

6.9.2a Article III Standing

6.9.2a.1 Introduction

Article III, section 2, of the United States Constitution limits the judicial power of federal courts to cases and controversies. To qualify as a case or controversy, a plaintiff in federal court 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.¹ To establish an injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.”² This subsection discusses these requirements, focusing on the requirement of concreteness.

Article III applies only to the jurisdiction of federal courts. If a case does not meet the case or controversy requirement of Article III, it may still be possible to pursue it in state court, depending on the standing requirements adopted by courts in that state.

This subsection first summarizes the Supreme Court’s 2016 decision in *Spokeo, Inc. v. Robins*³ and then explores its application to claims under the TCPA. Whether a plaintiff has statutory standing is a separate question from Article III standing and focuses on the question of which persons are authorized by the statute to bring suit. Statutory standing is discussed elsewhere in this chapter, in the sections dealing with each statutory prohibition.⁴

6.9.2a.2 *Spokeo*’s Interpretation of Article III Standing

In *Spokeo, Inc. v. Robins*,⁵ the Supreme Court addressed the injury-in-fact requirement for Article III standing.⁶ *Spokeo* breaks no new ground. The Supreme Court confirmed the long-established principle that injury-in-fact is one of three elements required for standing.⁷ Quoting from previous decisions, the Court held: “To establish injury in fact, a plaintiff must show that he or she

¹ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016).

² *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016).

³ *Id.* 136 S. Ct. at 1540.

⁴ See §§ 6.3.5 (robocalls to cell phones), 6.4.5 (prerecorded calls to residential lines), 6.5.3 (do-not-call rules), 6.8.4 (junk faxes), *supra*.

⁵ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 193 L. Ed. 2d 635 (2016).

⁶ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561, 112 S. Ct. 2130, 199 L. Ed. 2d 352 (1992).

⁷ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1547, 194 L. Ed. 2d 635 (2016) (“The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”).

suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’⁸ The Supreme Court held that the Ninth Circuit Court of Appeals had addressed the particularity requirement⁹ of injury in fact but had overlooked the concreteness requirement¹⁰ and had therefore failed to determine whether a consumer reporting agency’s alleged violations of the procedural requirements in the Fair Credit Reporting Act caused concrete injury. The court noted that injury in fact needed to be clearly stated in the pleadings and clearly supported by evidence to obtain a summary or final judgment.¹¹

If the consumer alleges and can later prove actual damages, the requirements for standing set forth in *Spokeo* should be easily satisfied. However, in many cases the plaintiff will choose to plead only a claim for statutory damages.

When actual damages have not been incurred, the consumer will need to plead and prove “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo* acknowledges that either tangible or intangible injuries can satisfy this requirement.¹²

When the injury is intangible, *Spokeo* summarizes two approaches to meet the requirement of concreteness. First, courts should 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.”¹³ As the Court noted, “the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. *See, e.g.*, Restatement (First) of Torts §§ 569 (libel), 570 (slander *per se*) (1938).”¹⁴

Second, Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law. . . .”¹⁵ It “has the power to define injuries and

⁸ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1548, 194 L. Ed. 2d 635 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

⁹ For an injury to be “particularized,” it “must affect the plaintiff in a personal and individual way.” *Id.* 136 S. Ct. at 1548. The Court found this part of the standing test was easily satisfied in the case before it.

¹⁰ *Id.* 136 S. Ct. at 1545.

¹¹ *Id.* 136 S. Ct. at 1547 (“The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. . . . Where, as here, a case is at the pleading stage, the plaintiff must ‘clearly . . . allege facts demonstrating’ each element.”).

¹² *Id.* 136 S. Ct. at 1549.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

articulate chains of causation that will give rise to a case or controversy where none existed before.”¹⁶

Nonetheless, the Court also noted that a plaintiff may not merely assert a bare procedural right, divorced from any concrete harm.¹⁷ Even for procedural rights, however, a “risk of real harm” can satisfy Article III: “[T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”¹⁸ The Supreme Court offered two examples:

- “[I]nability to obtain information’ that Congress had decided to make public is a sufficient injury in fact to satisfy Article III). . . .”¹⁹
- “[F]ailure to obtain information subject to disclosure under the Federal Advisory Committee Act ‘constitutes a sufficiently distinct injury to provide standing to sue’ . . .”²⁰

Spokeo should be read in tandem with the Supreme Court’s decision in *Campbell-Ewald Co. v. Gomez*,²¹ decided earlier in the same term and finding Article III jurisdiction over a claim based on a robocall to the plaintiff’s cell phone even though the defendant had made an unaccepted offer of judgment. While the decision focuses on this specific aspect of the case or controversy requirement, the decision also stands for the more general proposition that the courts have Article III jurisdiction over such a claim, since “[w]hen a requirement goes to subject-matter jurisdiction, courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented.”²² Therefore, if subject matter jurisdiction was truly lacking under the TCPA due to the lack of a concrete injury, the Supreme Court should have dismissed *Campbell-Ewald* as non-justiciable. It did not. In fact, the Court held that “the District Court retained jurisdiction to adjudicate [the plaintiff’s] complaint,”²³ and Justice Roberts noted the Court’s agreement that the receipt of unwanted telephone

¹⁶ *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (J. Kennedy, concurring)).

¹⁷ *See generally* § 6.9.2a.3, *infra* (whether TCPA violations are substantive or procedural).

¹⁸ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1549–1548, 194 L. Ed. 2d 635 (2016) (emphasis in original).

¹⁹ *Id.* 136 S. Ct. at 1549.

²⁰ *Id.* 136 S. Ct. at 1550

²¹ *Campbell-Ewald Co. v. Gomez*, ___ U.S. ___, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

²² *Gonzalez v. Thaler*, ___ U.S. ___, 132 S. Ct. 641, 648, 181 L. Ed. 2d 619 (2012).

²³ *Id.* 136 S. Ct. at 672.

calls was an injury in fact.²⁴ Notably, the plaintiff in *Campbell-Ewald* alleged only a single text message in violation of the TCPA.²⁵

6.9.2a.3 Article III Standing for Unlawful Robocalls

6.9.2a.3.1 Types of harm caused by robocalls; substantive vs. procedural

One of the most important protections of the TCPA is its prohibition of autodialed or prerecorded calls to cell phones without the consent of the called party.²⁶ The types of harm that unlawful robocalls cause clearly meet the requirement of concreteness as articulated in *Spokeo*. First, some consumers will incur monetary costs or loss of specific property as a result of robocalls to cell phones. Many consumers have cell phone calling plans that give them only a limited number of minutes. Unwanted robocalls use up these minutes, so they deprive these consumers of something valuable that they have paid for.²⁷ Other consumers—many of them low-income consumers participating in the federal Lifeline program²⁸—have prepaid cell phones, so they pay for each call by the minute. Unwanted calls also deplete a cell phone’s battery, and the cost of electricity to recharge the phone is a tangible harm. While small, this cost is a real one, and the cumulative effect can be consequential, just as is true for exposure to x-rays.²⁹ These are all tangible harms and there can be no doubt that they create Article III standing.³⁰

²⁴ *Campbell-Ewald*, ___ U.S. ___, 136 S. Ct. 663, 679, 193 L. Ed. 2d 571 (2016) (C.J., Roberts dissenting) (“All agree that at the time Gomez filed suit, he had a personal stake in the litigation. In his complaint, Gomez alleged that he suffered an injury in fact when he received unauthorized text messages from Campbell. To remedy that injury, he requested \$1500 in statutory damages for each unauthorized text message.”). *See also* *Hewlett v. Consolidated World Travel, Inc.*, 2016 WL 4466536, at *3 (E.D. Cal. Aug. 23, 2016) (noting that it would be inconsistent with *Campbell-Ewald* to hold that a plaintiff who received a single call in violation of the TCPA lacks standing).

²⁵ *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 874 (9th Cir. 2014), *aff’d*, ___ U.S. ___, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016).

²⁶ *See* § 6.3, *supra*.

²⁷ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *3 (N.D. W. Va. June 30, 2016).

²⁸ Fed. Communications Comm’n, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order 15–71, ¶ 16 (Released June 22, 2015) (noting that most Lifeline participants have service through a prepaid wireless Lifeline Program, which most commonly limits usage to only 250 minutes a month for entire household); Universal Service Administrative Company, 2014 Annual Report 9 (2014) (almost 12.5 million low-income households maintain essential telephone service through federal Lifeline Assistance Program).

²⁹ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *3 (N.D. W. Va. June 30, 2016) (“In addition, all ATDS calls deplete a cell phone’s battery, and the cost of electricity to recharge the phone is also a tangible harm. While certainly small, the cost is real, and the cumulative effect could be consequential.”). *But cf.* *Leung v. XPO Logistics, Inc.*, ___ F. Supp. 3d ___, 2015 WL 10433667 (N.D. Ill. Dec. 9, 2015) (pre-*Spokeo* case; declining to find, without an allegation about length of call, that drain on battery was measurable enough to confer standing, but finding standing on several other grounds).

