptions of Invasion of Privacy in a Personnel Selection Situation*, 65 J. APPLIED PSYCH. 623, 623–26 (examining the dynamic perceptions of invasion of privacy as partially dependent upon the outcome of the disclosure).

⁴² *Gadelhak*, 950 F.3d at 462 (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

⁴³ *Id.* (citing Telephone Consumer Protection Act, Pub. L. No. 102–243, § 2, 105 Stat. 2394, 2394 (1991)).

⁴⁴ *Id.* at 463 (citing *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 464 (evaluating if the phrase “using a random or sequential number generator” modifies both “store” and “produce” within the meaning of an “automatic telephone dialing system).

⁴⁷ *Id.* (concluding that the phrase “using a random or sequential number generator” modifies both “store” and “produce” within the statute and holding that because AT&T’s tool does not store or produce numbers but rather dials them from a customer database, it does not violate the TCPA).

⁴⁸ *Id.*

⁴⁹ *Id.* at 461–62 (citation omitted) (“[S]tanding to sue . . . depends on whether the unwanted texts from AT&T caused him concrete harm or were merely a technical violation of the statute.”).

⁵⁰ *Aimonetti & Talley*, *supra* note 9, at 185 (footnote omitted) (“[T]he Seventh Circuit concluded that the alleged harm satisfied both components of the framework.”).

⁵¹ *Gadelhak*, 950 F.3d at 462.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Salcedo v. Hanna*, 936 F.3d 1162, 1171 (11th Cir. 2019) (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

⁵⁵ *Id.*

⁵⁶ *Gadelhak*, 950 F.3d at 462.

⁵⁷ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)).

⁵⁸ *Salcedo*, 936 F.3d at 1170–71 (quoting *Spokeo, Inc. v. Robins* 136 S. Ct. 1540, 1549 (2016)) (“[I]t is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been . . . a basis for a lawsuit in English or American Courts.”).

⁵⁹ *Id.* at 1171 (citing RESTATEMENT (SECOND) OF TORTS § 652B (AM. L. INST. 1977)) (“[T]he generally accepted tort of intrusion upon seclusion . . . creates liability for invasions of privacy that would be ‘highly offensive to a reasonable person.’”).

⁶⁰ *Id.* at 1172.

⁶¹ *Id.*

⁶² *Gadelhak*, 950 F.3d at 462.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (quoting Pub. L. No. 102–243, § 2, 105 Stat. 2394, 2394 (1991)) (citing *Melito v. Experian Marketing Solutions*, 923 F.3d 85, 92–93 (2d Cir. 2019)) (“[U]nrestricted telemarketing . . . can be an intrusive invasion of privacy’ and characterizing telemarketing as a ‘nuisance.’”).

⁶⁶ *Id.* (emphasis added) (quoting *Spokeo, Inc. v. Robins* 136 S. Ct. 1540, 1549 (2016)).

⁶⁷ *Id.* at 463 (citing *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 528 (1992))).

⁶⁸ See *Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019).

⁶⁹ *But see id.* (Pryor, J., concurring) (“I write separately to emphasize my understanding that the majority’s holding is narrow and . . . leaves unaddressed whether a plaintiff who . . . received multiple unwanted and unsolicited text messages may have standing . . .”).

⁷⁰ Petitions for Declaratory Ruling on Regulatory Status of Wireless Messaging Service, 33 FCC Rcd. 12075, 12085 (2018) (citing *Why Millennials Still Love Text*, OPEN MARKET, <https://www.openmarket.com/resources/millennials-stilllove-text/> (last visited Nov. 20, 2018)).

⁷¹ *Id.*

⁷² *Id.* at 12078.

⁷³ *Salcedo v. Hanna*, 936 F.3d 1162, 1169 (11th Cir. 2019).

⁷⁴ *Id.*

⁷⁵ *Id.* at 1172.

⁷⁶ *Cf.* Turturro, *supra* note 5 (commenting that the circuit split regarding standing in TCPA involving text messages will likely continue without further guidance from the Supreme Court).

⁷⁷ *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 463 (7th Cir. 2020).

⁷⁸ See *Salcedo*, 936 F.3d at 1169–73.

⁷⁹ *Gadelhak*, 950 F.3d at 463.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Salcedo v. Hanna*, 936 F.3d 1162, 1169–73 (11th Cir. 2019).

