C.A. No. 21-10199

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUSAN DRAZEN,
on behalf of herself and other persons similarly situated,

Plaintiff-Appellee,

GODADDY.COM, LLC,

Defendant-Appellee,

v.

JUAN ENRIQUE PINTO,

Movant-Appellant.

On Appeal from the United States District Court
for the Southern District of Alabama, Mobile Division
D. Ct. No. 1:19-cv-00563-KD-B
The Honorable Kristi K. DuBose, District Judge

EN BANC BRIEF OF RETAIL LITIGATION CENTER, INC., AND FLORIDA RETAIL FEDERATION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND VACATUR

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Local Rule 26.1-1 *et seq.*, *Amici* Retail Litigation Center, Inc., and Florida Retail Federation state that in addition to the persons listed in Movant-Appellant Pinto's principal panel brief, C.A. Doc. 32, at CIP-1 to -2 (Aug. 20, 2021); Plaintiff-Appellee Drazen's principal panel brief, C.A. Doc. 40, at i–iv (Nov. 3, 2021); Defendant-Appellee GoDaddy.com, LLC's principal panel brief, C.A. Doc. 41, at CIP-1 to -3 (Nov. 3, 2021); Movant-Appellant Pinto's panel reply brief, C.A. Doc. 51, at CIP-1 to -2 (Jan. 26, 2022); Movant-Appellant Pinto's en banc brief, C.A. Doc. 91 at CIP-1 to -2 (Apr. 14, 2023); and Florida Justice Reform Institute's motion to participate as *amicus*, C.A. Doc. 93, at CIP-1 to- 3 (May 1, 2023), the following persons and entities have an interest in the outcome of this case:

1. Florida Retail Federation, *Amicus Curiae*;
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Amicus curiae Retail Litigation Center, Inc., certifies that it has no parent corporation and that no publicly held company has 10% or greater ownership in Retail Litigation Center, Inc.

Amicus curiae Florida Retail Federation certifies that it has no parent corporation and that no publicly held company has 10% or greater ownership in the Florida Retail Federation.

Date: May 15, 2023

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STATEMENT REGARDING CONSENT

Defendant-Appellee GoDaddy.com, LLC, consents to this filing. Plaintiff-Appellee Susan Drazen and Movant-Appellant Juan Enrique Pinto do not consent to this filing.[1]

STATEMENT OF THE ISSUES

Pursuant to this Court's March 15, 2023 Order, C.A. Doc. 90, the sole question before this Court on rehearing en banc is:

Whether the receipt of a single unwanted text message constitutes a concrete injury sufficient to confer Article III standing under the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended in scattered sections of 47 U.S.C.).

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amicus Retail Litigation Center, Inc. (RLC), provides courts with retail-industry perspective on potential industry-wide consequences of significant court cases. Since its founding in 2010, the RLC has participated as an *amicus* in more than 200 cases. The RLC's members employ millions of workers throughout the

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that no party's counsel authored this brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and that no person other than *amici*, their members, and their counsel contributed money that was intended to fund preparing or submitting this brief.

United States, provide goods and services to hundreds of millions of consumers, and account for more than $1 trillion in annual sales.

The Florida Retail Federation (FRF) is the leading voice representing Florida's retail industry and is made up of a wide range of Florida retailers, including general retailers, grocers, convenience stores, and pharmacies, among others. For more than 80 years, FRF has worked side by side with elected officials, community leaders, stakeholders, and consumers to demonstrate the value of Florida's retail industry in the Sunshine State. With 2.7 million jobs supported by Florida retailers and $49 billion in wages paid to retail employees each year, the retail industry is critical to the State's success.

The RLC and FRF have a strong interest in this case, particularly given its unusual procedural posture. This Court granted rehearing en banc to consider a question with significant practical and jurisprudential implications: whether the receipt of a single unwanted text message is a sufficiently concrete injury to support a plaintiff's Article III standing. The resolution of that question is important in its own right and will have important consequences for whether other intangible injuries that are often asserted in class-action suits can support standing.[2] Yet, it is not clear