³⁰ *See, e.g., Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *3 (N.D. W. Va. June 30,

Robocalls also cause intangible injuries, regardless of whether the consumer has a prepaid cell phone or a plan with a limited number of minutes. The main types of intangible harm that unlawful robocalls cause are (1) invasion of privacy, (2) intrusion upon and occupation of the capacity of the consumer’s cell phone, and (3) wasting the consumer’s time or causing the risk of personal injury due to interruption and distraction. All of these harms meet the requirement of concreteness as interpreted by *Spokeo*.

As noted in § 6.9.2a.2, *supra*, in *Spokeo* the Supreme Court drew some distinctions between “procedural” rights and “substantive” rights. The TCPA’s prohibitions of robocalls, junk faxes, and the like clearly create substantive rather than procedural rights.³¹ They prohibit specific actions directed toward specific consumers. Indeed, in a case decided just four years before *Spokeo*, the Supreme Court characterized the TCPA as providing “detailed, uniform, federal substantive prescriptions.”³² A recent district court decision explains the distinction particularly well:

The Supreme Court’s point in *Spokeo* was not that a statutory violation cannot constitute a concrete injury, but rather that where the bare violation of a statute conferring a procedural right could cause a congressionally identified harm or material risk of harm and just as easily could not, it is not sufficient simply to allege that the statute at issue was violated. Failure to ensure the accuracy of a consumer report may result in a harm or material risk of harm the FCRA was intended to curb—loss of employment opportunities, for example, or a decrease in the consumer’s creditworthiness. But it may also fail to cause any harm or material risk of harm at all. Put differently, the procedural rights imposed through section 1681e(b) are attenuated enough from the interests Congress identified and sought to protect through the FCRA that charging a

2016); *Jamison v. Esurance Ins. Services, Inc.*, 2016 WL 320646, at *3 (N.D. Tex. Jan. 27, 2016) (“Here, Jamison alleged that when Esurance violated the TCPA, it caused her to incur cellular telephone charges or to reduce her previously-paid-for cellular telephone time, and that it invaded her privacy. . . . At this stage, this pleading is sufficient to establish an injury in fact. Therefore, Jamison has standing to bring suit.”). *See also* *King v. Time Warner Cable*, 113 F. Supp. 3d 718 (S.D.N.Y. 2015) (“The legislative history of the TCPA makes clear that the provision against autodialing was drafted to protect ‘consumers who pay additional fees for cellular phones, pagers, or unlisted numbers [and] are inconvenienced and even charged for receiving unsolicited calls from automatic dialer systems.’ . . . In receiving 163 unsolicited calls, Plaintiff clearly experienced the very sort of inconvenience against which Congress sought to protect her. She is entitled to seek compensation for violations of this right, regardless of whether she suffered *monetary* damages.”).

³¹ *A.D. v. Credit One Bank, N.A.*, 2016 WL 4417077, at *6 (N.D. Ill. Aug. 19, 2016); *Krakauer v. Dish Network, L.L.C.*, ___ F.R.D. ___, 2016 WL 4272367, at *2 (M.D.N.C. Aug. 5, 2016) (“Telemarketing calls made in violation of the [TCPA] are more than bare procedural violations.”); *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *2 (N.D. W. Va. June 30, 2016). *But see* *Romero v. Dep’t Stores Nat’l Bank*, ___ F. Supp. 3d ___, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016) (erroneously characterizing prohibition of robocalls as a procedural right).

³² *Mims v. Arrow Fin. Services, L.L.C.*, ___ U.S. ___, 132 S. Ct. 740, 751, 181 L. Ed. 2d 881 (2012).

defendant with violating them is not necessarily the same as charging the defendant with causing a congressionally-identified concrete injury that gives rise to standing to sue.

The same cannot be said of the TCPA claims asserted in this case. Unlike the statute at issue in *Spokeo* (and those at issue in *Smith* and *Gubala*), the TCPA section at issue does not require the adoption of procedures to decrease congressionally-identified risks. Rather, section 227 of the TCPA prohibits making certain kinds of telephonic contact with consumers without first obtaining their consent. It directly forbids activities that by their nature infringe the privacy-related interests that Congress sought to protect by enacting the TCPA. There is no gap—there are not some kinds of violations of section 227 that do not result in the harm Congress intended to curb, namely, the receipt of unsolicited telemarketing calls that by their nature invade the privacy and disturb the solitude of their recipients.³³

6.9.2a.3.2 The invasion of privacy caused by robocalls provides Article III standing

One of the ways that *Spokeo* identifies to establish that an intangible injury is concrete is to evaluate whether it “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”³⁴ Invasion of privacy is an intangible harm that is recognized by the common law. Almost all states recognize invasion of privacy as a common law tort.³⁵ A number of post-*Spokeo* decisions have cited the invasion of privacy as a concrete injury, both when caused by unwanted robocalls³⁶ and by violation of other consumer

³³ A.D. v. Credit One Bank, N.A., 2016 WL 4417077, at *6 (N.D. Ill. Aug. 19, 2016).

³⁴ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

³⁵ Eli A. Meltz, *No Harm, No Foul? Attempted Invasion of Privacy and the Tort of Intrusion Upon Seclusion*, 83 *Fordham L. Rev.* 3431, 3440 (May 2015) (state-by-state survey; “[c]urrently, the vast majority of states recognize the intrusion strand of invasion of privacy either under common law or by statute”). See also A.D. v. Credit One Bank, N.A., 2016 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016) (“American and English courts have long heard cases in which plaintiffs alleged that defendants affirmatively directed their conduct at plaintiffs to invade their privacy and disturb their solitude.”); National Consumer Law Center, *Fair Debt Collection* § 9.3.1 (8th ed. 2014), updated at www.nclc.org/library.

³⁶ A.D. v. Credit One Bank, N.A., 2016 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016) (violation of the substantive right to be free from telemarketing calls is sufficient to constitute a concrete, *de facto* injury; “American and English courts have long heard cases in which plaintiffs alleged that defendants affirmatively directed their conduct at plaintiffs to invade their privacy and disturb their solitude”); *Krakauer v. Dish Network, L.L.C.*, ___ F.R.D. ___, 2016 WL 4272367, at *2 (M.D.N.C. Aug. 5, 2016) (“These calls form concrete injuries because unwanted telemarketing calls are a disruptive and annoying invasion of privacy.”); *Ung v. Universal Acceptance Corp.*, ___ F. Supp. 3d ___, 2016 WL 4132244 (D. Minn. Aug. 3, 2016); *Cour v. Life360, Inc.*, 2016 WL 4039279 (N.D. Cal. July 28, 2016) (a single unwanted text message is an invasion of privacy that meets Article III’s concreteness requirement); *Caudill v. Wells Fargo Home Mortg., Inc.*, 2016 WL 382019, at *2 (E.D. Ky. July 11, 2016) (finding standing under *Spokeo*; invasion of privacy has traditionally been regarded as basis for a lawsuit, and Congress intended TCPA to protect consumers from nuisance, invasion of privacy,

protection laws.³⁷

The prong of the invasion of privacy tort that makes intrusion upon seclusion actionable is particularly analogous here.³⁸ It has often been applied to unwanted telephone calls.³⁹ Indeed, the

cost, and inconvenience; fact that an individual could have made the same calls does not deprive plaintiff of standing); *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *5 (N.D. W. Va. June 30, 2016). *But see* *Romero v. Dep't. Stores Nat'l Bank*, ___ F. Supp. 3d ___, 2016 WL 4184099, at *3 (S.D. Cal. Aug. 5, 2016) (mistakenly reading *Spokeo* to hold that a statutory violation alone cannot be a concrete injury, when *Spokeo* holds that “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified”; also mistakenly requiring plaintiff to demonstrate that each of 290 unwanted calls, in isolation, caused a concrete harm; finding invasion of privacy insufficient).

³⁷ *See, e.g., In re Nickelodeon Consumer Privacy*, ___ F.3d ___, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (unlawful disclosure of legally protected information meets *Spokeo* definition of concreteness; “Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress’s judgment, ought to remain private”).

³⁸ *See* Restatement (Second) of Torts §§ 652A, 652B (setting forth elements), 652F, 652G (privileges) (1977).