STANDING ON SHAKEY GROUND: AN ANALYSIS OF THE MISSED OPPORTUNITIES
PRESENTED IN *GADELHAK V. AT&T SERVICES, INC.*

INTRODUCTION

In 1991, Congress passed the Telephone Consumer Protection Act (“TCPA”), a codified system of guidelines and rules restricting telemarketers and the use of automated dialing systems.¹ Decades later, following the advent of the cellphone and standardization of text messaging, AT&T sent surveys to customers who had previously interacted with its customer service team via text message using what it dubbed its “Customer Rules Feedback Tool”.² Utilizing this tool, AT&T sent five text messages in Spanish to Ali Gadelhak—who was neither an AT&T customer nor a Spanish speaker.³ Gadelhak’s number was also registered on the “Do Not Call Registry.”⁴ In hopes of halting the communication, Gadelhak brought a punitive class action against AT&T for violating the TCPA.⁵ Because the tool did not qualify as an “automatic dialing system” per the TCPA’s definition,⁶ the district court held the company was not in violation of the statute.⁷ The plaintiffs appealed the lower court’s ruling, and the Seventh Circuit affirmed the decision ruling that AT&T was not in violation of the TCPA.

Before adjudicating the merits of the parties’ claims, the Seventh Circuit needed to first establish standing on behalf of Gadelhak.⁸ Article III of the U.S. Constitution instructs that judicial power is limited to issues involving “Cases” or “Controversies.”⁹ Without a clear determination of standing, a court cannot adjudicate on the issue presented to it, and it is within a court’s discretion to deny standing if it believes it lacks constitutional power to do so.¹⁰ Confirming standing, however, is not a straightforward task, yet the doctrine of standing remains *essential* to maintaining the balance of powers between the branches of government.¹¹ Courts have largely turned to the decision rendered in *Spokeo, Inc. v. Robbins*¹² as a way to confirm standing. However, when using

Spokeo in TCPA cases, courts have failed to consistently apply the rule.¹³ Because a clear standard to determine standing has yet to be established in TCPA cases, this lack of clarity produces a disorienting effect on plaintiffs attempting to argue that telemarketing campaigns violated the TCPA and intruded on their right to privacy.¹⁴

Considering the challenges the current process yields, this Comment proposes that the *Gadelhak* court reached the correct conclusion regarding standing, but it failed to render reliable guidance that can be adhered to in future cases. Furthermore, this Comment proposes a balancing test—a method considering companies’ marginal utility of performing marketing outreach via text against consumers’ right to privacy—to supplement the established *Spokeo* standard. Part I discusses how courts have applied the concept of standing to cases involving the TCPA and explores relevant publications regarding the right to privacy. Part II details the holding and reasoning of *Gadelhak*. Part III analyzes the court’s failure to establish a concrete method to determine standing and argues for the creation of the above-mentioned balancing test.

I. BACKGROUND

A. The Judicial Branch and the Doctrine of Standing

The democratic system established by the United States Constitution relies on the separation of powers between the executive, legislative, and judicial branches, and this separation is essential to the liberty of U.S. citizens.¹⁵ Apprehensions over the preservation of the balance of powers and potential overreach of judicial oversight have long been concerns of political scholars.¹⁶ To that end, the courts can only review issues that are classified as either “Cases” or “Controversies.”¹⁷ To elevate a particular issue to the requisite standing, the plaintiff “must show that he has sustained or is immediately in danger of sustaining a direct injury as a result of [the

executive or legislative] action”¹⁸ In order to determine injury, the courts have repeatedly turned to *Spokeo* especially in cases involving a breach of the TCPA.¹⁹

B. The Telephone Consumer Protection Act of 1991 and a Right to Privacy

With advancing technology making automated calling more cost-effective (and abundant),²⁰ the Committee on Commerce, Science and Transportation introduced a bill following an increase in consumer complaints due to the recent inundation of unprompted calls.²¹ Thus, the TCPA was codified rendering it unlawful to make a call, other than emergency calls or calls made with prior express consent of the recipient, using an automated dialing system and was later supplemented to create a national do-not-call registry.²² Texts were later found by the Federal Communications Commission (“FCC”), the enforcement bureau of the TCPA, to be included under the TCPA’s scope²³ with special permissions accorded to political campaigns.²⁴ To the unwary phone user, unsolicited texts prove to be especially dangerous as cybercriminals now possess the ability to embed malware and other dangerous software in unsuspecting users’ phones.²⁵ Since the enactment of the TCPA, the FCC has continually striven to protect the interests of consumers who are bombarded with unwanted calls and texts at the behest of companies utilizing marketing campaigns in violation of the statute.²⁶ Because of the increase in unsolicited voice calls and texts, several academic articles have been written detailing the effects that intrusions of privacy have on the individual psyche and how “privacy plays a crucial role in facilitating social interaction”²⁷ Finally, other countries and international organizations similarly uphold a right to privacy and protect against overly persistent telemarketers.²⁸

