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 IN OPPOSITION

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QUESTION PRESENTED

To protect people's privacy at home and deter the nuisance of telemarketing, Congress authorized suit by any "person who has received more than one telephone call" to a residential number on the National Do-Not-Call Registry "within any 12-month period by or on behalf of the same entity." 47 U.S.C. § 227(c)(5). The question presented is whether a plaintiff who fits that description is barred from bringing suit unless they can show some additional harm beyond that identified by Congress.

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INTRODUCTION

Congress passed the Telephone Consumer Protection Act of 1991 because "consumers [were] outraged over the proliferation of intrusive, nuisance telemarketing calls to their homes." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 372 (2012). To protect against that harm, Congress provided for the creation of a national do-not-call registry, prohibited calls to residential numbers on the registry, and authorized suit by any "person who has received more than one [such unlawful] call within any 12-month period by or on behalf of the same entity." 47 U.S.C. § 227(c)(5).

In keeping with this statutory text, the district court below certified a class of people who "received" multiple unlawful calls from Dish to a residential number on the do-not-call registry during a fixed period, and held that every member of that class has standing under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). A jury then found Dish liable for thousands of unlawful calls to the class, and the court entered judgment for the class, reserving any class-membership questions for the ongoing claims process.

In an opinion by Judge Wilkinson, the Fourth Circuit affirmed. "Looking both to Congress's judgment and historical practice, as *Spokeo* instructs," the court found that the class "plainly satisfies" Article III. Pet. App. 14a. By definition, every class member "received [multiple] calls" to a residential number on the registry, and the jury agreed. That harm is not "ethereal or abstract." *Id.* "Our legal traditions, moreover, have long protected privacy interests in the home." *Id.* So "[a]nyone looking for some grand pronouncement of law in this case has simply picked the wrong horse." Pet. App. 27a. The court thus affirmed "under well-settled and broadly accepted principles." *Id.*

That holding is unworthy of further review. Although Dish claims (at 1) that it "deepens a circuit split," the one

case that Dish cites shows the opposite. The plaintiff in that case received a single text message in violation of a different statutory provision. Applying *Spokeo*, the court expressly distinguished the scenario in this case. It held that "a single unwelcome text message" does not invade "the privacy of the home in the same way that a voice call to a residential line necessarily does." *Salcedo v. Hanna*, 936 F.3d 1162, 1170 (11th Cir. 2019). Far from conflicting with the decision below, that holding *supports* it.

The Fourth Circuit's "straightforward application of *Spokeo*" is also correct. Pet. App. 15a. History and the role of Congress support it, as do other circuits' cases. *See, e.g.*, *Sussino v. Work Out World Inc.*, 862 F.3d 346, 351–52 (3d Cir. 2017) (Hardiman, J.). And this case involves "personal rights," Pet. App. 7a, so there is standing under Justice Thomas's concurrence in *Spokeo* as well, 136 S. Ct. at 1553.

At any rate, Dish's question isn't even presented. Dish asks "whether a call placed in violation of the [TCPA]"—whatever the violation—"suffices to establish concrete injury." But standing is not assessed in gross. The court below did not hold that "*every* violation of the TCPA produces concrete injury," as Dish asserts (at 31), or even that receiving "a call" does so. It held only that the violations in *this case* give rise to standing because each class member received multiple calls at home.

Nor does the case even present Dish's policy concerns. Although Dish complains (at 29) about defendants being "pressured into settling questionable claims," a jury found it liable for thousands of violations, and the district court found that the violations were knowing and willful. Dish's willful violations netted hundreds of millions of dollars in revenue, drew the attention of regulators in all 50 states, and resulted in the largest civil fine ever obtained by the Federal Trade Commission. Certiorari is unwarranted.

STATEMENT

A. "The National Do Not Call Registry is a popular federal program," and for good reason. FTC, *FTC and DOJ Case Results in Historic Decision Awarding $280 Million in Civil Penalties against Dish Network and Strong Injunctive Relief for Do Not Call Violations* (June 6, 2017), https://goo.gl/rZSWES (quoting then-Acting Assistant Attorney General Chad Readler). "Within the federal government's web of indecipherable acronyms and byzantine programs, the Do-Not-Call registry stands out as a model of clarity. It means what it says. If a person wishes to no longer receive telephone solicitations, he can add his number to the list. The TCPA then restricts the telephone solicitations that can be made to that number." Pet. App. 5a.