[2] The result of this case may affect the standing analysis in cases arising under numerous statutory-damages laws, including the Fair Credit Reporting Act, Pub. L. No. 91-508, § 601, 84 Stat. 1127 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x); the Fair and Accurate Credit Transactions Act of 2003, Pub. L. No. 108-

that any party to the case will defend the panel's conclusion that receipt of a single unwanted text message is not an Article III injury. Movant-Appellant Pinto has already attacked that conclusion; Plaintiff-Appellee Drazen undoubtedly will do so as well; and Defendant-Appellee GoDaddy.com may be reluctant to undermine the settlement to which it agreed, even if holding that certain class members lack standing would decrease the class size. *Amici*, by contrast, offer a full-throated defense of the panel's decision and the decision in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), including addressing the import of this Court's recent en banc decision in *Hunstein v. Preferred Collection & Management Services, Inc.*, 48 F.4th 1236 (11th Cir. 2022)—a decision not cited at all in Pinto's en banc brief.

Amici and their members have an interest in ensuring that nontraditional intangible injuries do not give rise to Article III standing, and an especially strong interest in ensuring that this position is adequately aired in this case. The question of what intangible injuries support standing can determine the size of a class. The less serious the requisite injury, the larger the class—and the larger the class, the greater the pressure on retailers to settle with class counsel to avoid the risk of bet-the-company liability. *Amici* and their members have a strong interest in curtailing

159, 117 Stat. 1952 (codified as amended in scattered sections of the U.S. Code); and the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

meritless class-action proceedings. And given the unusual procedural posture of this case, *amici*'s brief will provide the Court with the adversarial argumentation necessary to resolve the legal question before it.

SUMMARY OF ARGUMENT

In *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), and *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the Supreme Court held that the violation of a statutorily created right inflicts a concrete injury that can support Article III standing only if "the asserted harm has a 'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2200 (quoting *Spokeo*, 578 U.S. at 341). While Congress's view of what constitutes an injury "may be 'instructive,'" *id.* at 2204 (quoting *Spokeo*, 578 U.S. at 341), the judiciary ultimately bears responsibility for determining whether an injury supports Article III standing. The Supreme Court has "rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" *Id.* at 2205 (quoting *Spokeo*, 578 U.S. at 341). Instead, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* (quoting *Spokeo*, 578 U.S. at 341).

This Court, sitting en banc, recently interpreted those decisions to establish that "when an element 'essential to liability' at common law is missing from an

alleged harm, the common-law comparator is not closely related to that harm." *Hunstein v. Preferred Collection & Mgmt. Servs., Inc.*, 48 F.4th 1236, 1244 (11th Cir. 2022) (quoting *TransUnion*, 141 S. Ct. at 2209). Congress's role in the analysis is limited: although it may "observ[e] the existence of real-world injuries and create[e] federal causes of action to redress them," it may not "create[e] new injuries out of whole cloth." *Id.* at 1243. This understanding of the appropriate inquiry, as set forth in *TransUnion* and *Hunstein*, vindicates the panel decision in *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), which held that the receipt of a single unwanted text message does not support Article III standing. *See id.* at 1166–73.

Although other courts of appeals have found close relationships to the common-law torts of intrusion upon seclusion and nuisance, they have misunderstood the elements of those torts. The tort of intrusion upon seclusion accrues when a defendant, acting in an objectively offensive manner, pries into the plaintiff's private affairs or enters a private location. That element of the tort (or anything similar to it) does not occur when a person receives a single unwanted text message. Nor does the purported harm from receiving such a message bear any similarity to the tort of public nuisance, which involves damage to the public health or destruction of a public right. Trespass is also an irrelevant comparator, since there is no harm to any property interest of the class members who received only a single unwanted text message.

Pinto argues that the common-law tort of intrusion upon seclusion is an adequate comparator because it covers cases involving persistent telephone calls that hound the plaintiff. Therefore, Pinto insists, a *single* text message must also be injurious. That cannot be right. Under this theory, a homeowner being handed a single leaflet at her home would sustain an Article III injury because plastering 10,000 flyers over the entire property would be harassment. Similarly, a pedestrian being asked for a charitable donation on a single occasion would suffer an Article III injury because it would be actionable if the collector followed the pedestrian around with a bullhorn for several days. The Court should not expand the scope of Article III standing in this unprecedented way. A persistent course of harassment *qualitatively* differs from a single phone call or text message; it is not just the amplification of a concrete and cognizable harm.