C. Reconciling the Doctrine of Standing with the TCPA

However important standing may be, opinions on how to balance the Article III mandate with rights to privacy illuminate the inconsistent nature in which the doctrine of standing is applied

to cases involving telemarketers and automated dialing systems. Several circuits affirm standing in TCPA cases using the *Spokeo* holding as guiding principle. In *Florence Endocrine Clinic, PLLC, v. Arriva Medical, LLC*, the clinic received several faxes from Arriva in order to confirm doctor approval of ordered medication on behalf of patients.²⁹ However, the clinic contested that such contact was an “unsolicited advertisement” and claimed Arriva was in violation of the TCPA.³⁰ The Eleventh Circuit granted the clinic standing specifying that it had suffered a concrete injury.³¹ Additionally, in *Van Patten v. Vertical Fitness Group, LLC*, the plaintiff received two marketing texts from a fitness center he was previously a member of and had provided his contact information to.³² The defendants argued that Van Patten lacked standing in light of the *Spokeo* ruling.³³ The Ninth Circuit ultimately disagreed and held that Van Patten did, in fact, have standing to bring forth his claims under the TCPA and such unsolicited contact was enough to constitute a concrete harm.³⁴ Finally, though the issue of standing was not discussed in *Facebook, Inc., v. Duguid*, the Supreme Court adjudicated on a matter involving unsolicited texts sent by Facebook to the plaintiff—the plaintiff was not a Facebook user nor had he ever given Facebook his phone number.³⁵ Because the Supreme Court ultimately held that Facebook’s system fell outside of the scope of the TCPA, this would suggest that the Court was under the assumption that the plaintiff had the proper standing for the case to proceed.

Conversely, several courts have denied standing in similar TCPA cases using the same basis set forth in *Spokeo*. In *Salcedo v. Hanna*, the plaintiff, a former client of the defendant, received a single text message from the defendant’s law firm offering a discount on services.³⁶ The Eleventh Circuit ruled in favor of the defendant holding that Salcedo lacked standing³⁷ in the present matter.³⁸ More drastically, a district court in Florida was forced to adjudicate on a matter involving the reception of seven unauthorized text messages sent to the plaintiff in *Elridge v. Pet*

*Supermarket Inc.*³⁹ Using the decision rendered in *Salcedo* as binding precedent, the court found the plaintiff lacked the appropriate standing to allege certain violations against the TCPA.⁴⁰ In such cases contesting standing, defendants typically question whether the communications and “message[s] *in this case* injured the privacy interests the statute was designed to protect.”⁴¹

Thus, the current judicial landscape is sprinkled with inconsistent holdings on standing in TCPA cases leaving potential plaintiffs and their counsel in a state of perpetual disorientation. This unpredictable state is the arena in which the *Gadelhak* court was forced to adjudicate within.

II. CASE DESCRIPTION

In *Gadelhak v. AT&T Services, Inc.*, the Seventh Circuit employed the *Spokeo* test to determine if the plaintiff had standing to bring forth the TCPA action, then performed an in-depth textual analysis of the statute to determine if AT&T was in violation of the TCPA.⁴² Applying *Spokeo*'s test on standing, the Seventh Circuit found that the five texts sent by AT&T to the plaintiff were enough to amount to a concrete injury under Article III purposes.⁴³ First, turning to the history of TCPA litigation and traditional cases involving a right to privacy, the Seventh Circuit took note of the diverse set of holdings rendered across the circuits, but ultimately held that the unwanted text messages were akin to traditional invasions of privacy.⁴⁴ The court then turned to Congress's intent when passing the TCPA ultimately deciding that Congress specifically chose to recognize the kind of harm to privacy interests that automated dialing systems pose.⁴⁵

