No. 16-3277

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOREEN SUSINNO,
individually and on behalf of all others similarly situated
Plaintiff-Appellant,

v.

WORK OUT WORLD INC.; JOHN DOES 1-25,
Defendant-Appellee.

On appeal from the United States District Court for the
District of New Jersey, No. 3-15-cv-05881, Hon. Peter G. Sheridan

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT/APPELLEE

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. The Chamber participated as an *amicus* before the Supreme Court at both the petition and merits stages in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

The Chamber has a significant interest in the Article III standing issue presented in this case because its members frequently face putative class action lawsuits that allege bare violations of the TCPA and other statutes without identifying any concrete, particularized injury in fact. The Supreme Court in *Spokeo* affirmed that the Constitution requires plaintiffs to allege concrete, *i.e.*,

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amicus* affirms that no party or counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

"real," harm—rejecting the contention that alleging a bare statutory violation automatically satisfies Article III's injury-in-fact requirement. If, despite *Spokeo*'s mandate, plaintiffs are permitted to maintain such cases, the Chamber's members will be mired in litigation over alleged technical statutory violations that have not caused any actual harm, in cases that are designed to extract settlements even in the absence of meritorious claims.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a prime example of a no-injury lawsuit that the Supreme Court held in *Spokeo* cannot proceed in federal court. The district court correctly dismissed this case for lack of standing, concluding that plaintiff Noreen Susinno failed to allege an injury in fact resulting from a single phone call that she never even answered.

Susinno contends that she satisfies Article III's injury-in-fact requirement for two reasons. *First*, she asserts that it is enough simply to allege that the defendant violated the TCPA. Susinno Br. 19. But that is the precise theory adopted by the Ninth Circuit and ***rejected*** by the Supreme Court in *Spokeo*. The Court held that allegation of a bare statutory violation is not sufficient by itself to confer standing. Article III requires more: an injury in fact that is both particularized and concrete.

Second, Susinno maintains in the alternative that a single, unanswered phone call invaded her privacy, intruded upon her seclusion, trespassed upon her personal property, caused her to lose time, aggravated and annoyed her, and depleted her battery. *Id.* These allegations are insufficient to support Article III standing.

Susinno does not argue that she was charged for the call, nor does she allege any other kind of economic loss. Rather her laundry list of claimed "intangible harm[s]" (Susinno Br. 17) consists of conclusory, unsubstantiated, and *de minimis* allegations. A single, unanswered phone call bears no resemblance to the harm required to support a common-law invasion of privacy or trespass to chattel claim. This Court should affirm the decision below.

ARGUMENT

I. Under *Spokeo*, Alleging A Bare Violation Of The TCPA "Divorced From Concrete Harm" Cannot Satisfy Article III.

The "'irreducible constitutional minimum'" of Article III standing is that "[t]he 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*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). To establish Article III standing, a plaintiff therefore must "'[f]irst and foremost'" demonstrate that she suffered "an injury in fact" that is both "concrete and particularized." *Spokeo*, 136 S. Ct. at 1547-48 (quoting *Steel Co. v. Citizens for Better*

Environment, 523 U.S. 83, 103 (1998)). That requires allegations of "facts that affirmatively and plausibly suggest that" she meets the injury-in-fact requirement. *Schuchardt v. President of the United States*, 839 F.3d 336, 344 (3d Cir. 2016).

Susinno tries to avoid that burden by contending that simply alleging a statutory violation (here, a violation of the TCPA) is sufficient to establish standing. But that was the legal rule endorsed by the Ninth Circuit in *Spokeo*, *see Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014), and squarely rejected by the Supreme Court, which held that a plaintiff cannot plead a concrete "injury in fact" merely by alleging a bare statutory violation "divorced from any concrete harm." *Spokeo*, 136 S. Ct. at 1549. Instead, the Court stated, "Article III standing requires ***a concrete injury even in the context of a statutory violation***." *Id.* (emphasis added).

Numerous other circuits have recognized that the Supreme Court meant what it said in *Spokeo*—plaintiffs may not satisfy their obligation to establish standing by asserting only "the invasion of a legal right that Congress *created*." *Braitberg v. Charter Comm'cns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016); *see also Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016) ("Article III is not satisfied every time a statute creates a legal obligation and grants a private right of action for its violation.").