The lack of a common-law comparator renders Congress's views irrelevant. But even if those views were considered, nothing in the TCPA evinces a Congressional determination that the receipt of a single unwanted text message inflicts a concrete injury. And the views of the Federal Communications Commission (FCC) are even further from relevance, as an agency cannot expand the category of real-world harms that give rise to Article III standing.

ARGUMENT

In *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), this Court held that receipt of a single unwanted text message is not a sufficiently concrete injury to confer Article III standing. *Id.* at 1166–73. That conclusion was correct and consistent with subsequent decisions by the Supreme Court in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), and this Court in *Hunstein v. Preferred Collection & Management Services, Inc.*, 48 F.4th 1236 (11th Cir. 2022) (en banc). This Court should reaffirm *Salcedo*, adopt the conclusion of the panel that class members who received a single text message lack Article III standing, and vacate the district court's class certification and settlement approval.

A. The Purported Harm Caused by Receipt of a Single Unwanted Text Message Bears No Close Relationship to Harms Actionable at Common Law.

"It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). Regardless of what the TCPA allows,[3] the plaintiff "must show that he or she suffered 'an invasion of a legally

[3] The Supreme Court reached the merits of what the TCPA allows in *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163 (2021), which also involved unwanted text messages. *See id.* at 1168–69. *Duguid* did not address standing, however, so it should not be understood to shed any light on the question presented here. *See Wilkins v. United States*, 598 U.S. 152, 160 (2023) ("[A] 'drive-by jurisdictional rulin[g]' . . . receives 'no precedential effect.'" (second alteration in original) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006))).

protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

The Supreme Court has instructed courts to "assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts" to determine whether Article III's concreteness requirement is satisfied. *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341). That close-relationship inquiry "does not require an exact duplicate in American history and tradition," but neither is it "an open-ended invitation for federal courts to loosen Article III based on contemporary, evolving beliefs about what kinds of suits should be heard in federal courts." *Id.*

This Court has observed the awkwardness that arises when plaintiffs "insist[] on hammering square causes of action into round torts" to show that intangible injuries are sufficiently concrete. *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 931 (11th Cir. 2020) (en banc). To prevent courts from "overthinking" the close-relationship question, *id.*, this Court has therefore interpreted the Supreme Court's recent decisions as requiring an element-by-element comparison of the traditional tort injury to the injury alleged by the plaintiff: "Although an 'exact duplicate' of a traditionally recognized harm is not required, the new allegations cannot be missing an element 'essential to liability' under the comparator tort." *Hunstein*, 48 F.4th at

1242 (quoting *TransUnion*, 141 S. Ct. at 2209); *see id.* at 1244 ("[W]hen an element 'essential to liability' at common law is missing from an alleged harm, the common-law comparator is not closely related to that harm." (quoting *TransUnion*, 141 S. Ct. at 2209)). *Hunstein* interpreted *TransUnion* to mean that "a theory that 'circumvents a fundamental requirement' of an analogous common-law tort 'does not bear a sufficiently "close relationship"' to establish standing." *Id.* at 1244 (quoting *TransUnion*, 141 S. Ct. at 2210 n.6).

Applying those principles, this Court held in *Hunstein* that a plaintiff's alleged injury—disclosure of personal information to a single private party—was not a concrete injury that conferred Article III standing because it lacked the "publicity" element of the common-law public-disclosure tort. 48 F.4th at 1236; *see id.* at 1245–47. This Court explained that the "new harm" was "not similar to the old harm" because the "traditional tort requires publicity," which the plaintiff had not alleged. *Id.* at 1242. And publicity was not just a technical element of the common-law tort; it was the key element that distinguished between harmful and harmless disclosures. *See id.* ("Without publicity, none of the exposure targeted by the tort of public disclosure is at play.").

Under *Hunstein*'s approach, class members whose alleged harm is the mere receipt of a single unwanted text message lack standing. This purported "injury"

bears hardly any relationship—much less a "close" one—to a harm traditionally actionable at common law.

Pinto and other courts of appeals claim that the receipt of an unwanted text message relates to two common-law torts: intrusion upon seclusion and public nuisance. Pinto En Banc Br. 19; *see Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 690–92 (5th Cir. 2021) (public nuisance); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (intrusion upon seclusion); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2d Cir. 2019) (both); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (intrusion upon seclusion); *cf. Susinno v. Work Out World Inc.*, 862 F.3d 346, 351–52 (3d Cir. 2017) (addressing the relationship between intrusion upon seclusion and unwanted phone calls). Neither tort, however, bears a close resemblance to the receipt of a single unwanted text message. Receiving a single unwanted text message lacks the key element—objectively offensive prying into private affairs or locations—that makes intrusion upon seclusion actionable. And it is hardly analogous at all to nuisance or other torts, such as trespass.