The program's continued effectiveness depends on "businesses [accepting] that they must comply with the Do Not Call rules." *Historic Decision Awarding $280 Million against Dish* (quoting Chad Readler). Petitioner Dish Network did not do so. Through its agent, Dish violated the law thousands of times over, reaping millions in profits through illegal telemarketing. These violations eventually caused Dish to enter into an Assurance of Voluntary Compliance with 46 state Attorneys General. CA4 JA846; https://goo.gl/bJm1FW. Yet nothing changed. Despite its promises to ensure TCPA compliance, Dish continued to allow its agent to engage in rampant violations.

For a while, these unrepentant violations paid off. But the law soon caught up with Dish. In 2017, an enforcement action brought by the Federal Trade Commission and the remaining four states (on a parallel track with this private-enforcement action) resulted in the largest single civil fine ever assessed in the FTC's century-long history. *See* FTC, *Historic Decision Awarding $280 Million against Dish*.

B. This case involves people on the receiving end of thousands of those calls. The named plaintiff, Dr. Thomas Krakauer, received at least ten calls to his home, despite having contacted Dish to complain. He sued under 47 U.S.C. § 227(c)(5), which authorizes suit by any "person who has received more than one [unlawful] call within any 12-month period by or on behalf of the same entity."

Adhering to the text of that provision, the district court certified a class of people who received more than one call within the relevant period and whose residential numbers were on the registry. The court worked with the parties to refine the class over time to exclude people for whom Dish might have an affirmative defense and thus to narrow the triable issues for the jury. In addition, actual call records were used to ensure that the trial involved only "received" calls. Over 1.4 million calls were therefore excluded from the case, leaving a total of 51,119 actionable, received phone calls to 18,066 residential numbers on the registry.

Two years into the case, Dish challenged the class's standing. The court denied the motion. By definition, all class members "received telemarketing calls." *See* CA4 JA268. "These calls," the court held, "form concrete injuries" for each class member. CA4 JA248.

C. The case then went to trial. The jury found for "Dr. Krakauer and all class members" and awarded $400 per unlawful call, as permitted by section 227(c)(5)(B). CA4 JA508–09. After trial, the district court found that Dish's violations were willful and knowing. The court exercised its discretion and trebled the damages "because of the need to deter Dish from future violations and the need to give appropriate weight to the scope of the violations" and Dish's "sustained and ingrained practice of violating the law." CA4 JA576–78. Since trial, the court has noted "Dish's lack of respect" for the adjudicative process, "its

continuing repetition of long-rejected arguments, and its attempt to obfuscate the issues, confuse the record, and shift arguments and facts." CA4 JA682. Although the court entered judgment for the class, the claims process is ongoing, with Dish objecting to 350 individual claims.

D. The Fourth Circuit affirmed. After observing that "the record reflects substantial diligence and care by the district court in managing the class," Pet. App. 11a, the court rejected all of Dish's arguments.

On standing, the court began by recognizing that the class definition mirrors the statute, so the question "is whether this class definition, by its terms, stated an injury that is sufficient to support federal jurisdiction." Pet. App. 13a. The court found that *Spokeo* "provides the answer." *Id.* "Looking both to Congress's judgment and historical practice, as *Spokeo* instructs, the private right of action here plainly satisfies the demands of Article III." Pet. App. 14a. "In enacting § 227(c)(5)," the court explained, "Congress responded to the harms of actual people by creating a cause of action that protects their particular and concrete privacy interests." *Id.* The statute requires that a person "have received unwanted calls on multiple occasions" to "a residential number listed on the Do-Not-Call registry." *Id.* "There is nothing ethereal or abstract about it." *Id.* Further, intrusions upon privacy—including those "made via phone calls"—"were recognized in tort law and redressable [in] private litigation." *Id.* at 14a–15a.