The Supreme Court's core holding in *Spokeo*, the D.C. Circuit recently explained, confirms that "the legislature 'cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing' under Article III." *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016) (quoting *Spokeo*, 136 S. Ct. at 1547-48). "Instead, an asserted injury to even a statutorily conferred right 'must actually exist,' and must have 'affect[ed] the plaintiff in a personal and individual way.'" *Id.* (citations omitted); *see also Lee v. Verizon Commc'ns, Inc.*, 837 F.3d 523, 529 (5th Cir. 2016) ("*Spokeo* recognize[d] that at minimum, a 'concrete' intangible injury based on a statutory violation must constitute a 'risk of real harm' to the plaintiff.").

A. *Spokeo* rejects the notion that alleging a bare statutory violation—without more—automatically confers standing to sue.

Spokeo involved a company that operated a web-based search engine that retrieves publicly available information about individuals. After a user searches for a person by name, phone number, or email address, the Spokeo service retrieves information relating to that person from various databases. One of the persons about whom Spokeo retrieved information sued the company in a putative class action under the Fair Credit Reporting Act (FCRA), alleging that some of the information the company disseminated about him was inaccurate. *Spokeo*, 136 S. Ct. at 1544.

Before the Ninth Circuit, the plaintiff in *Spokeo*, like the plaintiff in this case, argued that standing exists where the defendant "violated *his* statutory rights" and "the interests protected by the statutory rights at issue are sufficiently concrete and particularized that Congress can elevate them" by creating a cause of action. *See* 742 F.3d at 413. The Ninth Circuit agreed, reasoning that the substantive interests protected by FCRA—the privacy interest in the "handling of [plainitff's] credit information"—could create standing because it was that sort of "'concrete, de facto injur[y]' that Congress could 'elevat[e] to the status of legally cognizable injuries.'" *Id.* (quoting *Defenders of Wildlife*, 504 U.S. at 578). Since the court "determine[d] that [plaintiff] ha[d] standing by virtue of the alleged violations" of a statute intended to redress concrete harms, the court declined to address "whether harm to [plaintiff's] employment prospects or related anxiety could be sufficient injuries in fact." *Id.* at 414 n.3.

The Supreme Court rejected the Ninth Circuit's approach. By upholding standing based solely on the allegation of an individualized statutory violation, the Ninth Circuit had "elided" the distinct requirements that an Article III injury be both particularized and concrete. *Spokeo*, 136 S. Ct. at 1548. As the Supreme Court explained, alleging an statutory violation relating to the plaintiff may establish that an injury is *particularized*, but it does not suffice to meet the "concrete" element of injury in fact. *Id.* at 1549. Rather, "concreteness" requires

that the plaintiff show that the alleged injury both "actually exist[s]," and is "'real,'" "not 'abstract.'" *Id.* at 1548.

The Supreme Court elaborated that "intangible injuries" may sometimes be concrete, and that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* at 1549. Therefore, "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.*

In addition, the Court noted that Congress may attempt to "identify intangible harms that meet minimum Article III requirements," and that Congress's judgment is "instructive and important." *Id.* The Court explicitly cautioned, however, that "Congress['s] role . . . *does not mean* 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.* (emphasis added).

Rather, Article III standing "requires a concrete injury ***even in the context of a statutory violation***." *Id.* (emphasis added). A plaintiff cannot, for example, "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.*

In short, *Spokeo* confirms, as the Supreme Court has repeatedly made clear, that the injury-in-fact requirement requires that the plaintiff allege *real-world adverse consequences* from an alleged statutory violation; simply pleading a statutory violation without an accompanying concrete injury does not satisfy Article III. *See, e.g.*, *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("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."); *see also Hancock*, 830 F.3d at 514.

B. The better-reasoned post-*Spokeo* authority rejects claims that a concrete injury in fact may be based solely on an alleged TCPA violation.

Under *Spokeo*, alleging the placement of a telephone call in violation of the TCPA is not sufficient to permit the called party to sue in federal court. That person must also allege facts showing that he or she suffered a concrete injury that is "real" and "actually exist[s]." *Spokeo*, 136 S. Ct. at 1548.

As Susinno points out, some courts have held that a TCPA violation is in itself an injury in fact. But as just explained, that position reflects the same erroneous logic that the Ninth Circuit employed in *Spokeo* and is directly contrary to the Supreme Court's decision.