³⁹ *See, e.g., Charvat v. NMP, L.L.C.*, 656 F.3d 440, 452–453 (6th Cir. 2011) (Ohio law) (repeated telemarketing calls, especially after do-not-call request, may be invasion of privacy); *St. Paul Fire & Marine Ins. Co. v. Green Tree Fin. Corp.*, 249 F.3d 389 (5th Cir. 2001) (Tex. law) (cause of action for invasion of privacy available to challenge frequent and abusive debt collection calls); *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *3 (N.D. W. Va. June 30, 2016); *Beal v. Windham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962 (W.D. Wis. 2013) (100 phone calls after being told to cease contact are highly offensive); *Corson v. Accounts Receivable Mgmt., Inc.*, 2013 WL 4047577 (D.N.J. Aug. 9, 2013) (two months of daily phone calls to non-debtor, seeking location information for relative who did not live with plaintiff, offensive enough to support claim); *Pariscoff v. JPMorgan Chase Bank*, 2013 WL 3776589 (S.D. Ohio July 16, 2013) (issue is whether calls are “unreasonable action in pursuing the debtor”—measured by effect on a person of ordinary sensibilities; fact issue here as to number and pattern of calls); *Humphrey v. U.S. Bank, N.A.*, 2012 WL 3686272 (N.D. Okla. Aug. 24, 2012) (*Restatement* standard: twenty-five to thirty calls per day, over a period of months, for hotly disputed debt, sufficient to allege “a course of hounding”); *Quinlan v. CitiMortgage, Inc.*, 2012 WL 2401380 (E.D. Cal. June 22, 2012) (refusing to dismiss claim that collectors’ numerous letters were intrusion upon seclusion; giving weight to fact that debt was allegedly not owed and that consumers were put in fear of losing their home); *Shupe v. J.P. Morgan Chase Bank*, 2012 WL 1344786 (D. Ariz. Apr. 18, 2012) (need not show extreme and outrageous conduct; 100 phone calls sufficient to state claim for highly offensive conduct); *Zirena v. Capital One Bank*, 2012 WL 843489 (S.D. Fla. Feb. 2, 2012) (100 phone calls in one month to non-debtor’s cell phone were highly offensive; not clear whether simple wrong number or identity theft); *Smith v. J.P. Morgan Chase Bank*, 2011 WL 5373969 (D. Nev. Nov. 4, 2011) (telephone harassment of borrowers by lender that was egregiously mishandling loan modification); *Duncan v. JP Morgan Chase Bank*, 2011 WL 5359698 (S.D. W. Va. Nov. 4, 2011) (fact issue whether numerous calls after request to cease contact were highly offensive; giving phone number to creditor not blanket permission to call whenever it chose); *Gray v. Chase Bank*, 2011 WL 4716232 (S.D. W. Va. Oct. 7, 2011) (fact issue whether 594 calls, only four of which resulted in conversation, were highly offensive; giving phone number to creditor does not waive right to privacy); *Sewell v. Allied Interstate, Inc.*, 2011 WL 32209 (E.D. Tenn. Jan. 5, 2011) (harassing calls at home; also employer contact); *Brandt v. I.C. Sys., Inc.*, 2010 WL 582051 (M.D. Fla. Feb. 19, 2010) (Florida recognizes intrusion on seclusion claim arising from harassing debt collection calls; fact issue here as to number and pattern); *Krasnor v. Spaulding Law Office*, 675 F. Supp. 2d 208 (D. Mass. 2009) (harassing calls and false threats); *Fausto v. Credigy Services Corp.*, 598 F. Supp. 2d 1049 (N.D. Cal. 2009) (number and content of phone calls, for debt allegedly not owed, sufficient to raise fact issue as to offensiveness); *Campbell v. Triad Fin. Corp.*, 2007 WL 2973598 (N.D. Ohio Oct. 9, 2007) (numerous phone calls, including accusation of crime, and one night-time visit sufficient to state claim for intrusion on seclusion); *Panahiasl v. Gurney*, 2007 WL 738642 (N.D. Cal. Mar. 8, 2007) (continuous abusive debt collection calls, resulting in emotional distress, sufficient to show intrusion on seclusion); *Joseph v. J.J. MacIntyre Cos., L.L.C.*, 281 F. Supp. 2d 1156 (N.D.

TCPA can be seen as “merely liberalizing and codifying the application of this common law tort to a particularly intrusive type of unwanted telephone call.”⁴⁰ The Seventh Circuit has recognized that TCPA actions asserting violations of the statute’s junk fax provisions implicate privacy interests in seclusion.⁴¹ While the common law tort may require different elements than the TCPA, the Supreme Court’s focus in *Spokeo* was not on the elements of the cause of action but rather on whether the harm was of a type that traditionally provides a basis for a common law claim.

It is not only the common law that recognizes the harm caused by invasion of privacy as actionable. The right to privacy is protected under the Constitution.⁴² The Constitution’s protection against unreasonable searches, including those conducted electronically,⁴³ is another aspect of its protection of privacy.⁴⁴ Violations are actionable under the *Bivens* doctrine⁴⁵ and by 42 U.S.C. § 1983 when committed by state actors.⁴⁶ Indeed, many of the rights that are protected by the Bill of Rights and actionable under *Bivens* and section 1983 are intangible.

Even if invasion of privacy were not a harm recognized as redressable through a common law tort claim, it would meet the requirement of concreteness as interpreted by *Spokeo* because

Cal. 2003) (numerous calls on same day to sick older consumer); *Norris v. Moskin Stores, Inc.*, 132 So. 2d 321 (Ala. 1961); *Hairford v. Centurytel, Inc.*, 856 So. 2d 139 (La. Ct. App. 2003) (numerous calls, threats to cut off phone service of older consumer for debt not owed); *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956). *See generally* National Consumer Law Center, Fair Debt Collection § 9.3.2 (8th ed. 2014), *updated at* www.nclc.org/library.

⁴⁰ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *3 (N.D. W. Va. June 30, 2016).

⁴¹ *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 549 (7th Cir. 2009) (discussing particular interests protected by “right of privacy” and holding that “the underlying [TCPA] suit here involves only seclusion interests”). *See also* *Mims v. Arrow Fin. Services, L.L.C.*, ___ U.S. ___, 132 S. Ct. 740, 744, 181 L. Ed. 2d 881 (2012) (“[t]he [Telephone Consumer Protection] Act bans certain practices invasive of privacy”); *Nickelodeon Consumer Privacy*, ___ F.3d ___, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (unlawful disclosure of legally protected information meets *Spokeo* definition of concreteness; “Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress’s judgment, ought to remain private”); *Md. v. Universal Elections, Inc.*, 729 F.3d 370, 376–377 (4th Cir. 2013) (noting TCPA’s purpose of protecting residential privacy by restricting prerecorded calls); *Owens Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 819–820 (8th Cir. 2012) (“[T]he ordinary meaning of the term ‘right of privacy’ easily includes violations of the type of privacy interest protected by the TCPA.”).

⁴² *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *Frisby v. Schultz*, 487 U.S. 474, 484–485, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (“The State’s interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society”; “individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom”); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972).

⁴³ *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).

⁴⁴ *See* *Winston v. Lee*, 470 U.S. 753, 758, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985) (characterizing Fourth Amendment as protecting expectations of privacy, “the most comprehensive of rights and the right most valued by civilized men”).

⁴⁵ *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).

⁴⁶ *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961).

Congress so clearly identified it as a legally cognizable harm.⁴⁷ As the *Spokeo* majority said, “because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’”⁴⁸

Protection of consumers’ privacy rights was clearly foremost on Congress’s mind when it enacted the telephone call restrictions of the TCPA. The Congressional findings accompanying the TCPA repeatedly stress the purpose of protecting consumers’ privacy:

(5) Unrestricted telemarketing, however, can be an *intrusive invasion of privacy* and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged over the proliferation of *intrusive, nuisance calls* to their homes from telemarketers.

* * * *

(9) Individuals’ *privacy rights*, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that *protects the privacy of individuals* and permits legitimate telemarketing practices.

(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*.

* * * *

(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this *nuisance and privacy invasion*.

(13) While the evidence presented to the Congress indicates that automated or

⁴⁷ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *4 (N.D. W. Va. June 30, 2016).

⁴⁸ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

prerecorded calls are *a nuisance and an invasion of privacy*, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

(14) Businesses also have complained to the Congress and the Federal Communications Commission that automated or prerecorded telephone calls *are a nuisance, are an invasion of privacy*, and interfere with interstate commerce.⁴⁹

As was forcefully stated by Senator Hollings, the Act’s sponsor, “Computerized calls are the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”⁵⁰

Thus, Congress repeatedly identified the intangible harm of invasion of privacy as one of its primary concerns when it enacted the TCPA. Its judgment that this harm is legally cognizable should be given great weight.⁵¹

6.9.2a.3.3 The intrusion upon and occupation of the capacity of the consumer’s phone caused by robocalls provides Article III standing

A second type of intangible harm caused by unwanted robocalls is intrusion upon and occupation of the capacity of the consumer’s cell phone. The harm recognized by the ancient common law claim of trespass to chattels—the intentional dispossession of a chattel, or the use of or intermeddling with a chattel that is in the possession of another⁵²—is a close analog for this TCPA violation. Except that it involves intrusion upon personal property rather than real property, the tort

⁴⁹ Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (emphasis added) (found as a note to 47 U.S.C. § 227).

⁵⁰ 137 Cong. Rec. 30,821–30,822 (1991). *See also* S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972–1973 (“The Committee believes that Federal legislation is necessary to protect the public from automated telephone calls. These calls can be an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services.”).

