NO. 19-496

In the Supreme Court of the United States

DISH NETWORK L.L.C.,

Petitioner,

–v–

THOMAS H. KRAKAUER, ON BEHALF OF A CLASS OF PERSONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Cruise Lines International Association ("CLIA") is a not-for-profit trade association whose membership includes over 50 ocean, river and specialty cruise lines, reflecting approximately 97 percent of the cruise capacity in North America. CLIA represents the interests of its members before the courts, Congress, the Executive Branch, and international tribunals. To that end, CLIA files amicus curiae briefs in cases that raise issues of vital concern to the business of the cruise community. This is one of those cases.

CLIA's members have been named as a party-defendant in lawsuits alleging various theories under the Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227 (2012)) ("the TCPA.") It is vital to CLIA members that they are not subject to litigation involving alleged hyper-technical violations of the TCPA in federal court where a plaintiff has not satisfied the bare minimum requirements of Constitutional Article III. standing.

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1 Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amicus made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This class action case arises from an allegation that petitioner violated the Do-Not-Call Registry mechanism under the TCPA. *See* 47 C.F.R. § 64.1200(c)(2); 47 U.S.C. § 227(c)(5). But it also raises an important and fundamental question of how courts are to analyze whether TCPA violations (and indeed, any statutory violation) also meet the requirements of standing under Article III of the Constitution. As will be discussed below, Congress may not confer standing on a plaintiff by legislative fiat—Article III's standing requirements must be met even where a plaintiff has alleged a technical statutory violation. This Court has instructed that courts are to look in part to historical practice, to traditional remedies available in English and American law, to determine whether Article III standing has been shown.

Several courts of appeal, however, have abstracted this historical inquiry to such a generalized extent that almost any statutory violation can pass muster. If this petition is not granted, not only will CLIA members be subject to lawsuits involving alleged TCPA violations involving no Constitutional injury, but the confusion arising from the diverging analytical approaches adopted by the circuits will continue. CLIA members have an interest, at the very least, in clarification of the law and, as a matter of substance, in seeking to ensure that courts take seriously this Court's instructions on how Article III standing is to be analyzed in the context of a statutory violation.

ARGUMENT

A. The Circuits Are Explicitly in Conflict Regarding How to Apply *Spokeo*'s Standing Analysis.

The Constitution grants jurisdiction to federal courts only through "Cases" and "Controversies." U.S. Const. art. III, §§ 1–2. The law of standing, including its most important aspect, injury in fact, prevents "the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013). To show standing, a "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." *Spokeo, Inc. v. Robins*, __ U.S. __, 136 S. Ct. 1540, 1547, 194 L.Ed.2d 635 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992).)

This Court's decision in *Spokeo* reiterated that "Article III standing requires a concrete injury even in the context of a statutory violation." 136 S.Ct. at 1549. This is because "the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

In determining whether a bare statutory violation in fact meets Article III's standing requirements, this Court instructed in *Spokeo* that both "history and the judgment of Congress" should be examined. 136 S. Ct. at 1549. Because the case or controversy requirement of Article III "is grounded in historical practice," "it is

instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.*

But lower courts have interpreted this instruction to allow for broad discretion in reaching their intended result. On the one hand is the analysis recently adopted by the Eleventh Circuit. In *Salcedo v. Hanna*, 936 F.3d 1162, 1165 (11th Cir. 2019), the court was faced the question of whether a plaintiff who alleged he had received a single unsolicited text message, sent in violation of the TCPA, suffered a "concrete injury in fact" for Article III standing.

The Eleventh Circuit focused on the quality and severity of the injury suffered by the plaintiff, finding that his claimed injury could not be said to have a "close relationship" to a traditionally redressable harm. Noting that the historical tort of intrusion upon seclusion required a plaintiff to show conduct "highly offensive to a reasonable person" and that the interference had to be "substantial" and "strongly object[ionable]," the court found that a single unsolicited text message did not rise to this level and so did not meet Article III's standing requirement. *Id.* at 1171 (quoting Restatement (Second) of Torts § 652B).

Notably, the *Salcedo* court cited the traditional notion that there could no liability for one, two or even three phone calls and that liability under the traditional tort could only arise when the "telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff." *Id.* (quoting Restatement (Second) of Torts § 652B, cmt. d.) The receipt of a single text message, on the other hand,

was not objectively intense and was rather only "isolated, momentary and ephemeral." *Salcedo,* 936 F.3d at 1171.

The Eleventh Circuit also rejected analogies to the traditional tort of intrusion upon seclusion because sending one text message "is not closely related to the severe kinds of actively intermeddling intrusions that the traditional tort contemplates." *Id.* For similar reasons, the court rejected comparisons to the torts of nuisance, conversion, trespass, and trespass to chattel. *Id.* at 1171-1172. Plaintiff's allegations, though bearing "a passing resemblance to . . . kind[s] of historical harm . . . differ so significantly in degree as to undermine his position. History shows that [plaintiff]'s allegation is precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing." *Id.* at 1172.