The better-reasoned decisions have recognized that *Spokeo* compels a fact-specific approach to standing: The plaintiff must allege that he or she personally

suffered a concrete harm *beyond* mere exposure to an alleged violation of the statute in order to satisfy Article III.

For example, in the factually analogous case of *Smith v. Aitima Medical Equipment, Inc.*, the court demanded concrete harm beyond the mere allegation that the TCPA had been violated and held that the receipt of a single phone call, without more, failed to establish standing even if that phone call technically violated the TCPA. *See* 2016 WL 4618780, at *2-4 (C.D. Cal. July 29, 2016).

Likewise, in *Sartin v. EKF Diagnostics, Inc.*, 2016 WL 3598297 (E.D. La. July 5, 2016), the court held that the recipient of a junk fax lacked standing. Though the plaintiff had "plausibly alleged that defendants violated the TCPA by sending unsolicited fax advertisements, he fail[ed] to plead facts demonstrating how this statutory violation ***caused him concrete harm***." *Id.* at *3 (emphasis added). It was not sufficient for the plaintiff in his complaint to "exhaustively describe[] the requirements of the TCPA" or to generally reference "Congress and the FCC"; instead, under *Spokeo*, the lawsuit could not proceed because the complaint did not allege "what ***specific*** injury, if any, [plaintiff] sustained." *Id*. (emphasis added).

In cases involving claims under other federal statutes, courts have recognized that *Spokeo* requires plaintiffs to allege concrete real-world harm, not just the violation of a statutory or common-law right. In *Kamal v. J. Crew Group,*

Inc., 2016 WL 6133827 (D.N.J. Oct. 20, 2016), a suit under the Fair and Accurate Credit Transactions Act, the plaintiff alleged that the defendant, in violation of the statute, did not properly truncate credit card numbers on receipts, thus exposing him to potential identity fraud. *Id.* at *3. Judge Martini explained that the plaintiff lacked standing because he alleged no facts suggesting that "anyone has accessed or attempted to access or will access Plaintiff's credit card information." *Id.*

Similarly, in *Gubala v. Time Warner Cable, Inc.*, 2016 WL 3390415, at *5 (E.D. Wis. June 17, 2016), the plaintiff lacked standing to bring a claim for a violation of the Cable Communications Policy Act because he had alleged only that the defendant had failed to destroy his personal information as required by the statute, but not that any real-world injury stemmed from that alleged statutory violation.

Khan v. Children's National Health System, 2016 WL 2946165 (D. Md. May 19, 2016) reached a similar result. The plaintiff there had asserted that she sustained injury because (in her view) a data breach caused a loss of privacy; she contended that this claimed loss allowed her to raise "various statutory and common law causes of action." *Id.* at *1. The court disagreed, holding that the plaintiff lacked standing because "she has not identified any potential damages arising from such a loss." *Id.* at *6. And in *Nokchan v. Lyft, Inc.*, 2016 WL 5815287 (N.D. Cal. Oct. 5, 2016), a claim based on a failure to provide statutorily

required disclosures under the FCRA was insufficient because the plaintiff had not shown that he suffered any concrete injury as a result of the alleged technical violations.[2]

Susinno nonetheless insists that *Spokeo* applies only to "procedural" violations. *See* Susinno Br. 11-13. The Supreme Court did cite a "bare procedural violation" as an "***example***" of a violation that, in the absence of concrete harm, would not satisfy the injury-in-fact requirement. 136 S. Ct. at 1549 (emphasis added). But the concrete-harm requirement is not limited to "procedural" violations. "Article III standing requires a concrete injury even in the context of a statutory violation" of *any* kind, procedural or otherwise. *Id.* After all, "'Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" *Id.* at 1547-48 (quoting *Raines*, 521 U.S. at 820 n.3).

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[2] Courts across the country have dismissed claims similar to those in *Nokchan* for lack of standing. *See, e.g.*, *Boergert v. Kelly Servs., Inc.*, 2016 WL 6693104 (W.D. Mo. Nov. 14, 2016); *Kirschner v. First Adv. Background Servs. Corp.*, 2016 WL 6766944 (E.D. Cal. Nov. 14, 2016); *Tyus v. USPS*, 2016 WL 6108942 (E.D. Wis. Oct. 19, 2016); *Shoots v. iQor Holdings US Inc.*, 2016 WL 6090723 (D. Minn. Oct. 18, 2016); *Groshek v. Great Lakes Higher Educ. Corp.*, 2016 WL 6819697 (W.D. Wis. Oct. 4, 2016); *Fisher v. Enter. Holdings, Inc.*, 2016 WL 4665899 (E.D. Mo. Sept. 7, 2016); *Larroque v. First Advantage LNS Screening Solutions, Inc.*, 2016 WL 4577257 (N.D. Cal. Sept. 2, 2016); *Smith v. Ohio State Univ.*, 2016 WL 3182675 (S.D. Ohio June 8, 2016).