After confirming *Gadelhak*'s standing, the court then turned to a textual analysis of the TCPA under § 227(b)(1).⁴⁶ The TCPA prohibits automated telephone dialing systems from calling or texting a recipient without prior express consent.⁴⁷ However, different interpretations of the definition of “automated telephone dialing system”⁴⁸ yield different results.⁴⁹ Ultimately, in applying deep textual and grammatical analysis, the court decided that the TCPA's definition did

not apply to AT&T's feedback tool and that AT&T was not in violation of the statute.⁵⁰ Because AT&T's tool lacked the ability to store or produce telephone numbers using a random number generator, it was not an automated dialing system per the TCPA's definition.⁵¹

III. ANALYSIS

Gadelhak, like the courts above, relied heavily on the *Spokeo* test to determine if the plaintiff possessed standing under Article III.⁵² TCPA cases cannot continue to be adjudicated in a manner that results in such inconsistent holdings. The lack of consistency indicates the need for the Supreme Court to clarify the doctrine of standing in relation to TCPA cases as this lack of clarity freezes consumers' ability to adjudicate their right to privacy when unjustly contacted by telemarketers.⁵³ To supplement *Spokeo*, the Supreme Court should enact a balancing test (*i.e.* a process to allow courts to consider the marginal utility each marketing text yields for a company against the negative effects it has on the particular individual who received the message).

A. The Gadelhak Holding Was Consistent with the Spokeo Test

The Seventh Circuit's decision in *Gadelhak v. AT&T Services, Inc.* correctly applied the *Spokeo* test and upheld the plaintiff's standing. However, as highlighted above, circuits do not consistently apply the test despite there being similar fact patterns. In its commentary, the court notes it is in agreement with the Second and Ninth Circuits holding that unwanted text messages can amount to a concrete injury.⁵⁴ However, earlier in its opinion, the court made the decision to "see things differently" from the *Salcedo* court in the Eleventh Circuit thus choosing to hold the decisions in the Second and Ninth Circuits as more persuasive and applicable to *Gadelhak's* situation.⁵⁵ By failing to incorporate a clear discussion of the counterarguments and discrepancies posed by *Salcedo*, this court's arbitrary decision to deviate from the *Salcedo* holding highlights the inherent malleability of the current *Spokeo* standard. Therefore, though it supplements its

reasoning for conferring standing to Gadelhak via explanations of history and Congressional intent and though the court was not in complete error when rendering its decision, the Seventh Circuit missed a grave opportunity to provide clarity to future TCPA litigants.

B. Balancing Corporate Interests Against Consumers' Experienced Harms

To rectify the unpredictable situation, this Comment proposes supplementing the *Spokeo* standard with a balancing test to further clarify what amounts to a concrete injury. Though the *Gadelhak* court, the Second Circuit, and the Ninth Circuit were of the belief that unwarranted text messages were enough to amount to a concrete injury under the TCPA, the briefs of defendants in *Salcedo v. Hanna* and *Cranor v. 5 Star Nutrition, L.L.C.* noted significant reasons why text messages do not amass to concrete injuries⁵⁶ thus rendering arguments for standing untenable. As such, a balancing test would correct for confusion. Rather having to nitpick whether a particular injury was sufficiently concrete or not, the court could have instead laid out a balancing test in which the marginal utility rendered by the sender of the unsolicited message (*e.g.* marginal profit) is compared against the reasonable harm suffered by the recipient (*e.g.* time spent worrying about unknown senders and asking them to cease communication and extra costs incurred by having additional messages received).⁵⁷ If it is made apparent that plaintiffs are required to articulate the specific harms encountered, they and their counsel can knowingly spend an increased amount of time forming their arguments around the harms incurred rather than having to postulate how the court is going to assess the doctrine of standing.

More clarity surrounding the doctrine of standing is essential in TCPA cases as such cases are intertwined with a right to privacy, and such clarity would be beneficial for public policy. Recent academic writings highlight the importance that the feeling of privacy imparts on individuals. For instance, in the workspace, psychologists postulate that “individuals who perceive

that they have some control over [their personal information] may experience less of an invasion of privacy than those individuals who believe that they have no control over [their personal information].”⁵⁸ Furthermore, academics hypothesize that privacy facilitates social interactions (rather than hinders), and sufficient barriers must be put into place—perhaps through legislation—to ensure the protection of privacy.⁵⁹ Such a ruling would also be in accord with global policies. In Canada, anti-spam legislation was enacted against the use of electronics that “compromises privacy and the security of confidential information” and “undermines the confidence of Canadians” in order to promote the economy.⁶⁰ The Unsolicited Communications Enforcement Network, an international organization, also issued a statement recognizing the pressing nature of unlawful electronic messages and imploring signatories to cooperate with one another to assuage the effects of these communications.⁶¹ Thus, the creation of a balancing test would not cause a complete upheaval of the already established process to determine standing; rather, in matters involving the TCPA, a balancing test supplements *Spokeo* and mitigates the inconsistent nature in which the doctrine of standing is applied to plaintiffs asserting a violation of the statute.