1. *Receiving a single unwanted text message is not analogous to intrusion upon seclusion.*

The tort of intrusion upon seclusion is a subcategory of the tort of invasion of privacy. *See* Restatement (Second) of Torts § 652A(2) (1979) (Restatement).[4] The tort occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." *Id.* § 652B. The tort encompasses "physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff's room in a hotel or insists over the plaintiff's objection in entering his home," or by surreptitiously discovering information about the plaintiff that the plaintiff wishes to keep private. *Id.* § 652B cmt. b.

Sending a single unwanted text message to a cell phone does not resemble these intrusive behaviors. A plaintiff who wishes to remain walled off from communication can set aside or mute his cell phone; text messages are therefore unlike the landline phone calls with audible rings that were Congress's core concern in enacting the TCPA. Nor does receipt of a text message—again unlike phone calls—

[4] Pinto and some courts have also noted invasion of privacy as a relevant tort. Pinto En Banc Br. 19; *see Melito*, 923 F.3d at 93; *Van Patten*, 847 F.3d at 1043. But invasion of privacy is a *genus* of tort; intrusion upon seclusion is the relevant member of the genus. *See* Restatement § 652A(2); *see also Salcedo*, 936 F.3d at 1171 & n.10; *Susinno*, 862 F.3d at 352 n.3 ("[I]ntrusion upon seclusion is a well-recognized subset of common law invasion of privacy.").

require any form of interaction between recipient and sender. No action whatsoever is required by the recipient other than averting his glance, and the sender gains no access to any sounds or images from the recipient's location. Receipt of a text message is a mere informational notification: the recipient is told by his device that someone wants to communicate with him, and he is free to ignore or engage with that communication as he sees fit. In light of these characteristics, it strains credulity to describe the receipt of a single text message as "highly offensive to a reasonable person." Restatement § 652B. Nor can a text message reasonably be considered an intrusion into a private location, since the plaintiff himself enabled the channel to the outside world. In short, the injury here "just does not fit" the quintessential harm that gives rise to a common-law suit for intrusion upon seclusion. *Hunstein*, 48 F.4th at 1241.

Indeed, examples in the commentary to Section 652B of the Restatement underscore the aspects of intrusion upon seclusion that are absent here. The commentary's first example supposes a woman "sick in a hospital with a rare disease that arouses public curiosity" and a reporter who "calls her [unsolicited] on the telephone and asks for an interview," which she refuses. Restatement § 652B cmt. b illus. 1. The commentary states that the reporter has committed a tort if he nonetheless "goes to the hospital, enters [the woman's] room and over her objection takes her photograph." *Id.* If receiving a single unwanted message were a cognizable injury, the

commentary could have just stopped at the phone call. But, of course, the mere inconvenience of a call is not the type of privacy invasion that the tort is meant to redress. A single unwanted call is not an intrusion upon seclusion, and thus a single unwanted text message does not inflict a concrete Article III injury by comparison to that tort.

A second example involving phone calls posits "a professional photographer, seeking to promote his business," who calls the plaintiff, "a lady of social prominence, *every day for a month*, insisting that she come to his studio and be photographed." Restatement § 652B cmt. b illus. 5 (emphasis added). The example emphasizes that "[t]he calls are made at meal times, late at night and at other inconvenient times, and [the photographer] ignores [the plaintiff's] requests to desist." *Id.* Again, if receipt of the first call—at any time of day—were a sufficient injury to establish intrusion upon seclusion, there would be no need for the aggravating circumstances. But in truth, it is precisely those aggravators that make the defendant's conduct offensive and thus inflict the relevant form of harm.

The commentary to Section 652B makes the point explicitly, too. It states that there is "no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object." Restatement § 652B cmt. d. "Thus," it continues, "there is no liability for knocking at

the plaintiff's door, *or calling him to the telephone on one occasion or even two or three*, to demand payment of a debt." *Id.* (emphasis added). Instead, "[i]t is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded." *Id.* Persistence and frequency do not just amplify an otherwise minor injury—those aspects of the defendant's behavior *create* the injury.