⁵¹ *See, e.g.*, *A.D. v. Credit One Bank, N.A.*, 2016 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016) (Congress enacted the TCPA to protect consumers from the annoyance, irritation, and unwanted nuisance of telemarketing phone calls, granting protection to consumers’ identifiable concrete interests in preserving their rights to privacy and seclusion”); *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *5 (N.D. W. Va. June 30, 2016).

⁵² *See* Restatement (Second) of Torts § 217 (1965).

of trespass to chattels is similar to the more familiar tort of trespass.⁵³ As noted in *Spokeo*, harm can be actionable even if it is “difficult to prove or measure.”⁵⁴

A number of courts have held that temporary electronic intrusion upon another person’s cell phone⁵⁵ or other computerized electronic equipment⁵⁶ constitutes trespass to chattels. For example,

⁵³ Poff v. Hayes, 763 So. 2d 234, 240 (Ala. 2000) (“Trespass to real property is similar to trespass to chattels in that trespass, generally, ‘is a wrong against the right of possession.’” (citation omitted)); HSG, L.L.C. v. Edge-Works Mfg. Co., 2015 WL 5824453, at *6 (N.C. Super. Ct. Oct. 5, 2015) (unpublished) (“In addition to trespass by intruding on a person’s real property, North Carolina recognizes the separate tort of trespass to chattels, which is a trespass to personal property.”). See also Dakota, Minn. & Eastern R.R. Corp. v. Wis. & S. R.R. Co., 2010 WL 3282936, at *10 (W.D. Wis. Aug. 19, 2010) (“To state a claim for trespass—either trespass of real property or trespass of chattel (i.e., personal property)—a plaintiff must demonstrate ownership or possession of the alleged trespassed property.”), *aff’d on other grounds*, 657 F.3d 615 (7th Cir. 2011).

⁵⁴ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1549, 194 L. Ed. 2d 635 (2016).

⁵⁵ *Czech v. Wall St. on Demand*, 674 F. Supp. 2d 1102, 1122 (D. Minn. 2009) (declining to dismiss cell phone owner’s trespass-to-chattels claim against sender of unwanted text messages); *Amos Fin., L.L.C. v. H & B & T Corp.*, 20 N.Y.S.3d 291 (table), 2015 WL 3953325, at *8 (N.Y. Sup. Ct. June 29, 2015) (holding that defendant’s trespass to chattels counterclaim sufficiently alleged damage to his cell phone and answering machine when alleged calls “occupied the memory of his answering machine and interfered with the unencumbered access to his phone devices,” but dismissing counterclaim because plaintiff demonstrated that it did not make the subject calls). See also *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *5 (N.D. W. Va. June 30, 2016) (taking note of decisions holding that temporary electronic intrusion on another person’s electronic equipment is trespass to chattels, and finding Article III standing to hear cell phone robocall case).

⁵⁶ *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000) (intruding electronically into business’ database to harvest e-mail addresses, without authorization, causes harm by reducing the system’s capacity; “[a]lthough Register.com’s evidence of any burden or harm to its computer system caused by the successive queries performed by search robots is imprecise, evidence of mere possessory interference is sufficient to demonstrate the quantum of harm necessary to establish a claim for trespass to chattels”), *aff’d*, 356 F.3d 393 (2d Cir. 2004); *America Online, Inc. v. Nat’l Health Care Discount, Inc.*, 121 F. Supp. 2d 1255 (N.D. Iowa 2000); *America Online, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444 (E.D. Va. 1998); *America Online, Inc. v. IMS*, 24 F. Supp. 2d 548 (E.D. Va. 1998) (granting summary judgment against spammer on trespass to chattels and other claims); *Hotmail Corp. v. Van\$ Money Pie, Inc.*, 1998 WL 388389 (N.D. Cal. Apr. 16, 1998); *CompuServe, Inc. v. CyberPromotions, Inc.*, 962 F. Supp. 1015, 1022 (S.D. Ohio 1997) (issuing preliminary injunction against spammer on theory of trespass to chattels; “[a] plaintiff can sustain an action for trespass to chattels, as opposed to an action for conversion, without showing a substantial interference with its right to possession of that chattel”); *Sch. of Visual Arts v. Kuprewicz*, 771 N.Y.S.2d 804 (N.Y. Sup. Ct. 2003) (facts alleged constituting elements of trespass-to-chattels claim). See also *Dodge Data & Analytics, L.L.C. v. iSqFt, Inc.*, 2016 WL 1702326, at *13 (S.D. Ohio Apr. 28, 2016) (rejecting defendant’s assertion that trespass-to-chattels claim failed because trespass to chattels relating to improper access of computer database requires that there be some “physical damage” to database; physical damage not required when value of chattel is diminished); *Microsoft Corp. v. Does 1–18*, 2014 WL 1338677, at *9–10 (E.D. Va. Apr. 2, 2014) (“[t]he unauthorized intrusion into an individual’s computer system through hacking, malware, or even unwanted communications supports actions under these claims”; plaintiff alleged facts sufficient to show that defendant committed common law trespass to chattels by using “botnet” to access computers and servers without authorization); *Czech v. Wall St. on Demand*, 674 F. Supp. 2d 1102, 1122 (D. Minn. 2009) (declining to dismiss cell phone owner’s trespass-to-chattels claim against sender of unwanted text messages); *Therapeutic Research Faculty v. NBTY, Inc.*, 488 F. Supp. 991, 993–994 (E.D. Cal. 2007) (denying motion to dismiss trespass-to-chattels claim when plaintiff alleged financial injury resulting from trespass to its passcode-protected website as opposed to physical damage to computer itself); *Amos Fin., L.L.C. v. H & B & T Corp.*, 20 N.Y.S.3d 291 (table), 2015 WL 3953325, at *8 (N.Y. Sup. Ct. June 29, 2015) (holding that defendant’s trespass-to-chattels counterclaim sufficiently alleged damage to his cell phone and answering machine when

temporarily taking up a part of a computer's capacity with spam messages is trespass to chattels.⁵⁷ Even if the consumer does not answer the call or hear the ring tone, the mere invasion of the consumer's electronic device can be considered a trespass to chattels, just as "plac[ing a] foot on another's property"⁵⁸ is trespass. Thus, the harm caused by unwanted robocalls to cell phones has a close relationship to the harm recognized by this ancient common law tort—a tort that protects fundamental property rights. Indeed, the TCPA can be viewed as merely applying this common law tort to a twenty-first century form of personal property and a twenty-first century method of intrusion. Liberalizing this ancient tort and making redress more readily available "is particularly

alleged calls "occupied the memory of his answering machine and interfered with the unencumbered access to his phone devices"; but dismissing counterclaim because plaintiff demonstrated that it did not make the subject calls). *But see* *Fidlar Technologies v. LPS Real Estate Data Solutions, Inc.*, 82 F. Supp. 3d 844, 859 (C.D. Ill. 2015) (plaintiff did not sufficiently allege a threat to proper functioning of its servers: "Since Fidlar points to no information in the record beyond its conclusory assertion that its computer network was interfered with and its computer physically 'touched,' it has not shown the existence of anything in the record that a jury could rely upon to find for it on the trespass to chattels claim."), *aff'd on other grounds*, 810 F.3d 1075 (7th Cir. 2016); *Sturdy v. Medtrak Educ. Services, L.L.C.*, 2014 WL 2727200, at *5 (C.D. Ill. June 16, 2014) (even if sending an unsolicited fax advertisement could be said to constitute trespass to chattels of a single piece of paper and toner, the doctrine of *de minimis non curat lex* bars claim); *Fields v. Wise Media, L.L.C.*, 2013 WL 5340490, at *4–5 (N.D. Cal. Sept. 24, 2013) (denying plaintiffs leave to add trespass-to-chattels claim when they alleged "a financial injury that did not result from the physical damage or interference with their phones"; "[a]llowing plaintiffs to assert a claim for trespass to chattels absent actual physical harm or impairment to their phones would vastly expand tort law and this order will not do so absent binding Ninth Circuit authority"); *In re Google Android Consumer Privacy Litig.*, 2013 WL 1283236, at *13–14 (N.D. Cal. Mar. 26, 2013) (dismissing, with leave to amend, trespass-to-chattels claim alleging that Google's collection of geolocation data causes phone batteries to drain more quickly); *Intel Corp. v. Hamidi* 71 P.3d 296, 303–304 (Cal. 2003) (rejecting plaintiff's claim that defendant's spamming of its computer system constituted trespass to chattels; dispossession alone is sufficient injury to support claim, but for other forms of interference plaintiff must show some additional harm, even though this is not required by early English common law decisions); *Omnibus Int'l, Inc. v. AT&T, Inc.*, 111 S.W.3d 818, 826 (Tex. App. 2003) ("For liability to attach, causing actual damage to the property or depriving the owner of its use for a substantial period must accompany the wrongful interference"; here, no allegations or evidence that actual damage occurred to plaintiff's facsimile machine or that printing of facsimile advertisements deprived plaintiff of use of same machine for substantial period of time). *But cf.* *Omega World Travel, Inc. v. Mummagraphics, Inc.*, 469 F.3d 348 (4th Cir. 2006) (trespass-to-chattels claim based upon computer intrusion requires more than allegation of nominal damages; evidence failed to show that receipt of eleven e-mail messages placed "meaningful burden" on computer system or other resources).