This historical analysis is very different from the approach of the Second, Third, Fourth, and Ninth Circuits. And this difference in approach has led to divergent outcomes—as the Eleventh Circuit itself stated, the Ninth Circuit had come to the "opposite conclusion" on essentially identical facts. *Salcedo,* 936 F.3d at 1172 (citing *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).) *See also Susinno v. Work Out World Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017); *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Krakauer v. Dish Network,* 925 F.3d 643, 653 (4th Cir. 2019).

In effect, the approach adopted by these circuits is conducted on a much more general level of abstraction than that adopted by the Eleventh Circuit, eschewing any analysis of the degree or severity of harm and

instead concentrating on the broad theoretical umbrella under which a plaintiff's claim can be categorized. According to the Ninth Circuit, for example, a violation of the TCPA almost automatically meets Article III's standing requirements because the general issue of privacy is at stake: because "actions to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states" and because the TCPA is Congress's attempt at addressing an invasion of privacy, then a violation of the TCPA meets Article III's standing requirements. *Van Patten*, 847 F.3d at 1043.

This approach is essentially the same one adopted by the Fourth Circuit in this case: "In enacting § 227(c)(5) of the TCPA, Congress responded to the harms of actual people by creating a cause of action that protects their particular and concrete privacy interests. To bring suit, the plaintiffs here must have received unwanted calls on multiple occasions. These calls must have been to a residential number listed on the Do-Not-Call registry." *Krakauer*, 925 F.3d at 653. Because the Do-Not-Call provisions of the TCPA were meant to protect privacy interests, and because "[o]ur legal traditions . . . have long protected privacy interests in the home," the Fourth Circuit was satisfied that the alleged statutory violation in this case satisfied *Spokeo*'s analytical requirements. *Id.*

Similarly, while the Third Circuit recognized that, under traditional tort law, a person's privacy is invaded for the purpose of an intrusion upon seclusion "only when [such] calls are repeated with such persistence and frequency as to amount to . . . hounding" (*Susinno*,

862 F.3d at 351–52, *quoting* Intrusion upon Seclusion, Restatement (Second) of Torts § 652B, cmt d (1977)), Article III standing is invoked by Congress finding that unsolicited telemarking calls or text message, "by their nature" are intrusive. *Susinno*, 862 F.3d at 351–52.

The Second Circuit has taken the same generalized approach, reasoning that the TCPA's ban against unsolicited text messages protects against the same general harms (nuisance and privacy invasions) as were remediable at common law, and so, therefore, Article III is satisfied. *Melito*, 923 F.3d at 93.

There is then a stark difference in the way that *Spokeo*'s historical analysis requirement has been applied. Absent from the Second, Third, Fourth and Ninth Circuit's analyses is the Eleventh Circuit's emphasis on the severity or quality of the harm required to be shown by various traditional privacy tort plaintiffs as compared to the alleged harm coming from a statutory violation. While the Eleventh Circuit's approach takes seriously the *Spokeo* question of whether a new statutory violation actually does have a close relationship to the kinds of harm traditionally actionable, the approach of the other circuits is to instead abstract the relevant inquiry by asking whether privacy or some other very broad interest has been protected as a matter of historical practice.

Of course, the more abstracted the analysis becomes, the more heavily weighted the approach becomes toward finding that a plaintiff has shown Article III standing. After all, if the question becomes simply "was privacy protected at common law and did Congress intend to protect privacy in some form

under statute," then it is difficult to see why a historical analysis would not quickly become almost formulaic. In any event, the circuits are in explicit disagreement about the proper approach and the difference promises only to grow in the future. Whether a plaintiff has standing to sue in federal court under the Constitution should be the same whether the plaintiff lives in Florida or California.

B. The Petition Presents an Important Question on the Separation of Powers.

Ensuring that each branch of the federal government stays within its proper sphere is vitally important to the liberty of all. Put plainly, "there is no liberty if the power of judging be not separated from the legislative and executive powers." The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961). And "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation and quotation marks omitted).

While this case involves a statutory question involving the TCPA, the difference in analytical approach to the historical analysis mandated by *Spokeo* is profound. If there is no principle more fundamental to the judiciary's role in our Constitutional system than its limitation of jurisdiction to actual cases or controversies, then surely the analytical path to determine if there is an actual case or controversy also raises a fundamental and important question fit for this Court's review. This Court should take this opportunity to clarify a fundamental question going to the very structure of our system of government.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and this *amicus curiae* Brief, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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