Pinto acknowledges that the common-law tort of intrusion upon seclusion "encompasse[s] liability for irritating intrusions" like unwanted phone calls only when those calls are "'repeated with such persistence and frequency as to amount to a course of hounding the plaintiff.'" Pinto En Banc Br. 19 (quoting Restatement § 652B cmt. d). But he nevertheless argues that "[t]he harm posed by unwanted text messages is comparable to that kind of intrusive invasion of privacy." *Id.*

That assertion is not credible. As just explained, intrusion upon seclusion arises from highly offensive intrusions that disrupt the plaintiff's life, invade his personal space, or uncover his personal information. Receiving a single unwanted text message does none of this. So while such a text message might be colloquially described as an intrusion, it bears no "close relationship," *Spokeo*, 578 U.S. at 341, to the harm actionable at common law for intrusion upon seclusion.

Moreover, Pinto's theory would elevate a fleeting inconvenience to an Article III injury-in-fact solely because, if the inconvenience were repeated *ad nauseam*, it would be actionable. It seems unlikely that being handed a political flyer at one's home would constitute an Article III injury, but on Pinto's view, that harm would be actionable because it would constitute harassment if 10,000 flyers were posted over every square inch of the plaintiff's property. Similarly, it is hard to imagine that a pedestrian who is asked for a charitable donation on a single occasion has suffered an Article III injury, even if it would be actionable were the collector to follow the pedestrian around with a bullhorn for several days.

Most importantly, the conclusion that a single unwanted text message is insufficiently analogous to intrusion upon seclusion does not turn on the "substantiality of the harm," as the Fifth Circuit has claimed in its pre-*TransUnion* criticism of *Salcedo*. *Cranor*, 998 F.3d at 693. *Salcedo* itself acknowledged that "Article III standing is not a 'You must be this tall to ride' measuring stick." 936 F.3d at 1172. Instead, the panel correctly explained that "[t]here is no minimum quantitative limit required to show injury; rather, the focus is on the qualitative nature of the injury, regardless of how small the injury may be." *Id.* (quoting *Saladin v. City of Milledgeville*, 812 F.2d 687, 691 (11th Cir. 1987)). That is, the differentiating factor between sufficiently and insufficiently concrete harm must be more than just the number of text messages received.

That principle accords with *Salcedo*'s holding. It is not that receiving a single text message is a cognizable-harm level of 0.001, and a level of 1.000 must be achieved before Article III permits suit. Rather, *the cognizable harm from receiving a single text message is 0.000*. If amplified and repeated, it *morphs* into something else altogether—something different in *kind*, not just degree. One-time, inoffensive outreach by text message "is not just a less extreme form" of intrusion upon seclusion; it is not intrusion upon seclusion at all. *Hunstein*, 48 F.4th at 1249.[5]

2. *Receiving a single unwanted text message is not analogous to either private or public nuisance.*

Pinto and other courts have also suggested that nuisance is the relevant tort comparator. *See Cranor*, 998 F.3d at 691–92; *see also Melito*, 923 F.3d at 93 (accepting nuisance theory because defendants did not "meaningfully contend

[5] In *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015), this Court held that the plaintiff had "suffered a concrete and personalized injury in the form of the occupation of its fax machine for the period of time required for the electronic transmission of the data ([*i.e.*,] one minute)." *Id.* at 1251; *see id.* at 1251–53. The receipt of a fax is easily distinguishable from the receipt of a text message. An incoming fax physically occupies the plaintiff's property—while the unwanted fax is being printed, the machine is unusable for any other applications—and permanently consumes ink. As Congress recognized when enacting the TCPA, a fax "shifts some of the costs of advertising from the sender to the recipient" and "occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." H.R. Rep. No. 102-317, at 10 (1991); *see Palm Beach Golf*, 781 F.3d at 1252 ("It is clear from the legislative history of the statute that the TCPA's prohibition against sending unsolicited fax advertisements was intended to protect citizens from the loss of the use of their fax machines during the transmission of fax data."). By contrast, receiving a text message neither makes a device unusable nor wastes ink.

otherwise"). Here, too, sending an unsolicited text message might *colloquially* be characterized as a "nuisance," but it bears no relationship whatsoever to the common-law tort of that moniker.