⁵⁷ *See, e.g.,* *Sotelo v. DirectRevenue, L.L.C.*, 384 F. Supp. 2d 1219 (N.D. Ill. 2005) (trespass to chattel may be claimed by individual consumer if unauthorized electronic contact with computer system causes harm). *See also* *Mortensen v. Bresnan Commc'n, L.L.C.*, 2010 WL 5140454 (D. Mont. Dec. 13, 2010) (must establish that defendant intentionally and without authorization interfered with plaintiff's possessory interest in computer system, causing damage to plaintiff); *Tyco Int'l (U.S.) Inc. v. John Does*, 1-3, 2003 WL 23374767, at *4 (S.D.N.Y. Aug. 29, 2003) (awarding \$10,000 in punitive damages in case alleging that defendant, intending to overload Tyco computer server and cause it to crash, launched a "denial of service" attack on server by sending more than 11,000 e-mail messages over a short period of time from fraudulent sender addresses to non-existent tyco.com e-mail addresses; while plaintiff failed to establish compensable losses, it did demonstrate that defendant acted willfully, with fraud and malice). *Cf.* *Burgess v. Eforce Media, Inc.*, 2007 WL 3355369 (W.D.N.C. Nov. 9, 2007) (in trespass-to-chattels claim based on unsolicited pop-up advertisements, actual damages not required when claim is based on unlawful interference).

⁵⁸ *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1551, 194 L. Ed. 2d 635 (2016) (Thomas, J., concurring).

appropriate since electronic intrusion is so much easier, and so much more readily repeated, than physical misuse of a chattel.”⁵⁹

At least one U.S. Court of Appeals has recognized that “the occupation of the recipient’s telephone line and fax machine” is a sufficient injury-in-fact for a TCPA claim asserting violations of the statute’s junk fax provisions.⁶⁰ A leading district court decision takes the same position, holding that the occupation of telephone lines and telephones caused by robocalls is analogous to trespass to chattels and is a sufficiently concrete harm to meet *Spokeo*’s tests.⁶¹

6.9.2a.3.4 Wasting the consumer’s time and causing risk of injury due to interruption and distraction provides Article III standing

A final intangible harm caused by robocalls is that they waste the time of the recipient, who must tend to the unwanted calls. The first post-*Spokeo* decision to address robocalls squarely holds that wasting the recipient’s time is a concrete injury that satisfies Article III:

Here, the court is satisfied that Plaintiffs’ allegations demonstrate “concrete injury” as elucidated in *Spokeo*. In *Spokeo*, the “injury” Plaintiffs incurred was arguably merely procedural and thus non-concrete. In contrast, the TCPA and [state law] violations alleged here, if proven, required Plaintiffs to waste time answering or otherwise addressing widespread robocalls. The use of the autodialer, which allegedly enabled Defendants to make massive amounts of calls at low cost and in a short period of time, amplifies the severity of this injury. As Congress and Washington State’s legislature agreed, such an injury is sufficiently concrete to confer standing.⁶²

⁵⁹ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *6 (N.D. W. Va. June 30, 2016). *See also* S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 (noting that one of the causes of growth of consumer complaints about unwanted calls is “the advance of technology which makes automated phone calls more cost-effective”).

⁶⁰ *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1250–1251 (11th Cir. 2015) (“the occupation of its fax machine for the period of time required for the electronic transmission of the data (which, in this case was one minute)” was a sufficient injury). *See also* *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *12 (N.D. W. Va. June 30, 2016) (noting that “[t]his pre-*Spokeo* decision is consistent with *Spokeo* and supports the finding that this harm is concrete”).

⁶¹ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *12 (N.D. W. Va. June 30, 2016). *But see* *Romero v. Dep’t Stores Nat’l Bank*, ___ F. Supp. 3d ___, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016) (misreading *Spokeo*’s ruling about role of traditional tort law to require more than a showing that harm in question has traditionally been actionable; whether harm alleged by plaintiff is closely related to harms actionable as invasion of privacy or trespass to chattels is irrelevant).

⁶² *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) (pre-recorded telemarketing calls to land line). *Accord* *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *12–13 (N.D. W. Va. June 30, 2016).

A number of pre-*Spokeo* decisions have also recognized that lost time is an adequate injury-in-fact, both in TCPA cases⁶³ and in other contexts.⁶⁴

When it enacted the TCPA, Congress repeatedly emphasized the nuisance aspect of robocalls, showing that it considered the interruptions that they cause and the time they cause consumers to waste to be one of the harms they cause. Senator Hollings made this clear: “They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall.”⁶⁵ Congress was also mindful to protect consumers from the burdens they face when dealing with unwanted calls. One of its findings was that “[t]echnologies that might allow consumers to avoid receiving such calls . . . place an inordinate burden on the consumer.”⁶⁶ Courts should give weight to Congress’s identification of these harms and should determine that they also meet the requirement of concreteness.⁶⁷

Unwanted calls also cause a risk of injury due to interruption and distraction.⁶⁸ “Driving while distracted” due to a cell phone call is a common cause of automobile accidents: the National Highway Traffic Safety Administration found that cell phone use contributed to 995 (or 18%) of fatalities in distraction-related crashes in 2009.⁶⁹ More robocalls will inevitably lead to more

⁶³ See *Leung v. XPO Logistics, Inc.*, ___ F. Supp. 3d ___, 2015 WL 10433667, at *4 (N.D. Ill. Dec. 9, 2015) (“Leung alleges that he lost time in responding to XPO’s call. . . . That is enough, so XPO’s motion must be denied.”; fact that consumer could have reduced lost time by hanging up sooner does not mean he lacks standing); *Martin v. Leading Edge Recovery Sols., L.L.C.*, 2012 WL 3292838, at *3 (N.D. Ill. Aug. 10, 2012) (“[plaintiffs suffered an injury in fact] because they had to spend time tending to unwanted calls”).

⁶⁴ See, e.g., *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 807 (7th Cir. 2011) (“What did provide standing, we held, is that the plaintiffs had altered their daily commute, thus incurring costs in both time and money, to avoid the unwelcome religious display.”); *Walker v. City of Lakewood*, 272 F.3d 1114, 1124–1125 (9th Cir. 2001); *Rex v. Chase Home Fin., L.L.C.*, 905 F. Supp. 2d 1111 (C.D. Cal. 2012) (“[A] plaintiff suffers an injury sufficient to establish Article III standing where she alleges that she lost time spent responding to the defendant’s wrongful conduct and the lost time is at least indirectly attributable to the defendant’s actions.”).

⁶⁵ 137 Cong. Rec. 30,821–30,822 (1991).

⁶⁶ Pub. L. 102–243, § 2, 105 Stat. 2394 (1991) (found as a note to 47 U.S.C. § 227).

⁶⁷ *Hewlett v. Consol. World Travel, Inc.*, 2016 WL 4466536 (E.D. Cal. Aug. 23, 2016) (finding standing; citing Congress’s intent to curb the aggravation, nuisance, and invasion of privacy caused by unwanted calls); *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *6 (N.D. W. Va. June 30, 2016); *Rogers v. Capital One Bank*, No. 1:15-cv-04016, slip op. at 4–5 (N.D. Ga. June 7, 2016), available at www.nclc.org. See also *A.D. v. Credit One Bank, N.A.*, 2016 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016) (Congress enacted the TCPA to protect consumers from the annoyance, irritation, and unwanted nuisance of telemarketing phone calls”); *Krakauer v. Dish Network, L.L.C.*, ___ F.R.D. ___, 2016 WL 4272367, at *2 (M.D.N.C. Aug. 5, 2016) (“These calls form concrete injuries because unwanted telemarketing calls are a disruptive and annoying invasion of privacy.”); *Leung v. XPO Logistics, Inc.*, ___ F. Supp. 3d ___, 2015 WL 10433667 (N.D. Ill. Dec. 9, 2015) (pre-*Spokeo* case; aggravation and emotional distress due to calls establishes standing).

⁶⁸ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *7 (N.D. W. Va. June 30, 2016).

⁶⁹ Nat’l Highway Traffic Safety Admin., *Distracted Driving 2009* (Sept. 2010), available at www.nhtsa.gov.

distracted drivers and, inescapably, more accidents. They also diminish the ability of consumers to receive emergency calls. Unwanted calls can drown out emergency calls or even force the consumer to turn off a cell phone's audible alert feature. The *Spokeo* court took care to note that a risk of harm can satisfy the concreteness requirement of Article III. The risks of harm that unwanted cell phone calls bring are both real and concrete.