Susinno's reliance on *Mims* and *Campbell-Ewald* is similarly unpersuasive. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016); *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012). While both cases (which were decided before *Spokeo*) involved the TCPA, in neither case was the Supreme Court asked to consider whether the plaintiff had suffered an injury in fact. The decisions therefore cannot be relied upon in assessing the requirements of Article III, because any indication that the plaintiffs in those cases satisfied the injury-in-fact requirement would be at most a "drive-by jurisdictional ruling[]" with "no precedential effect." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). It has been settled law for over six decades that courts are "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952).

II. Susinno's Attempts To Allege Concrete Injury Do Not Satisfy Article III.

Susinno's alternative argument for standing fares no better. Her attempts to manufacture real-world harm from a single phone call she did not even answer fails to establish an Article III injury-in-fact.

A. Susinno has not alleged a concrete invasion of privacy.

Susinno first argues that the solitary unanswered call invaded her privacy, asserting that Congress in enacting the TCPA "defined an injury"—that unsolicited

phone calls automatically injure their recipients' privacy. This argument fails for several reasons.

First, Susinno misconstrues *Spokeo*'s reference to the importance of "historical practice." *Spokeo*, 136 S. Ct. at 1549. She points out that "invasion of privacy has been recognized as a common law tort for over a century," noting that it was first accepted in 1905. Susinno Br. 17-18.

But the question before the Court in *Spokeo* was the meaning of the injury-in-fact standard, which is an element of Article III's "case or controversy" requirement. The "historical practice" referenced by the Court is therefore harms recognized *at the time of the founding* as sufficient to support a lawsuit in court. Indeed, in discussing historical practice, the Court cited *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 774-77 (2000), which examined "the long tradition of *qui tam* actions in England and the American Colonies," including "in the period *immediately before and after the framing of the Constitution*" (emphasis added). *See also Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274-75 (2008) ("[I]n crafting Article III, the framers gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union.") (alterations and quotation marks omitted).

In contrast to the *qui tam* actions at issue in *Vermont Agency*, a claim based on privacy concerns would have been unrecognizable to the Framers of the Constitution, because "[p]rior to 1890 no English or American court had ever expressly recognized the existence of the right [to privacy]." Restatement (Second) of Torts § 652A cmt. a (1977) (citing Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890)).

Second, even assuming that an invasion of privacy is a type of intangible harm that Congress could elevate to the status of actionable concrete injury, Susinno has not experienced it here. As recent decisions have reiterated in both the statutory and common-law context, generalized assertions of "loss of privacy … are too abstract to establish Article III standing"; rather, a plaintiff must show resulting "damages or injury." *Duqum v. Scottrade, Inc.*, 2016 WL 3683001, at *8 (E.D. Mo. July 12, 2016) (collecting cases); *accord, e.g.*, *Khan*, 2016 WL 2946165, at *6 (rejecting argument that data breach in violation of state statutes and common law "caused a loss of privacy that constitutes an injury in fact," because the plaintiff "has not identified any potential damages arising from such a loss and thus fails to allege a 'concrete and particularized injury.'") (citation omitted).

Susinno cannot avoid *Spokeo*'s requirement of "real" and "not abstract" harm simply by appending the word "privacy" to her allegation of a TCPA

violation. The issue is not whether some calls that allegedly violate the TCPA might inflict concrete harm by invading someone's privacy, but rather whether the single call at issue here inflicted harm on Susinno. *See Kamal*, 2016 WL 6133827, at *4 ("While FACTA as a whole may implicate traditional privacy interests, Plaintiff's . . . injury does not.").

Susinno's allegations fall far short of this standard. Susinno quotes the colorful pronouncements of one senator that telemarketing calls can "wake [people] up in the morning," "interrupt [their] dinner," "force the sick and elderly out of bed," and "hound [people] until we want to rip the telephone right out of the wall." Susinno Br. 2-3 (quoting 137 Cong. Rec. 30,821 (1991)). But she doesn't allege that any of those things happened to her. She did not answer the call at issue, or even hear the call; it did not interrupt her dinner, or wake her up. Quite simply, Susinno has failed to allege *any* harm caused by the single, unanswered phone call.