There are two types of nuisance torts: private nuisance and public nuisance. Restatement § 821A. A private nuisance is "a nontrespassory invasion of another's interest in the private use and enjoyment of land," *id.* § 821D, and a public nuisance "is an unreasonable interference with a right common to the general public," *id.* § 821B(1).

Salcedo rejected the analogy to private nuisance, observing that receipt of a single text message involves no "invasion of any interest in real property." 936 F.3d at 1171. The panel further observed that "[m]ere disturbance and annoyance as such do not in themselves necessarily give rise to an invasion of a legal right." *Id.* (quoting *A. & P. Food Stores, Inc. v. Kornstein*, 121 So. 2d 701, 703 (Fla. Dist. Ct. App. 1960)); *see also, e.g.*, *Ala. Power Co. v. Stringfellow*, 153 So. 629, 631–32 (Ala. 1934) (explaining that noise constitutes a nuisance only if it is "such as materially to interfere with and impair the ordinary comfort of existence on the part of ordinary people" (quoting Joseph A. Joyce & Howard C. Joyce, *Treatise on the Law Governing Nuisances* § 182, at 227 (1906))). Because receiving a text message does not materially interfere with any interests in land, *Salcedo* correctly rejected the analogy to private nuisance, and Pinto does not appear to criticize that conclusion. Instead,

channeling the Fifth Circuit in *Cranor*, he argues that *Salcedo* erred by failing to consider an analogy to the tort of *public* nuisance. Pinto En Banc Br. 21; *see Cranor*, 998 F.3d at 691–92. But that analogy, too, withers under even superficial consideration.

Cranor correctly observed that a public nuisance is an interference with the "public health," "public morals," "public peace," or "public comfort," 998 F.3d at 691 (quoting W. Page Keeton et al., *Prosser & Keeton on the Law of Torts* § 90, at 643–44 (5th ed. 1984)), in a manner "characteristically broad in scope, affecting an entire neighborhood or community, the local community, the public at large or community at large," *id.* (quoting 66 C.J.S. *Nuisances* § 9 (1950)). But the Fifth Circuit's analogy to such harmful activity was not persuasive.

Cranor characterized the plaintiff, who had received three unsolicited text messages from a nutrition retailer, as "want[ing] to use our Nation's telecommunications infrastructure without harassment" and thus "similar to someone who wants to use another piece of infrastructure like a road or bridge without confronting a malarial pond, obnoxious noises, or disgusting odors." 998 F.3d at 692. The dissimilarities, however, are apparent. Receiving a text message does not impair one's

ability to use his phone in the way obstructing a road or bridge precludes travel. Nor does it pose health risks comparable to a disease-ridden pool of standing water.[6]

3. *Receiving a single unwanted text message is not analogous to other torts.*

Salcedo additionally considered and rejected analogies to the "personal property torts of conversion and trespass to chattel." 936 F.3d at 1171; *see id.* at 1171–72. The panel explained that these torts involve long-term or permanent deprivations of property rights, and the receipt of a single unwanted text message is "precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing." *Id.* at 1172. The panel similarly rejected an analogy to the tort of trespass, which involves infringement on real property. *Id.* at 1171.

Pinto does not suggest that either trespass, conversion, or trespass to chattel is an analogous tort of any relevance here. But the Fifth Circuit in *Cranor* criticized *Salcedo*'s analysis with respect to trespass to chattel, arguing that "*Salcedo*'s view of [that tort] is substantially narrower than [its] scope . . . at common law," under which "'a suit for trespass to chattels could be maintained if there was a violation of

[6] The Fifth Circuit in *Cranor* also relied on the plaintiff's allegations that the unwanted text message "deplet[ed] the battery life on [plaintiff's] cellular telephone and . . . us[ed] minutes allocated to [him] by his cellular telephone service provider." 998 F.3d at 692 (first, third, fourth, and fifth alterations in original) (quoting complaint). It is hard to see how either fact renders the text a public nuisance (or how a text message depletes a user's minutes), but regardless, this case includes no allegations about battery life or reduced capacity to receive text messages.

"the dignitary interest in the inviolability of chattels."'" *Cranor*, 998 F.3d at 693 (quoting *United States v. Jones*, 565 U.S. 400, 419 n.2 (2012) (Alito, J., concurring in the judgment)).