6.9.2a.3.5 The vast majority of decisions, consistent with *Spokeo*, hold that the harm caused by receipt of illegal robocalls meets Article III requirements

Applying the principles outlined above, courts since *Spokeo* have overwhelmingly held that unwanted robocalls cause particularized and concrete harm, so a plaintiff asserting a TCPA claim has Article III standing.⁷⁰ *Mey v. Got Warranty, Inc.*,⁷¹ is a particularly detailed, thorough, and carefully reasoned decision, finding Article III standing for a cell phone robocall claim both because Congress has so clearly identified the harm to be redressed and because of the close analogy to common law torts including invasion of privacy and trespass to chattels. Courts hold that even a single unwanted text message is an invasion of privacy and meets the concreteness requirement as defined by *Spokeo*⁷² and that the risk of harm is sufficient to give consumers standing even for calls that they do not hear or answer.⁷³ A large number of earlier decisions, while predating *Spokeo*, are entirely

⁷⁰ *Hewlett v. Consol. World Travel, Inc.*, 2016 WL 4466536, at *3 (E.D. Cal. Aug. 23, 2016); *A.D. v. Credit One Bank, N.A.*, 2016 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016) (violation of substantive right to be free from telemarketing calls is sufficient to constitute concrete, *de facto* injury; “American and English courts have long heard cases in which plaintiffs alleged that defendants affirmatively directed their conduct at plaintiffs to invade their privacy and disturb their solitude”); *Krakauer v. Dish Network, L.L.C.*, ___ F.R.D. ___, 2016 WL 4272367, at *2 (M.D.N.C. Aug. 5, 2016) (“These calls form concrete injuries because unwanted telemarketing calls are a disruptive and annoying invasion of privacy”); *Ung v. Universal Acceptance Corp.*, ___ F. Supp. 3d ___, 2016 WL 4132244 (D. Minn. Aug. 3, 2016); *Cour v. Life360, Inc.*, 2016 WL 4039279 (N.D. Cal. July 28, 2016) (a single unwanted text message is an invasion of privacy that meets Article III’s concreteness requirement); *Caudill v. Wells Fargo Home Mortg., Inc.*, 2016 WL 382019, at *2 (E.D. Ky. July 11, 2016) (finding standing under *Spokeo*; invasion of privacy has traditionally been regarded as basis for a lawsuit, and congress intended TCPA to protect consumers from nuisance, invasion of privacy, cost, and inconvenience; fact that an individual could have made the same calls does not deprive plaintiff of standing); *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195, at *5 (N.D. W. Va. June 30, 2016); *Rogers v. Capital One Bank*, No. 1:15-cv-04016 (N.D. Ga. June 7, 2016), *available at* www.nclc.org; *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) (finding Article III standing as defined by *Spokeo*; violations “required Plaintiffs to waste time answering or otherwise addressing widespread robocalls”).

⁷¹ *Mey v. Got Warranty, Inc.*, ___ F. Supp. 3d ___, 2016 WL 3645195 (N.D. W. Va. June 30, 2016).

⁷² *Ung v. Universal Acceptance Corp.*, ___ F. Supp. 3d ___, 2016 WL 4132244 (D. Minn. Aug. 3, 2016); *Cour v. Life360, Inc.*, 2016 WL 4039279 (N.D. Cal. July 28, 2016). *See also* *Hewlett v. Consol. World Travel, Inc.*, 2016 WL 4466536, at *3 (E.D. Cal. Aug. 23, 2016) (single call would be sufficient, but here plaintiff alleged multiple calls). *But see* *Romero v. Dep’t Stores Nat’l Bank*, ___ F. Supp. 3d ___, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016) (erroneously requiring a showing of concreteness for each call in isolation).

⁷³ *But see* *Romero v. Dep’t Stores Nat’l Bank*, ___ F. Supp. 3d ___, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016) (erroneously holding that consumer can suffer aggravation and distress only if she was aware of call when it

consistent with it and are strong additional authority that these calls create Article III standing.⁷⁴

Most of the few decisions to the contrary arise under unique facts or in a unique procedural

occurred; failing to note that learning one is target of an ongoing campaign of harassment is likely to cause stress even after calls have occurred).

⁷⁴ See, e.g., *Weisberg v. Kensington Prof'l & Associates, L.L.C.*, 2016 WL 1948785, at *2–3 (C.D. Cal. May 3, 2016) (“Plaintiff here does not allege statutory standing, or standing based on the mere alleged violation of a federal statute. Instead, Plaintiff states his theory of actual, individual, concrete injury in the FAC: Defendant illegally contacted Plaintiff and Class members via their cellular telephones thereby causing Plaintiff and Class members to incur certain charges or reduced telephone time for which Plaintiff and Class members had previously paid by having to retrieve or administer messages left by Defendant during those illegal calls, and invading the privacy of said Plaintiff and Class members. (FAC ¶ 28.) The invasion of privacy and the allegation that the illegal calls cost Plaintiff and the class money—financial harm—are not speculative future injuries or injuries based on the violation of rights provided in a statute. . . . [I]n this case, Plaintiff has alleged an invasion of his privacy and monetary damages. These allegations are much more concrete and particularized than those alleged in *Spokeo* and have been accepted as actual injuries in other cases.”); *Haysbert v. Navient Solutions, Inc.*, 2016 WL 890297 (C.D. Cal. Mar. 8, 2016) (allegations that calls caused stress and embarrassment and interrupted business and personal interactions are sufficient for Article III standing); *Jamison v. Esurance Ins. Services, Inc.*, 2016 WL 320646, at *3 (N.D. Tex. Jan. 27, 2016) (“Here, Jamison alleged that when Esurance violated the TCPA, it caused her to incur cellular telephone charges or to reduce her previously-paid-for cellular telephone time, and that it invaded her privacy. Doc. 7, Pl.’s First Am. Compl. ¶ 49. At this stage, this pleading is sufficient to establish an injury in fact. Therefore, Jamison has standing to bring suit.”); *Abante Rooter & Plumbing, Inc. v. Birch Communications, Inc.*, 2016 WL 269315, at *3 (N.D. Ga. Jan. 7, 2016) (noting Congress’s concern that autodialers tie up recipients’ telephone lines; plaintiff needed only to allege that its cellular telephone line was occupied by unsolicited call, in violation of the TCPA, to establish standing; “[t]he invasion of this statutory right established by the TCPA is itself a concrete harm”); *King v. Time Warner Cable*, 113 F. Supp. 3d 718 (S.D.N.Y. 2015) (“The legislative history of the TCPA makes clear that the provision against autodialing was drafted to protect ‘consumers who pay additional fees for cellular phones, pagers, or unlisted numbers [and] are inconvenienced and even charged for receiving unsolicited calls from automatic dialer systems.’ . . . In receiving 163 unsolicited calls, Plaintiff clearly experienced the very sort of inconvenience against which Congress sought to protect her. She is entitled to seek compensation for violations of this right, regardless of whether she suffered monetary damages.”); *Schumacher v. Credit Prot. Ass’n*, 2015 WL 5786139, at *5 (S.D. Ind. Sept. 30, 2015) (“We agree with CPA 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,’ and that an interest in statutory damages cannot be the sole injury to satisfy Article III requirements, but that is not what has happened here. . . . Here, Mr. Schumacher’s TCPA-created right to privacy was invaded by repeated automated calls from CPA. ‘Congress referred to the interest protected by the TCPA as a “privacy” interest, noting that “[e]vidence . . . 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.” ’ ”); *Wallace v. Enhanced Recovery Co., L.L.C.*, 2015 WL 5455937, at *5 (E.D.N.C. Sept. 16, 2015) (use of plaintiff’s phone for a period of time is sufficient; “[u]nder the TCPA, and as relevant to this case, an injury-in-fact may be established where owner of the telephone number, suing as plaintiff, demonstrates that he or she lost the use of his or her cellular telephone”), *aff’d*, 2016 WL 3402539 (4th Cir. June 21, 2016); *Ikuseghan v. MultiCare Health Sys.*, 2015 WL 4600818 (W.D. Wash. July 29, 2015) (using up cell phone minutes and invading privacy create Article III standing); *Boise v. ACE USA, Inc.*, 2015 WL 4077433, at *3 (S.D. Fla. July 6, 2015) (“Thus, Mr. Boise does not need to ‘allege that he wanted to use his phone for another purpose but could not do so.’ . . . To establish standing, Mr. Boise needs to allege only that his line was occupied by an unsolicited call in violation of the TCPA. The statute presumes that the violation was ‘intrusive’ and ‘potentially dangerous,’ and accordingly includes a private right of action to rectify the harm.”); *Meyer v. Bebe Stores, Inc.*, 2015 WL 431148, (N.D. Cal. Feb. 2, 2015) (invasion of privacy sufficient to confer standing even though plaintiff does not allege she incurred any carrier charges for specific text message at issue).

posture. In an unreported decision, *Davis Neurology v. DoctorDirectory.com L.L.C.*,⁷⁵ the defendant removed a claim under some unidentified section of the TCPA to federal court and then argued that the federal court lacked jurisdiction because the plaintiff did not have Article III standing. (This shift in tactics smacks of a Rule 11 violation, since the defendant’s statement of the grounds for removal, required by 28 U.S.C. § 1446(a), in all likelihood asserted that the federal court *did* have jurisdiction over the case.) The court remanded the case to state court. Its opinion does not note any opposition by the plaintiff. In *Stoops v. Wells Fargo*,⁷⁶ the court found an absence of Article III standing on what it described as unique facts, when the plaintiff had affirmatively sought to attract robocalls to her cell phones, so was not inconvenienced and did not suffer an invasion of privacy.