Susinno attempts to circumvent this absence of personal harm by insisting that *any* phone call causes an injury if it violates the TCPA, because the statute is intended to protect privacy. Susinno Br. 24-27. In particular, she compares the violation of automatic voice prohibition in Section 227(b)(1)—prohibiting "*any* call"—with the Do-Not-Call Registry prohibition in Section 227(c)(5)—prohibiting *more than one* call within a 12-month period. This distinction, Susinno

argues, means that the privacy right codified in the TCPA "is not limited only to recipients of multiple or repeated calls." Susinno Br. 25. But this argument based on the contours of the statutory right is simply a rephrasing of Susinno's initial argument that a bare statutory violation establishes standing—the argument that *Spokeo* squarely rejected. 136 S. Ct. at 1547; *see also* pp. 5-8, *supra*.

In *Spokeo*, the Supreme Court identified certain FCRA violations that—even though actionable under the statute's private right of action—would not inflict concrete injury. *Id.* at 1550. The same is true here—every TCPA violation does not automatically produce an injury in fact. Put another way, if a phone rings in the forest, but no one is there to hear it, there can be no harm that is "real" and therefore no injury in fact whether or not the call violates the TCPA.

In this case, as with the FCRA in *Spokeo*, there is no indication that Congress determined that every technical violation of the TCPA inflicts sufficient concrete harm to satisfy Article III's injury-in-fact standard. Rather, Congress legislated against the backdrop of the Supreme Court's Article III jurisprudence, and recognized that cases would be able to proceed only if the generally-applicable injury-in-fact standard was satisfied. *See, e.g.*, *Romero v. Dep't Stores Nat'l Bank*, 2016 WL 4184099, at *5 (S.D. Cal. Aug. 5, 2016) ("Congress's finding that the proliferation of unwanted calls from telemarketers causes harm does not mean that the receipt of one telephone call that was dialed using an ATDS results in concrete

harm."). Certainly nothing in statute indicates that Congress intended to override that standard and permit lawsuits by persons who had not suffered such concrete harm.

Nothing in *Mims* suggests otherwise. There, the Supreme Court observed that Congress enacted the TCPA because "'[u]nrestricted telemarketing . . . *can* be an . . . invasion of privacy.'" 132 S. Ct. at 745 (emphasis added). Certainly some kinds of telemarketing amount to actionable invasions of privacy: Excessive phone calls that "hound" a person until he or she "wants to rip the telephone out of the wall" (137 Cong. Reg. 30,821 (1991)) likely would inflict injury in fact. But that is a far cry from the case at hand: a single phone call that Susinno does not even allege that she heard.[3]

Finally, Susinno's summary mention of the common-law privacy tort of intrusion upon seclusion (Susinno Br. 18 (citing Restatement (Second) of Torts § 652B)) provides no support for her position.

Intrusion upon seclusion (like an invasion of privacy) was not a basis for suit at common law at the time of the founding, and therefore does not satisfy the

[3] *Mey v. Got Warranty, Inc.*, 2016 WL 3645195 (N.D. W. Va. June 30, 2016), suffers from the same fundamental defect as Susinno's arguments here: the court held in generic terms that the potential harms from ***some*** TCPA violations are sufficiently concrete to satisfy Article III, without addressing whether the named plaintiff in that case had sufficiently alleged facts plausibly demonstrating that he or she had suffered those harms.

historical test specified in *Spokeo* and prior cases. Moreover, a comparison of Susinno's case to the modern tort of intrusion upon seclusion confirms that Susinno has alleged no concrete "privacy" harm as a result of receiving a single, isolated phone call.

The common-law tort of intrusion upon seclusion permits suit only when "the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man." Restatement § 625B cmt. d. Indeed, the Restatement is clear that no intrusion occurs when the defendant "call[s] [a person] to the telephone on one occasion or even two or three"; rather, it 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.*

Susinno has not here alleged, nor could she, that the single, unanswered call at issue rose anywhere close to the level of "hounding," the required harm for a claim of a common-law intrusion upon seclusion. Thus, her analogy to that species of privacy claim is fatally flawed.