This "straightforward application of *Spokeo*" the court concluded, "neatly resolves this matter." Pet. App. 15a. "The class definition hewed tightly to the language of the TCPA's cause of action," which "recognizes a cognizable" injury, so there is "no untold number of class members who lack standing here, and we need not expound on what it would mean if there were." Pet. App. 12a.

REASONS FOR DENYING THE PETITION

I. The decision below does not conflict with *Salcedo v. Hanna*—as that case makes abundantly clear.

Dish kicks off its petition by claiming that the decision below "deepens" a "persistent conflict" in the circuits. Pet. 1, 14. But the only case it cites for that proposition—an Eleventh Circuit case issued after the decision below—in fact shows the opposite: The court in that case repeatedly distinguished the scenario here from the scenario there.

A. *Salcedo* was brought under a different cause of action, alleging a different violation. The plaintiff received a single unwanted text message on his cell phone. He sued under section 227(b)(3), which provides that any "person" may sue "based on a violation." The violation he alleged relied on an agency rule applying section 227(b)(1)(A)'s prohibition on autodialed calls to text messages.

The Eleventh Circuit held that he lacked standing. Like the court below, it followed "*Spokeo*'s instruction to consider history and the judgment of Congress," and emphasized that different cases with different claims will "have differing outcomes depending on those inputs." *Salcedo*, 936 F.3d at 1167 n.4, 1173. The court then applied those two inputs to the particular claim before it.

The court began with the role of Congress. It noted that Congress was "completely silent on the subject of unsolicited text messages," and that its findings "show a concern for privacy within the sanctity of the home." *Id.* at 1169. The court expressly recognized that "a voice call to a residential line"—like those at issue here—"necessarily" involves "an intrusion into the privacy of the home." *Id.* at 1170. But because the same is not true of a text message to a cell phone, the court reasoned that the "privacy and nuisance concerns about residential telemarketing are

less clearly applicable to text messaging." *Id.* at 1169. The court thus concluded 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"—namely, "nuisance calls to [people's] homes from telemarketers," like the ones here. *Id.* (emphasis added).

The *Salcedo* court drew the same distinction in finding that historical analogues did not supply an independent basis for standing. It acknowledged that "the traditional torts of trespass and nuisance" are closely related to many TCPA claims because "Congress was concerned about intrusions into the home when it enacted the TCPA." *Id.* at 1171. But it took the view that they are "not closely related" to Salcedo's particular claim. *Id.* As for the tort of intrusion upon seclusion, the court noted that receiving multiple "phone calls" could give rise to a claim at common law, but it determined that receiving a single text message was too "isolated, momentary, and ephemeral" to qualify in the absence of a contrary congressional command. *Id.*

The court thus held that Salcedo's "allegations of the harm he suffered from receiving a single text message" did not satisfy Article III. *Id.* at 1173. But it emphasized that this was a "close question," *id.* at 1167 n.4, and did not purport to decide anything beyond it. In a concurrence, Judge Pryor underscored that the "holding is narrow" and "leaves unaddressed" even whether "receiv[ing] multiple unwanted and unsolicited text messages" might produce a different answer. *Id.* at 1174. (Pryor, J., concurring).

Thus, as *Salcedo* itself makes clear, Dish is simply wrong to say (at 18) that "[u]nder the rule of *Salcedo*, the[] class members would lack standing" here. And Dish seems to recognize as much. Later in that same paragraph, it tries to overcome *Salcedo*'s own express reasoning by dismissing it as "dicta" (at 18). But that characterization is

both irrelevant and incorrect. It is irrelevant because there is no conflict with *Salcedo*'s holding, and *Salcedo*'s reasoning supports the decision below. It is incorrect because the court in *Salcedo* expressly distinguished prior Eleventh Circuit precedent on the ground that "both the judgment of Congress and history [] reveal concerns about intrusions into the privacy of the home and interferences with property that do not readily transfer to the context of cell phones," *id.* at 1172 n.11—leaving no doubt that this distinction was integral to the court's holding.[1]