A final decision, *Romero v. Department Stores National Bank*,⁷⁷ is riddled with errors. It misstates *Spokeo*’s holding about whether Congress can define an injury and articulate a chain of causation that will meet Article III’s concreteness requirement⁷⁸ and misreads its ruling about the role of traditional tort law.⁷⁹ It wrongly requires a plaintiff—who had received 290 illegal robocalls—to show Article III standing for each individual call in isolation, justifying this impossible burden solely by inference from Congress’s provision of statutory damages per call.⁸⁰ In fact, the legislative history shows that Congress was concerned about the cumulative effect of repeated calls,⁸¹ and the per-call statutory damages structure actually supports this concern, as the penalty increases when there is a series of calls. The *Romero* court treats the TCPA’s prohibition against use of an autodialer as a mere “procedural” right, even though the Supreme Court has characterized the TCPA’s protections as substantive.⁸² Finally, the decision erroneously rejects the claim of standing on the ground that the caller could have made the calls without using an autodialer. The decision ignores the fact that the

⁷⁵ *Davis Neurology v. DoctorDirectory.com, L.L.C.*, No. 4:16-cv-00095 BSM (E.D. Ark. June 29, 2016), available at www.nclc.org.

⁷⁶ *Stoops v. Wells Fargo*, 2016 WL 3566266 (W.D. Pa. June 24, 2016).

⁷⁷ *Romero v. Dep’t Stores Nat’l Bank*, ___ F. Supp. 3d ___, 2016 WL 4184099 (S.D. Cal. Aug. 5, 2016).

⁷⁸ *Id.* at *3 (mistakenly reading *Spokeo* to hold that a statutory violation alone cannot be a concrete injury, when *Spokeo*, 136 S. Ct. 1540, 1547, holds that “[t]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified” (emphasis in original)).

⁷⁹ *Id.* at *4 (misreading *Spokeo*’s ruling about role of traditional tort law to require more than a showing that harm in question has traditionally been actionable; whether harm alleged by plaintiff is closely related to harms actionable as invasion of privacy or trespass to chattels is irrelevant).

⁸⁰ *Id.* at *3.

⁸¹ See, e.g., S. Rep. 102-178, at 5 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1968 (“Consumers are especially frustrated because there appears to be no way to prevent these calls”).

⁸² *Mims v. Arrow Fin. Services, L.L.C.*, ___ U.S. ___, 132 S. Ct. 740, 751, 181 L. Ed. 2d 881 (2012). See generally § 6.9.2a.3.1, *supra*.

caller did *not* dial the calls by hand⁸³ and would have been very unlikely to call so many times but for the use of an autodialer. It also ignores Congress’s concern with this very issue—the fact that the advent of autodialers was causing such a steep growth in unwanted calls.⁸⁴

6.9.2a.4 Article III Standing for Prerecorded Telemarketing Calls to Residential Lines and Violations of the Do-Not-Call Rule

The TCPA also protects consumers by prohibiting prerecorded telemarketing calls to residential lines⁸⁵ and to consumers who have registered on the nationwide do-not-call list or who have asked to be placed on a company-specific do-not-call list.⁸⁶ Consumers who subscribe to or are the ordinary users of telephone numbers to which such calls were placed have Article III standing to pursue TCPA claims for reasons similar to those discussed in § 6.9.2a.3, *supra*, regarding robocalls to cell phones.

First, Congress enacted the TCPA to protect consumers from nuisance calls that invade privacy.⁸⁷ Congress mentions privacy or nuisance⁸⁷ in seven of fifteen findings explaining the purpose of and reason for the TCPA.⁸⁸ As discussed in § 6.9.2a.3.2, *supra*, a person who alleges that unlawful robocalls invaded his or her privacy should have Article III standing under *Spokeo* since this is the very interest that Congress sought to protect in enacting the TCPA. Moreover, this harm is closely analogous to that made actionable by the common law claim of invasion of privacy, another ground under *Spokeo* for finding Article III standing.

Second, these calls occupy the consumer’s telephone lines and may take up a portion of the consumer’s electronic voice mail capacity. Occupying the consumer’s telephone line or voice mail capacity is closely analogous to the common law tort of trespass to chattels,⁸⁹ providing another reason that this harm meets the concreteness requirement necessary for Article III standing.

Finally, these calls waste the consumer’s time, just as unwanted calls to cell phones do.⁹⁰ And

⁸³ *Romero v. Dep’t Stores Nat’l Bank*, ___ F. Supp. 3d ___, 2016 WL 4184099, at *5–6 (S.D. Cal. Aug. 5, 2016).

⁸⁴ S. Rep. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969 (citing “the advance of technology which makes automated phone calls more cost-effective” as one of two sources of growth in consumer complaints about unwanted calls).

⁸⁵ *See* § 6.4, *supra*.

⁸⁶ *See* § 6.5, *supra*.

⁸⁷ *See* § 6.9.2a.3.2, *supra*.

⁸⁸ Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (found as a note to 47 U.S.C. § 227).

⁸⁹ *See* § 6.9.2a.3.3, *supra*.

⁹⁰ *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) (finding Article III standing as

they cause a similar risk of injury. While consumers will not receive calls to residential lines while driving, these calls may, as Senator Hollings stated, “force the sick and elderly out of bed,”⁹¹ clearly creating a risk of injury. When the FTC adopted its telemarketing do-not-call rule, it cited consumers’ concerns for “the potential hazards that prerecorded messages may pose for their health and safety when home telephone lines cannot be released in emergencies. As this record attests, in at least a few instances, prerecorded messages of indeterminate length have prevented consumers from making emergency calls—a concern which was an important factor leading to passage of the TCPA.”⁹² As a specific example, it cited a case in which the receipt of prerecorded calls twice prevented an elderly consumer from contacting a doctor.⁹³

For the same reasons discussed in § 6.9.2a.3, *supra*, these harms and potential harms satisfy the concreteness requirement of Article III and are sufficient to confer constitutional standing.

6.9.2a.5 Article III Standing in Junk Fax Cases

The sending of junk faxes is another common type of TCPA violation.⁹⁴ Junk faxes cause both tangible and intangible injuries that meet Article III’s requirements.

First, a junk fax often causes tangible injury in that it uses up paper and toner, an injury that is both concrete and particularized. Congress identified the fact that a junk fax “shifts some of the costs of advertising from the sender to the recipient” as one of the reasons it enacted the TCPA.⁹⁵ Consuming the fax recipient’s paper and toner is also closely related to the harm addressed by the common law action for conversion, so would meet *Spokeo*’s tests even if it were an intangible injury.⁹⁶

But even if a junk fax is never printed (and fax machines today do not automatically print faxes), it causes intangible but equally concrete injuries. First, the sender of a fax ties up the recipient’s fax machine. Congress specifically identified this as one of the harms it wanted to prevent

defined by *Spokeo*; violations “required Plaintiffs to waste time answering or otherwise addressing widespread robocalls”). See § 6.9.2a.3.4, *supra*.

⁹¹ 137 Cong. Rec. 30,821–30,822 (1991).

⁹² Fed. Trade Comm’n, Telemarketing Sales Rule, 71 Fed. Reg. 58,716, 58,732 (Oct. 4, 2006).

⁹³ Fed. Trade Comm’n, Telemarketing Sales Rule, 71 Fed. Reg. 58,716, 58,732, n.62 (Oct. 4, 2006).

⁹⁴ See § 6.8, *supra*.

⁹⁵ H.R. Rep. No. 102–317, at 10 (1991).

⁹⁶ See §§ 6.9.2a.3.2, 6.9.2a.3.3, *supra* (Article III standing for unwanted robocalls as established by analogy to common law torts).

by passing the TCPA.⁹⁷ This harm is closely analogous to that addressed by the ancient common law tort of trespass to chattels. The nature of this tort and its application to intrusion upon and occupation of the capacity of a cell phone is discussed in § 6.9.2a.3.3, *supra*. The TCPA can be viewed as taking this tort and applying it to the harm caused by intrusion upon modern electronic equipment such as fax machines.

Junk faxes also waste time by requiring recipients to identify and delete the unwanted fax.⁹⁸ Courts have recognized in other contexts that time wasting is a concrete injury that meets Article III standing requirements.⁹⁹ This conclusion should be equally true for junk fax cases.¹⁰⁰

The leading decision on Article III issues in junk fax cases is the Eleventh Circuit’s decision in *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*¹⁰¹ That decision, although issued fourteen months before *Spokeo*, is entirely consistent with *Spokeo*. Relying on many of the same decisions that *Spokeo* cited, the Eleventh Circuit held:

We find that Palm Beach Golf has Article III standing sufficient to satisfy the injury requirement because it has 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 (which, in this case was one minute).