IV. CONCLUSION

In *Gadelhak v. AT&T Services, Inc.*, the Seventh Circuit was faced with the difficult task of confirming standing on behalf of a plaintiff in an area of law plagued with inconsistencies. Though ultimately relying on acceptable precedent and persuasive decisions, the opinion, and others like it, lack clarity and consistency for future litigants to follow. A single text message may amount to a concrete injury in some cases, but several text messages may not amount to injury in others. A clearer standard must ultimately be invoked. Though far from perfect, the *Spokeo* test lacks concrete and predictable guidelines for courts to apply and should be supplemented with a balancing test—one that measures corporate gains against individual harms. This will allow

litigants, of all backgrounds, to understand the doctrine of standing more comprehensively. As scholars from Alexander Hamilton⁶² to Antonin Scalia⁶³ remark, recognizing the doctrine of standing and knowing the extent to which the courts can adjudicate will forever be important tenets of this democracy.

¹ Telephone Consumer Protection Act, 47 U.S.C. § 227 (2018).

² *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 460 (7th Cir. 2020).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ 42 U.S.C. § 227(a)(1).

⁷ *Gadelhak*, 950 F.3d at 469.

⁸ *Id.* at 461–463.

⁹ U.S. CONST. art III, § 2 (“The judicial Power shall extend to all Cases . . . to Controversies . . .”).

¹⁰ *See* Letter from Supreme Court Justices, U.S., to George Washington, President (Aug. 8, 1793), <https://founders.archives.gov/documents/Washington/05-13-02-0263> (denying to answer a question posed by the President in order to uphold constitutionality).

¹¹ *E.g.*, Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK UNIV. L. REV. 881 (1983) (“[T]he doctrine of standing is a crucial and inseparable element of [the separation of powers], whose disregard will inevitably produce . . . an overjudicialization of the process of self governance.”).

¹² *See* *Salcedo v. Hanna*, 936 F.3d 1162, 1166–67 (11th Cir. 2019) (citing *Spokeo Inc., v. Robbins*, — U.S. —, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)) (“The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that

is likely to be redressed by a favorable judicial decision . . . To establish standing, an injury in fact must be concrete . . . [t]hat is, it must actually exist”).

¹³ *Compare Gadelhak*, 950 F.3d at 461 (granting Gadelhak standing after receiving five text messages from AT&T), *and Florence Endocrine Clinic, PLLC, v. Arriva Medical, LLC*, 858 F. 3d 1362, 1366 (11th Cir. 2017) (holding the clinic suffered an “injury in fact” after receiving several faxes from Arriva Medical), *and Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1042 (9th Cir. 2017) (holding Van Patten alleged a concrete injury after receiving several texts from the defendant), *with Salcedo*, 936 F.3d at 1166–67, 1172 (holding Salcedo lacked standing after receiving a single text message from his prior attorney), *and Elridge v. Pet Supermarket Inc.*, 446 F.Supp.3d 1063, 1073 (S.D. Fla. 2020) (finding the plaintiff lacked standing after receiving seven telemarketing text messages from the defendant).

¹⁴ *See* Angela Turturro, *Standing in TCPA Cases: How Many Texts are Enough?*, N.Y.L.J. (Feb. 14, 2020), <https://www.law.com/newyorklawjournal/2020/02/14/standing-in-tcpa-cases-how-many-texts-are-enough>.

¹⁵ Scalia, *supra* note 11, at 881 (citing THE FEDERALIST NO. 47 (James Madison)) (“[N]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”).

¹⁶ *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he general liberty of the people can never be endangered from that quarter; I mean so long as the judiciary remains truly distinct from both the legislature and Executive . . . but would have every thing to fear from its union with either of the other departments”).

¹⁷ U.S. CONST. art III, § 2.