But even if it were true that at common law, no "physical[] touch[ing]" or "'actual damage'" was necessary to bring a trespass-to-chattel suit, *Cranor*, 998 F.3d at 693 (quoting *Jones*, 565 U.S. at 419 n.2 (Alito, J., concurring in the judgment)), that does not support the conclusion that a harm akin to receiving a single unwanted text message would have been actionable. Sending such a text does not "dispossess[]" the owner of his phone, Restatement § 218(a); "impair[]" the phone's "condition, quality, or value," *id.* § 218(b); or "deprive" the owner of "the use of the [phone] for a substantial time," *id.* § 218(c). Touching or no, there is no common-law analogue to the harm alleged here. And sending an unwanted text message certainly bears no resemblance to "frighten[ing] a horse so that it runs away," *Cranor*'s proffered example of a touchless trespass on chattel at common law. 998 F.3d at 693 (quoting John W. Salmond, *Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* 331 (1907)). Unlike an escaping horse, a single unwanted text message is not frightening, imposes no cost, and is forgotten within seconds. *Cranor*'s criticism of *Salcedo* thus lacks merit.

B. Action by the Political Branches Has Not Elevated and Cannot Elevate the Receipt of Unwanted Text Messages to an Article III Injury.

The Supreme Court has explained that Congress's expressed judgment "may be 'instructive'" in determining whether a plaintiff's alleged harm bears the requisite close relationship with one actionable at common law—*i.e.*, whether it is "sufficiently concrete to qualify as an injury in fact." *TransUnion*, 141 S. Ct. at 2204 (quoting *Spokeo*, 578 U.S. at 341). The Court clarified, however, that "even though 'Congress may "elevate" harms that "exist" in the real world before Congress recognized them to actionable legal status, it may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.'" *Id.* at 2205 (quoting *Hagy v. Demers & Adams*, 882 F.3d 616, 622 (6th Cir. 2018) (Sutton, J.)).

Pinto and other courts argue that Congress elevated the receipt of a single unwanted text message to cognizable Article III injury when it enacted the TCPA. Pinto En Banc Br. 14–18; *see Cranor*, 998 F.3d at 690–91; *Gadelhak*, 950 F.3d at 462; *Melito*, 923 F.3d at 93; *Van Patten*, 847 F.3d at 1043. *TransUnion*, which postdates each of those decisions, eradicates this argument.

First, because the putative harm from receiving a single unwanted text message bears no close relationship to any harm actionable at common law, Congress cannot make it actionable under the TCPA even if it clearly evinced an intent to do

so. But in any event, Congress did not clearly address the receipt of text messages. And the effort to interpret the FCC's extension of the TCPA to text messages as relevant for Article III standing purposes founders on basic constitutional principles.

1. *Congress cannot elevate a purported injury with no close relationship to harm actionable at common law to one cognizable under Article III.*

The role of Congress in determining whether an alleged injury meets Article III's concreteness requirement is limited. Congress creates causes of action that permit plaintiffs to sue when they have suffered "concrete, *de facto* injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo*, 578 U.S. at 341). But courts retain the "responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III." *Id.*; *see id.* ("'[W]e cannot treat an injury as "concrete" for Article III purposes based only on Congress's say-so.'" (quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999 n.2 (11th Cir. 2020))); *Muransky*, 979 F.3d at 933 ("Although the judgment of Congress is an 'instructive and important' tool to identify Article III injuries, we cannot accept [the] argument that once Congress has spoken, the courts have no further role." (quoting *Spokeo*, 578 U.S. at 341)).

As explained above, the receipt of a single unwanted text message does not bear a close relationship to any "intangible harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2206. That

should end the inquiry. Even had Congress declared in clear terms that the receipt of an unwanted text should be actionable under the TCPA, that would make no difference, for "Congress cannot transform a non-injury into an injury on its say-so." *Gadelhak*, 950 F.3d at 462.