⁹⁷ H.R. Rep. No. 102–317, at 10 (1991) (noting that sender of a junk fax “occupies the recipient’s fax machine so that it is unavailable for legitimate business messages while processing and printing the junk fax”).

⁹⁸ *Imhoff Inv., L.L.C. v. Alfocino, Inc.*, 792 F.3d 627 (6th Cir. 2015) (“But unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements waste the recipients’ time and impede the free flow of commerce.”); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (“Even a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk.” (emphasis in original)). *See also* *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) (recipient of prerecorded calls to land line has standing under *Spokeo* standard; violations “required Plaintiffs to waste time answering or otherwise addressing widespread robocalls”). *But cf.* *Sartin v. EKF Diagnostics, Inc.*, 2016 WL 3598297 (E.D. La. July 5, 2016) (allegation that junk faxes caused recipient to “sustain statutory damages, in addition to actual damages, including but not limited to those contemplated by Congress and the [FCC]” is insufficiently specific; allowing leave to amend, since *Spokeo* was decided while motion to dismiss was pending).

⁹⁹ *See* § 6.9.2a.3.4, *supra*.

¹⁰⁰ *See Imhoff Inv., L.L.C. v. Alfocino, Inc.*, 792 F.3d 627, 632 (6th Cir. 2015) (“unsolicited fax advertisements impose costs on all recipients, irrespective of ownership and the cost of paper and ink, because such advertisements waste the recipients’ time and impede the free flow of commerce”); *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (“To the extent [the defendant] contends that each recipient must prove that he printed the fax (wasting paper) or otherwise suffered monetary loss, he is wrong on the law. . . . Even a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk.”).

¹⁰¹ *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015).

* * * *

The TCPA, in this instance, creates [a cognizable right]. 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. *See* H.R. REP. NO. 102–317, at 10 (1991) (“FACSIMILE ADVERTISING [:] . . . This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, *it occupies the recipient’s facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax.*” (emphasis added)).

* * * *

While the record does not demonstrate that the fax advertising Defendant’s dental practice was printed or seen by any of Palm Beach Golf’s employees, there is unrefuted record evidence that the fax information was successfully transmitted by B2B’s fax machine and that the transmission occupied the telephone line and fax machine of Palm Beach Golf during that time. The transmission thereby rendered Palm Beach Golf’s fax machine “unavailable for legitimate business messages while processing . . . the junk fax.” H.R. REP. NO. 102–317, at 10. This occupation of Plaintiff’s fax machine is among the injuries intended to be prevented by the statute and is sufficiently personal or particularized to Palm Beach Golf as to provide standing. *See Lujan*, 504 U.S. at 560 n. 1, 112 S. Ct. at 2136 n. 1 (“By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.”).¹⁰²

The Sixth Circuit¹⁰³ and other decisions¹⁰⁴ reach this same conclusion, all in opinions that are

¹⁰² *Id.* at 1252–1253.

¹⁰³ *Imhoff Inv., L.L.C. v. Alfocino, Inc.*, 792 F.3d 627, 633 (6th Cir. 2015) (“Congress intended to remedy a number of problems associated with junk faxes, including the cost of paper and ink, the difficulty of the recipient’s telephone line being tied up, and the stress on switchboard systems. Thus, viewing or printing a fax advertisement is not necessary to suffer a violation of the statutorily-created right to have one’s phone line and fax machine free of the transmission of unsolicited advertisements. Here, there is sufficient evidence in the record to conclude that the plaintiff suffered an injury on two occasions: a fax transmission on November 13, 2006, and another fax transmission on December 4, 2006.”).

¹⁰⁴ *See, e.g., City Select Auto Sales, Inc. v. David Randall Associates, Inc.*, 296 F.R.D. 299, 309 (D.N.J. 2013) (finding Article III standing, holding: “Plaintiff has produced evidence that the fax advertisements were successfully sent, and the B2B evidence is sufficient for standing purposes. The TCPA ‘does not specifically require proof of receipt.’ ”). *See also Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013) (“To the extent [the defendant] contends that each recipient must prove that he printed the fax (wasting paper) or otherwise suffered monetary loss, he is wrong on the law. . . . Even a recipient who gets the fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk.”).

wholly consistent with *Spokeo*.

6.9.2a.6 Allegations of Harm in TCPA Cases

In order to be prepared for Article III issues, TCPA complaints should include allegations regarding the specific harm caused by the violation.¹⁰⁵ The following are sample general allegations about harm for TCPA cases involving telephone calls or text messages:¹⁰⁶

1. Congress enacted the TCPA to prevent real harm. Congress found that “automated or pre-recorded calls are a nuisance and an invasion of privacy, regardless of the type of call” and decided that “banning” such calls made without consent was “the only effective means of protecting telephone consumers from this nuisance and privacy invasion.”¹⁰⁷
2. Defendant’s [phone calls or text messages] harmed Plaintiff by causing the very harm that Congress sought to prevent—a “nuisance and invasion of privacy.”
3. Defendant’s [phone calls or text messages] harmed Plaintiff by trespassing upon and interfering with Plaintiff’s rights and interests in Plaintiff’s cellular telephone.
4. Defendant’s [phone calls or text messages] harmed Plaintiff by trespassing upon and interfering with Plaintiff’s rights and interests in Plaintiff’s cellular telephone line.
5. Defendant’s [phone calls or text messages] harmed Plaintiff by intruding upon Plaintiff’s seclusion.

In addition to general allegations, complaints should include allegations of the harm caused to the plaintiff by the specific violation. Sample allegations in telephone cases include:

1. Defendant harassed Plaintiff by incessantly [calling or texting] Plaintiff’s telephone.
2. Defendant’s [phone calls or text messages] harmed Plaintiff by causing Plaintiff aggravation and annoyance.

¹⁰⁵ *Sartin v. EKF Diagnostics, Inc.*, 2016 WL 3598297 (E.D. La. July 5, 2016) (allegation that junk faxes caused recipient to “sustain statutory damages, in addition to actual damages, including but not limited to those contemplated by Congress and the [FCC]” is insufficiently specific; allowing leave to amend). *But see A.D. v. Credit One Bank, N.A.*, 2016 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016) (need not plead harm beyond receipt of unwanted call)..

¹⁰⁶ These model allegations were drafted by Tim Sostrin, a consumer rights attorney at the Chicago law firm, Keogh Law, Ltd. Tim has represented consumers in TCPA class actions and individual claims since 2010. His contribution is gratefully acknowledged.

¹⁰⁷ Pub. L. No. 102-243, §§ 2(10-13) (Dec. 20, 1991), *codified at* 47 U.S.C. § 227. *See also Mims v. Arrow Fin. Services, L.L.C.*, ___ U.S. ___, 132 S. Ct. 740, 744, 181 L. Ed. 2d 881 (2012) (“The Act bans certain practices invasive of privacy”).

3. Defendant's [phone calls or text messages] harmed Plaintiff by wasting Plaintiff's time.
4. Defendant's [phone calls or text messages] harmed Plaintiff by depleting the battery life on Plaintiff's cellular telephone.
5. Defendant's [phone calls or text messages] harmed Plaintiff by using [minutes or texting data] allocated to Plaintiff by Plaintiff's cellular telephone service provider.
6. Defendant's text messages harmed Plaintiff by using data storage space in Plaintiff's cellular telephone.

Possible general allegations for junk fax cases include:

1. Congress enacted the TCPA to prevent real harm. Congress found that facsimile advertisements "occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax."¹⁰⁸
2. Defendant's facsimile advertisements harmed Plaintiff by causing the very harm that Congress sought to prevent—occupying Plaintiff's facsimile machine and facsimile machine line.
3. Defendant's facsimile advertisements harmed Plaintiff by trespassing upon and interfering with Plaintiff's rights and interests in Plaintiff's facsimile machine.
4. Defendant's facsimile advertisements harmed Plaintiff by trespassing upon and interfering with Plaintiff's rights and interests in Plaintiff's facsimile machine line.
5. Defendant's facsimile advertisements harmed Plaintiff by intruding upon Plaintiff's seclusion.

Specific allegations regarding junk faxes might include:

1. Defendant's facsimile advertisements harmed Plaintiff by causing Plaintiff aggravation and annoyance.
2. Defendant's facsimile advertisements harmed Plaintiff by wasting Plaintiff's time.
3. Defendant's facsimile advertisements harmed plaintiff by using Plaintiff's paper and toner.

6.9.2a.7 Sample Briefs and Practice Aids

¹⁰⁸ See H.R. Rep. No. 102-317, at 10 (1991).

A variety of sample briefs, motions, and other practice materials addressing the Article III standing issues raised by *Spokeo* are included online as companion materials to this treatise. The materials include model briefs prepared by NCLC on several TCPA standing issues. Materials addressing *Spokeo* in TCPA and other consumer cases can also be found on a special NCLC website, www.nclc.org/spokeo.