B. Lacking a split, Dish mischaracterizes the decision below. It claims that the decision holds that "a violation of the TCPA *always* establishes Article III standing." Pet. 14 (emphasis added). It does not. The holding is limited to "the private right of action here"—section 227(c)(5)—which "plainly satisfies" Article III. Pet. App. 14a. The court's analysis is likewise confined to that provision. "To bring suit" under section 227(c)(5)—unlike the statute in *Salcedo*—a person "must have received unwanted calls on multiple occasions," and the "calls must have been to a residential number listed on the Do-Not-Call registry." *Id.* "Our legal traditions, moreover, have long protected privacy interests in the home," and "[c]ognizable intrusions include intrusions made via phone calls." Pet. App. 14a–15a. That reasoning is focused on the specific claims in this case, and would not dictate a different result in *Salcedo*. Further, it would have been unnecessary had the court simply held that a TCPA violation—*any* TCPA violation—is enough for Article III. It did no such thing.

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[1] Although *Salcedo* expressed disagreement with aspects of a different case involving "whether isolated text messages not received at home" are a cognizable harm, 936 F.3d at 1170 (citing *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1043 (9th Cir. 2017)), that disagreement is not implicated here for the reasons given in *Salcedo*.

Dish also says (at 21, 24–25) that the decision below is "emblematic of a broader post-*Spokeo* divide" because it allows a plaintiff to demonstrate standing without having "to demonstrate that she *actually* suffered the harm the TCPA seeks to prevent." That isn't true either. Under the decision below, a plaintiff shows that she actually suffered such harm by showing that she "received more than one telephone call within any 12-month period by or on behalf of the same entity" to a residential number on the do-not-call registry. *See* 47 U.S.C. § 227(c)(5). The courts below ensured that each plaintiff fits that description because that's the class definition. If someone cannot show that they meet the definition, they are not a class member and will not obtain relief. If they can, they are and they will.

Wading further into the weeds, Dish complains (at 20) that "there is no evidence that *any* plaintiff 'received' a call in the ordinary sense of answering the phone." But that factbound objection has nothing to do with Dish's question presented, nor has it been preserved in this appeal. Dish did not make any argument below about what it means to "receive" a call under section 227(c)(5). In any event, Dish is mistaken. Again, the class includes only those people who "received" multiple calls on a residential number, and the jury found that every call for which it entered liability was received because it was connected and picked up. To the extent that Dish is saying that individual claimants might not be able to meet the class definition—as it is now arguing for a small set of claimants in the claims process—that case-specific argument is not presented, not related to the question presented, and not remotely certworthy. And the same goes for Dish's contention (at 20) that the courts below erred by finding that "each class member had alleged a TCPA violation"—a particularly strange position given that "[t]he class definition hewed tightly to the language of the TCPA's cause of action." Pet. App. 12a.

II. This case is an unsuitable vehicle.

As the preceding discussion indicates, this case would be a poor vehicle for exploring Dish's question presented. For starters, the question is not actually presented. Dish asks the Court to decide "whether a call placed in violation of the [TCPA], without any allegation or showing of injury[,] . . . suffices to establish concrete injury." But the court below did not answer that question—which, apart from being conclusory, is framed at much too high a level of generality. Standing is assessed at the claim level, not the Act level.

Nor did the court below even hold that "a call placed in violation" of the provision in this case necessarily gives rise to standing. To the contrary, it held that a plaintiff may sue only if she "received unwanted calls on multiple occasions." Pet. 14a. Indeed, thousands of calls that Dish "placed in violation" of the law were screened out of this case and excluded from the trial and class judgment below because they were either (a) not picked up or connected, and thus not "received," or (b) received only once, rather than "on multiple occasions."

The real question presented by Dish's petition, then, is whether receiving multiple residential telemarketing calls to a number on the do-not-call registry is a cognizable injury—that is, whether the "class definition, by its terms, stated an injury." Pet. App. 13a. But this case would be a flawed vehicle even to address that uncertworthy question because Dish refuses to answer it. Throughout Dish's petition—from the first paragraph on—Dish resists the premise that the class here "received" calls. The class definition, however, requires exactly that, as does section 227(c)(5). *Cf.* Pet. App. 21a. ("Despite the fact that the relevant definition of the class is pulled directly from the statute, Dish argues that the class necessarily includes a

large number of people who have no statutory claim at all."). And the jury agreed. Likewise, its verdict says only that Dish is liable to the class. Whether an individual claimant can show that she meets the class definition is the subject of the claims process that continues to unfold in the district court (and from which Dish may eventually appeal). And Dish no longer challenges the district court's decision to "reserv[e] individual claims disputes for later down the line." Pet. App. 27a. Nor has Dish preserved an argument that the class definition is not ascertainable.