2. *Congress has not instructed that receipt of a single unwanted text message is a cognizable injury.*

Nonetheless, Congress has expressed no judgment about text messages in the TCPA. As *Salcedo* observed, "[t]he TCPA is completely silent on the subject of unsolicited text messages." 936 F.3d at 1169. And though it is true that text messaging did not exist when the statute was enacted in 1991, "Congress has amended the statute several times since then without adding text messaging to the categories of restricted telemarketing." *Id.*

To the contrary, "Congress's legislative findings about telemarketing suggest that the receipt of a single text message is qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA." *Salcedo*, 936 F.3d at 1169. Those findings mostly refer explicitly to telephone calls. *See, e.g.*, Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, § 2(1), 105 Stat. 2394, 2394 ("The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques."); *id.* § 2(5) ("Unrestricted telemarketing . . . can be an intrusive invasion of privacy *and, when an emergency or medical assistance*

telephone line is seized, a risk to public safety." (emphasis added)); *id.* § 2(6) ("Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers."); *id.* § 2(10) ("Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy."). And while there are general references in the Congressional findings to the notion that unwanted calls can be "a nuisance and an invasion of privacy," *e.g.*, *id.* § 2(13), those colloquial references are unavailing here because "a single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does," *Salcedo*, 936 F.3d at 1170; *see id.* ("[B]y nature of their portability and their ability to be silenced, cell phone calls may involve less of an intrusion than calls to a home phone.").[7]

Moreover, Congress has explicitly added provisions relating to text messages in amendments to the TCPA, but has not elevated coverage of text messages to the level of coverage of telephone calls. In 2018, Congress added the provision of the TCPA that now prohibits using fraudulent caller-identification information "in

[7] This case is thus easily distinguishable from *Susinno*, in which the Third Circuit held that unwanted *phone calls* inflict a concrete injury that confers Article III standing because "[t]he TCPA addresses itself directly to single prerecorded calls," and thus "Congress squarely identified th[e] injury." 862 F.3d at 351.

connection with any voice service *or text messaging service*." 47 U.S.C. § 227(e)(1) (emphasis added); *see* Repack Airwaves Yielding Better Access for Users of Modern Services (RAY BAUM'S) Act of 2018, Pub. L. No. 115-141, div. P, § 503(a)(1), 132 Stat. 1080, 1091. But Congress did not take that opportunity to extend all of the TCPA's substantive prohibitions to text messaging. Thus, far from finding that receiving a single text message is injurious, Congress concluded that the harm from receiving unwanted text messages differs in kind from the harm caused by unwanted phone calls.

3. *The FCC's judgment is irrelevant.*

Salcedo correctly concluded that the FCC's views on the harms posed by unwanted text messages are not relevant because "the Supreme Court has specifically instructed us to consider the judgment of *Congress*." 936 F.3d at 1169. Pinto criticizes that conclusion, arguing that under the principle of *Chevron* deference, the FCC's judgment should be given controlling weight. Pinto En Banc Br. 16–17; *see Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

That is a novel and untenable view. Neither the Supreme Court nor this Court has ever suggested that an *agency*, rather than Congress, has any power to "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2205 (quoting *Spokeo*, 578 U.S. at 341). Indeed, even *TransUnion*'s dissenters did not advocate this position.

Instead, they took the view that the *legislature* was empowered to create injuries at law, reasoning that the people's elected representatives were best positioned to assess whether particular conduct creates a sufficient injury to warrant standing. *See id.* at 2218 (Thomas, J., dissenting) (advocating approach that "accords proper respect for the power of Congress and other legislatures to define legal rights"); *id.* at 2226 (Kagan, J., dissenting) ("Congress is better suited than courts to determine when something causes a harm or risk of harm in the real world."). No Member of the Court has ever suggested that an *agency* can establish new, cognizable injuries at law.

It would be a considerable extension of the *Chevron* doctrine to suggest that agencies have say not only over the meaning of the statutes they administer, but over the jurisdiction of the federal courts. Pinto provides no support for this application of *Chevron*, and it is difficult to imagine the Supreme Court endorsing it.[8]

[8] Further, extension of *Chevron* would be particularly inapt while the Supreme Court is reconsidering that doctrine's scope and viability. *See Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. cert. granted May 1, 2023).

CONCLUSION

The district court's judgment certifying the class and approving the settlement should be vacated.

Date: May 15, 2023

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit set forth in Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f), this brief contains **6,498** words.

I further certify that this brief complies with the typeface requirements set forth in Federal Rule of Appellate Procedure 32(a)(5)(A) and with the type-style requirements set forth in Federal Rule of Appellate Procedure 32(a)(6).

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2023, I caused the foregoing **En Banc Brief of Retail Litigation Center, Inc., and Florida Retail Federation as *Amici Curiae* in Support of Defendant-Appellee and Vacatur** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be effected through the CM/ECF system.

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