B. Susinno's analogy to trespass to chattels fails.

Susinno next argues that the single, unanswered phone call caused her concrete harm in the form of loss of use of her phone during the time that her phone was occupied by the single call. This injury, she contends, is closely related

to the tort of trespass to chattels and thus cognizable under Article III. Susinno Br. 21. That common-law analogy is incorrect. But even if the analogy were applicable to ***some*** TCPA plaintiffs, it would provide no support for Susinno's claim, because ***she*** has not alleged that she was even temporarily precluded from using her phone.

Susinno thus resorts to arguing that ***any*** telephone call that violates the TCPA amounts to an "invasion" tantamount to "trespass to chattels," just as "placing a foot on another's property" is a trespass to real property. Susinno Br. 21-22 (alteration omitted) (quoting *Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring)). But Susinno fails to mention that the common law has long differentiated between trespasses to real property and trespasses to personal property (chattels). Minimal intrusions upon ***real*** property have "traditionally been regarded as providing a basis for a lawsuit in English or American courts" (*Spokeo*, 136 S. Ct. at 1549) because the law "*infers* some damage from every direct entry upon the land of another." *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997). If the law were different, otherwise-harmless trespasses might "ripen into prescription or adverse possession." *Id.*

But there is no parallel danger for harmless contacts with *personal* property, which explains why ***trespass to chattels requires a showing of actual harm***. Restatement (Second) of Torts § 218 (trespass to chattels requires dispossession,

impairment of the chattel, substantial deprivation of the possessor's use, or "harm" to the possessor or her property). This distinction completely undermines Susinno's position.

Indeed, Susinno fails to show that the brief "occup[ation]" of her phone line had any concrete effect on her—much less the kind of "substantial deprivation" of the use of her property required for a common law trespass to chattels action. She does not allege, for example, that she received another call while the call here was occurring, nor that she wished to make another call during that time. The theoretical possibility that another call might have been received is pure speculation at best and thus insufficient to confer standing. *See Spokeo*, 136 S. Ct. at 1549-50 (noting that a "risk of real harm" can be a concrete injury in fact, but this requires that the risk be "material") (citing *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013)).

The cases Susinno cites are inapposite. In one, the court did not even consider the question of standing. *Czech v. Wall St. on Demand*, 674 F. Supp. 2d 1102, 1122 (D. Minn. 2009). And the others involved allegations that the defendant actually made use of the plaintiff's computer systems for the purpose of sending spam messages or harvesting data from databases.[4] Nothing of the sort

[4] *See Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 243 (S.D.N.Y. 2000) ("search robot" downloaded contact information from plaintiff's database); *CompuServe, Inc. v. Cyber Promotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio

occurred here.

Susinno also points to a pre-*Spokeo* decision holding that occupation of the plaintiff's fax machine by a junk fax was found sufficient to support standing. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1250-51 (11th Cir. 2015). But *Palm Beach* involved an incoming fax that prevented the machine from receiving other communications during the transmission for at least a minute. *Id.* at 1251-52 (plaintiff's fax machine was "unavailable for legitimate business" while receiving the junk fax). An incoming telephone call to a cell phone does not "occupy" the phone line in the same way because modern cell phones have call waiting—allowing the phone user to switch to or answer another call even when the line is already in use (or when the user is listening to a voicemail).[5]

1997) (bulk emailing "commandeer[ed] . . . computer resources," which meant those resources were "not available to serve [plaintiff's] subscribers"); *Amos Fin., LLC v. H&B&T Corp.*, 2015 WL 3953325, at *6, *8 (N.Y. Sup. Ct. June 29, 2015) (on counterclaim, defendant alleged plaintiff had called "hundreds of times" and thereby "interfered with [defendant's] unencumbered access to his phone devices").

[5] *See, e.g.*, Verizon, *Call Waiting*, https://www.verizonwireless.com/support/call-waiting; Motorola, *Cell Phones: How Do I Answer Call Waiting*, https://motorola-global-portal.custhelp.com/app/answers/detail/a_id/15968/p/30; Apple, *Call Forwarding, Call Waiting, and Other Call Features on iPhone*, https://support.apple.com/en-us/HT202176.

C. Susinno's allegation of "wasted time" does not suffice to confer standing.

Susinno also asserts that the single, unanswered phone call wasted her time. *See* Susinno Br. 23-24. But the cases Susinno relies on—all decided before *Spokeo*—do nothing to save her argument. Instead, they stand for the proposition that a *non-trivial* loss of time *may* amount to an injury in fact.