¹⁸ Scalia, *supra* note 11, at 898 (citing *Ex parte Levitt*, 302 U.S. 633, 632 (1937)).

¹⁹ See *Salcedo v. Hanna*, 936 F.3d 1162, 1166–67 (citing *Spokeo Inc., v. Robbins*, — U.S. —, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016)).

²⁰ E.g., Transaction Network Services, 2018 Robocall Investigation Report 3 (2018) (“[A]n FTC report indicates that the Agency received 4.5 million complaints in 2017 . . .”).

²¹ S. REP. NO. 102-17, at 5 (1991) (“The Committee believes that . . . Legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy . . .”).

²² Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1) (2018); 18 FCC Rcd. 14014, at 14014 (2003) ([W]e revise the current Telephone Consumer Protection Act . . . Specifically, we establish with the Federal Trade Commission (FTC) a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls.”).

²³ FEDERAL COMMUNICATIONS COMMISSION, ROBOTEXT CONSUMER PROTECTION, TEST MESSAGE SENDERS MUST COMPLY WITH THE TELEPHONE CONSUMER PROTECTION ACT (2016) (defining robotexts as “autodialed text messages” and confirming FCC restrictions apply to both calls and texts).

²⁴ FEDERAL COMMUNICATIONS COMMISSION, RULES FOR POLITICAL CAMPAIGNS CALLS AND TEXTS (last visited Apr. 30, 2021), <https://www.fcc.gov/rules-political-campaign-calls-and-texts> (noting that political texts are permitted with prior expressed consent when manually dialed).

²⁵ See Blake Dowling, *Smishing? Yeah, It's a Thing*, FLA. POL. (Feb. 3, 2020), <https://floridapolitics.com/archives/317741-blake-dowling-smishing-yeah-its-a-thing/>.

²⁶ See 33 FCC Rcd. 12075, at 12075 (2018) (“This decision removes regulatory uncertainty, empowers providers to continue protecting consumers from unwanted text messages, and should foster further innovation and investment in messaging services.”).

²⁷ Kirsty Hughes, *A Behavioural Understanding of Privacy and its Implications for Privacy Law*, 75 MOD. L. REV. 806, 807 (2012); accord Marcelline R. Fusilier & Wayne D. Hoyer, Variables Affecting Perceptions of Invasions of Privacy in a Personnel Selection Simulation, 65 J. APPLIED PSYCH. 623 (1980) (arguing that a perceived invasion of privacy increases if there is a perception that one's control over personal information is lost).

²⁸ An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-Television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 210, c 23 (Can.); Memorandum of Understanding Among Public Authorities of the Unsolicited Communications Enforcement Network Pertaining to Unlawful Telecommunications and Spam, Unsolicited Commc'n Enf't Network (May 3, 2017) (on file with author).

²⁹ *Florence Endocrine Clinic, PLLC, v. Arriva Medical, LLC*, 858 F.3d 1362, 1364 (11th Cir.2017).

³⁰ *Id.* at 1365.

³¹ *Id.* at 1366 (“[T]he plaintiff suffers a concrete injury because the plaintiff’s fax machine is occupied while the unsolicited fax is being sent and the plaintiff must shoulder the cost . . .”).

³² *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1041 (9th Cir. 2017).

³³ *Id.* at 1042.

³⁴ *Id.* at 1043 ([T]he telemarketing text messages at issue here . . . present the precise harm and infringe the same privacy interest Congress sought to protect in enacting the TCPA. Unsolicited

telemarketing phone calls or text messages . . . invade the privacy and disturb the solitude of their recipients.”).

³⁵ Facebook, Inc., v. Duguid, 141 S.Ct. 1163, 1168 (2021).

³⁶ Salcedo v. Hanna, 936 F.3d 1162, 1165 (11th Cir. 2019).

³⁷ *Contra* Justin W. Aimonetti & Christian Tally, *What’s the Buzz About Standing?*, 88 GEO. WASH. L. REV. 175, 187 (2020) (arguing that the Eleventh Circuit was erroneous in their *Salcedo* decision and that the plaintiff did have Article III standing).

³⁸ *Id.* at 1172 (“The chirp . . . of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one’s face. Annoying, perhaps, but not a basis for invoking jurisdiction of the federal courts.”).

³⁹ Elridge v. Pet Supermarket Inc., 446 F.Supp.3d 1063, 1066 (S.D. Fla. 2020).