A similar problem plagues Dish's uninjured-class-member argument (at 27). Here, we could hardly improve on how Judge Wilkinson put it in discussing this issue through the lens of class certification:

> The question of how best to handle uninjured class members has led to well-reasoned opinions from our sister circuits. Were we empowered to issue advisory opinions, we might have something useful to contribute to the discussion. A litigated case is not a symposium, however, and whatever views we may have on these issues must be left for another day. The actual plaintiffs in this case can satisfy the requirements of class certification under well-settled and broadly accepted principles. Anyone looking for some grand pronouncement of law in this case has simply picked the wrong horse.

Pet. App. 27a.

Judge Wilkinson said the same thing about the court's Article III holding. Because "[t]he class definition hewed tightly to the language of" section 227(c)(5), which "itself recognizes a cognizable constitutional injury," there is "no untold number of class members who lack standing here, and we need not expound on what it would mean if there were." Pet. App. 12a.

III. The decision below is correct.

Certiorari is also unwarranted because the decision below is correct. Its methodology is plainly correct, and its application of that methodology yields the correct result.

Spokeo recognizes that, "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." 136 S. Ct. at 1549. Under that approach, Article III is satisfied if "an alleged intangible harm has a close relationship to a harm that has traditionally been" cognizable at common law. *Id.* In addition, "Congress may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Id.* (alterations omitted). If it does so, a plaintiff "need not allege any *additional* harm beyond the one Congress has identified." *Id.*

The Fourth Circuit correctly applied these principles. Because the class definition tracks the statutory text, the court explained that "[t]he question for us is whether this class definition, by its terms, stated an injury that is sufficient to support federal jurisdiction." Pet. App. 13a. It found that a "straightforward application of *Spokeo*"—"[l]ooking both to Congress's judgment and historical practice"—"provides the answer": yes. Pet. App. 13a–15a. The court got it right, both as to Congress and history.

As to Congress: The court observed that, 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." Pet. App. 14a. "The statute requires that an individual receive a call on his own residential number, a call that he previously took steps to avoid. There is nothing ethereal or abstract about it." *Id.* As a result, the court held that the "plaintiffs here do not seek redress for a procedural shortcoming, such as the defendant's failure to keep accurate Do-Not-

Call records. Their claim under § 227(c)(5) accrues only once a telemarketer disregards the registry and actually places multiple calls. Since that harm is both particular to each person and imposes a concrete burden on his privacy, it is sufficient to confer standing." Pet. App. 16a.

As to history: The court noted that "privacy interests in the home" have long been protected, and "[c]ognizable intrusions include intrusions made via phone calls." Pet. App. 14a–15a. The court cited Judge Hardiman's opinion for the Third Circuit in *Susinno* as support. That opinion found that, although the traditional rule at common law would impose liability only for more than "two or three calls"—not two calls or more, as in this case—Congress is empowered to draw a slightly different line. *Susinno*, 862 F.3d at 351–52. "*Spokeo* addressed, and approved, such a choice by Congress." *Id.* at 352. The Fourth Circuit agreed. It rejected Dish's argument that Article III "is not met until the plaintiff's alleged harm has risen to a level that would support a common law cause of action." Pet. App. 15a. "This sort of judicial grafting is not what *Spokeo* had in mind." *Id.* "Our inquiry is focused on types of harms protected at common law, not the precise point at which those harms become actionable." *Id.* Moreover, Congress did not authorize suit "for a single isolated phone call," Pet. 32, but for multiple calls, "and the Constitution in no way bars it from doing so." Pet. App. 16a.

Finally, not only is there standing under the Court's opinion in *Spokeo*, but there is also undoubtedly standing under Justice Thomas's concurrence in that case. In his view, a "plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." 136 S. Ct. at 1553. This case involves "personal rights," Pet. App. 7a, and so is covered by his rule. This Court's intervention is thus unnecessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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