In *Freedom From Religion Foundation, Inc. v. Obama*, for example, the Seventh Circuit described a prior opinion upholding standing where the plaintiffs "altered their daily commute, thus incurring costs in both time and money." 641 F.3d 803, 807 (7th Cir. 2011). Likewise, in *Walker v. Lakewood*, the Ninth Circuit held that the time an organization spent responding to an allegedly wrongful lawsuit was sufficient—at the summary judgment stage—to confer standing. 272 F.3d 1114, 1124 (9th Cir. 2001). And in *Rex v. Chase Home Finance LLC*, a district court in California held that "time spent responding to" a defendant's wrongful conduct established standing. 905 F. Supp. 2d 1111, 1146 (C.D. Cal. 2012).[6]

But these cases are inapposite—and Susinno's assertion of this injury fails—for the same reason that Susinno's other attempts to show injury fall flat: even

[6] The Seventh Circuit's decision in *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012) does not mention standing, let alone hold that time spent listening to a single voicemail is sufficient to clear the jurisdictional hurdle imposed by Article III.

assuming that time spent listening to a voicemail ***sometimes*** is enough to constitute an injury in fact, Susinno has not shown that any time that ***she*** spent qualifies an injury in fact. Susinno does not allege that she was forced to change a routine, nor that she lost time and money from doing so.

At most, Susinno alleges that she lost one minute of time listening to the voicemail. *See* Compl. ¶¶ 18-21, 34. If that conclusory assertion were enough to satisfy Article III, *Spokeo*'s holding would be rendered a nullity. Virtually any plaintiff can claim to have spent a minute of his or her time in connection with exposure to an alleged statutory violation. Endorsing that approach to injury in fact would turn standing into "a lawyer's game, rather than a fundamental limitation" on the jurisdiction of the federal courts. *Massachusetts v. EPA*, 549 U.S. 497, 548 (2007) (Roberts, C.J., dissenting). What is required is an allegation that the plaintiff suffered some concrete harm because her time and attention was diverted from some other useful purpose; and that is precisely what Susinno has not alleged here (nor could she).

D. Susinno's other allegations of "aggravation and annoyance" and battery depletion are insufficient to confer standing.

Susinno also alleges that the single, unanswered phone call aggravated and annoyed her, and depleted her battery. These precise allegations of injury were rejected in *Aitima*. There, the court also considered a TCPA case based on a single call to a cell phone, and held that virtually identical tacked-on allegations of

battery loss or aggravation failed to satisfy Article III. *See* 2016 WL 4618780, at *1, *2-4. "Any depletion of Plaintiff's battery, or aggravation and nuisance, resulting from only one call, is a de minimis injury." *Id.* at *4. Similarly here, the conclusory allegations of battery depletion, aggravation, and nuisance do not rise to the level of a constitutional injury in fact.

As with Susinno's allegations of wasted time, a contrary conclusion would render *Spokeo*'s holding a nullity; any plaintiff alleging a bare statutory violation could circumvent the Court's requirement of "real" harm by simply saying that the statutory violation caused her "aggravation" or "nuisance", or that an imperceptible amount of electrical power was used. There are surely cases in which TCPA violations might cause aggravation, nuisance, or battery drainage—perhaps even to an actionable extent—but a plaintiff must do more than simply invoke those words to satisfy Article III.

The Supreme Court's decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)* is of no help to Susinno. 412 U.S. 669 (1973). Quoting a law professor, the Court in a footnote said: "'The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle.'" *Id.* at 689 n.14. Susinno takes this to mean that any harm, no matter how slight, establishes injury in fact. Even if true, this does not save her claim. The allegations of annoyance, nuisance, and battery depletion

are so minimal and conjectural that they amount to nothing more than "abstract" injuries, rather than the "concrete"—or "real"—ones demanded by *Spokeo*. 136 S. Ct. at 1548.

She alleges nothing to demonstrate how a single, unanswered phone call actually harmed her, and indeed she could not. In *SCRAP*, as in *Spokeo*, the Court was clear: "[a] plaintiff must allege that he has been or will in fact be *perceptibly harmed* by the challenged . . . action." 412 U.S. at 688-89 (emphasis added).

III. No-Injury Lawsuits Like This One Abuse The TCPA And Impose Unjustified Costs That Businesses Must Pass On To Consumers.