⁴⁰ *Id.* at 1070 (“In light of *Salcedo*, the Court must find that the Plaintiff’s alleged injuries . . . do not state a concrete injury in fact.”).

⁴¹ Brief of Defendant-Appellee 5 Star Nutrition, LLC at 22, *Cranor v. 5 Star Nutrition, L.L.C.*, No. 19-51173, 2020 WL 3089024 (5th Cir. June 1, 2020) (arguing that the plaintiff’s receipt of a single text message is not a recognized harm in this case); *accord* Initial Brief of Appellants Alex Hanna and Law Offices of Alex A. Hanna, P.A. at 13–14, *Hanna v. Salcedo*, No. 17-14077, 2017 WL 6387352 (11th Cir. Dec. 11, 2017) (arguing that Salcedo did not suffer a concrete harm, but rather brought forth the case because of a mere violation of the TCPA).

⁴² Gadelhak v. AT&T Services, Inc., 950 F.3d 458 (7th Cir. 2020).

⁴³ *Id.* at 463 (“We therefore agree with the Second and Ninth Circuits that unwanted text messages can constitute a concrete injury-in-fact for Article III purposes.”).

⁴⁴ *Id.* at 462 (noting that the Eleventh Circuit in *Salcedo* rejected standing in a similar case, but in the current matter, the Seventh Circuit chooses to “see things differently”).

⁴⁵ *Id.* at 462-63 (“A few unwanted automated text messages may be too minor . . . But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable.”).

⁴⁶ *Id.* at 463-69.

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

⁴⁸ 42 U.S.C. § 227(a)(1).

⁴⁹ *Gadelhak*, 950 F.3d at 463 (noting that it is not clear what the phrase “using a random or sequential number generator” modifies—the term “store” or “produce”—as written in § 227(a)(1)).

⁵⁰ *Id.* at 469.

⁵¹ *Id.*

⁵² *Gadelhak*, 950 F.3d at 461; *Florence Endocrine Clinic, PLLC, v. Arriva Medical, LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017); *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1042 (9th Cir. 2017); *Salcedo v. Hanna*, 936 F.3d at 1166–67 (11th Cir. 2019); *Elridge v. Pet Supermarket Inc.*, 446 F.Supp.3d 1063, 1073 (S.D. Fla. 2020).

⁵³ *See* Angela Turturro, *Standing in TCPA Cases: How Many Texts are Enough?*, N.Y.L.J. (Feb. 14, 2020), <https://www.law.com/newyorklawjournal/2020/02/14/standing-in-tcpa-cases-how-many-texts-are-enough> (noting *Salcedo* creates confusion in terms of standing and explaining that plaintiffs who receive multiple text messages might not be able to bring suit under the TCPA).

⁵⁴ *Gadelhak*, 950 F.3d at 463 (referencing *Melito v. Experian Mtkg. Sols., Inc.*, 923 F.3d 85, 92–93 (2d Cir. 2019) and *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037,1042–43 (9th Cir.2011)).

⁵⁵ *Id.* at 462.

⁵⁶ Brief of Defendant-Appellee 5 Star Nutrition, LLC, *supra* note 38, at 20 (noting that though the TCPA was violated, the plaintiff was not severely harmed—he could still use his device and did not incur additional fees); Initial Brief of Appellants Alex Hanna and Law Offices of Alex A. Hanna, P.A., *supra* note 38, at 13–14 (“[A]n alleged violation of the TCPA alone is insufficient to establish standing, and Salcedo must further demonstrate a legally cognizable concrete injury-in-fact to survive dismissal.”)

⁵⁷ *Cf.* Jennifer M. Joslion, Note, *The Path to Standing: Asserting the Inherent Injury of the Data Breach*, 2019 UTAH L. REV. 735, 750 (2019) (arguing that to establish standing in cases where there has been a breach or theft of data, in order to calculate a concrete or particularized injury, one can point to financial and emotional harms).

⁵⁸ Fusilier & Hoyer, *supra* note 27, at 625.

⁵⁹ Hughes, *supra* note 27, at 835.

⁶⁰ An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying Out Commercial Activities, and to Amend the Canadian Radio-Television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 210, c 23 (Can.).

⁶¹ Unsolicited Commc’n Enf’t Network, *supra* note 28, at ¶ 3.1.

⁶² Hamilton, *supra* note 16

⁶³ Scalia, *supra* note 11.