As we have shown, *Spokeo* mandates dismissal of this case. The Supreme Court has made clear that a no-injury lawsuit cannot go forward. And a faithful application of *Spokeo* is especially important in the TCPA context. The TCPA has become a bludgeon used by the plaintiffs' bar to extract millions of dollars from businesses that inadvertently send text messages or make phone calls in alleged violation of the TCPA's technical requirements.

Indeed, TCPA litigation has increased exponentially in recent years. Approximately 5,000 TCPA cases have been filed in 2016 alone. *See* ACA News, *TCPA Cases Approach Milestone for 2016* (Nov. 17, 2016), http://www.acainternational.org/news/tcpa-cases-approach-milestone-for-2016. The attractiveness of these lawsuits stems largely from the combination of the class mechanism with the statutory damages available under the TCPA—each violation can result in a

damages award of up to $1,500 (47 U.S.C. § 227(b)(3)), leading to aggregate exposure totaling millions of dollars. For example, a company that makes three calls each to 50,000 customers could easily face a class action lawsuit seeking $225 million.

Even when the defendant has reasonable defenses, these cases are virtually never litigated on the merits. As the Supreme Court has put it, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

These *in terrorem* settlements impose substantial costs on businesses. In 2014, for example, Capital One settled a TCPA case for $75.5 million; Bank of America settled for $32 million; Metropolitan Life Insurance settled for $23 million; and Discover Financial Services settled for $8.7 million. *See* Institute for Legal Reform, *Lawsuit Ecosystem II: New Trends, Targets and Players*, at 87 (Dec. 2014), http://www.instituteforlegalreform.com/uploads/sites/1/evolving.pdf. And this money was directed in large part to compensating class counsel, rather than compensating consumers. *Id.*

The sharp uptick in abusive TCPA litigation has not gone unnoticed. In 2014, more than a dozen members of Congress wrote to the FCC to express concerns that the TCPA is being "unfairly applied with great unintended consequences" to non-telemarketing calls." *See Lawsuit Ecosystem*, *supra*, at 88. They further observed:

> the TCPA has turned a vehicle to protect consumers from unwanted random solicitations into a booming practice for opportunistic attorneys to take advantage of ambiguous rules and profit personally by receiving millions of dollars by suing businesses and overburdening the courts while providing only nominal relief to their clients.

Id. Businesses thus are beginning to cease all communications with their customers. A letter to the FCC signed by thirty-six trade associations explained that "the wide-spread litigation and the specter of devastating class action liability has or may spur some businesses and organizations to cease communicating important and time-sensitive non-telemarking information via voice and text to the detriment of customers, clients, and members." Letter to the FCC at 5 (Feb. 2, 2015), https://www.uschamber.com/sites/default/files/2.2.15-_multi-association_letter_to_fcc_on_tcpa.pdf.

Indeed, this abuse of the TCPA threatens the federal government's own ability to communicate with debtors. The 2016 proposed budget sought "to clarify that the use of automatic dialing systems and prerecorded voice messages is allowed when contacting wireless phones in the collection of debt owed to or

granted by the United States." U.S. 2016 Budget at 128, https://www.uschamber.com/sites/default/files/fy2016_white_house_budget_proposal_-_tcpa.pdf.

This lawsuit is not what Congress had in mind when enacting the TCPA. The statute was intended to provide a mechanism for consumers to seek legal redress in the case of *excessive* and *intrusive* telemarketing schemes. The TCPA should not enable aggressive plaintiffs' lawyers to extort massive settlements and chill legitimate communications between businesses and their customers. Adherence to *Spokeo*'s mandate will properly curb abusive, no-injury class actions like this one, while preserving access to federal courts by plaintiffs who have alleged actual harm.

CONCLUSION

The district court's judgment should be affirmed.

Dated: December 5, 2016

Respectfully submitted.

s/ Andrew J. Pincus

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6,496 words.

I further certify that the electronic copy of this brief filed with the Court is identical in all respects to the hard copy filed with the Court, and that a virus check was performed on the electronic version using System Center End Point Protection.

s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of December, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

s/ Andrew J. Pincus
Andrew J. Pincus

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify pursuant to LAR 46.1 that I was admitted to the Bar of the United States Court of Appeals for the Third Circuit on August 11, 2003 and remain a member in good standing of the Bar of this Court.

Dated: December 5, 2016

s/ Andrew J. Pincus
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