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Via Email

Ms. Molly C. Dwyer
Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Bradley Van Patten v. Vertical Fitness Group, LLC, et al.*, No. 14-55980

**Plaintiff-Appellant's Supplemental Briefing on Article III Standing in
light of *Spokeo, Inc. v. Robins***

Dear Ms. Dwyer:

This Court requested briefing on whether the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo*") affected Bradley Van Patten's standing to bring his claim under the Telephone Consumer Protection Act of 1991 ("TCPA"). In short, it did not. If anything, *Spokeo* re-affirms Mr. Van Patten's standing, as well as that of the 80,000 consumers he was certified to represent.

I. INTRODUCTION

In 2012, Appellees were promoting their clients' new gym: "Xperience Fitness." Using a few computer strokes, Appellees robo-dialed and blasted over 110,000 text advertisements to consumers, including Appellant Bradley Van Patten (twice). Appellees copied Mr. Van Patten's number from an old "Gold's Gym" application that they got from a third-party and despite Mr. Van Patten affirmatively cancelling his "Gold's Gym" membership three years prior.

Mr. Van Patten suffered the concrete harms required for Article III standing. He was harmed because the calls were an invasion of privacy, a costly intrusion onto his telephone, a nuisance, and a waste of time. Mr. Van Patten also presented unchallenged expert testimony that explained how mass-scale robo-calls, like the ones at issue here, raise the costs of phone services.

These are the exact harms that Congress sought to prevent in enacting the TCPA. Mr. Van Patten is not complaining about just “bare” procedural violations. Appellees violated Mr. Van Patten’s private, *substantive* rights under the TCPA. He, thus, has standing.

II. SPOKEO DOES NOT CHANGE THE LAW OF STANDING.

Spokeo confirmed that injury-in-fact is an element required for standing. *Spokeo*, 136 S. Ct. at 1547 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Further, to establish injury in fact—the element primarily at issue in *Spokeo*—a plaintiff must “allege an injury that is both “particularized” and “concrete.” *Id.* at 1545.

Spokeo then confirmed that either tangible or intangible injuries can satisfy the requirement of concreteness. *Id.* at 1549. Where the injury is intangible, *Spokeo* offers two approaches. First, courts should consider whether the 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.* A plaintiff may therefore demonstrate that she suffered a concrete injury by showing harm analogous to those traditionally recognized at common law.

Second, Congress may identify and “elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate at law.” *Id.* Congress “has the power to define injuries and articulate chains of causation that will give rise to a case or controversy

where none existed before” because Congress “is well positioned to identify intangible harms that meet minimum Article III requirements.” *Id.*

The Court did say that merely asserting a “bare procedural violation, divorced from any concrete harm,” will not satisfy the concreteness requirement. *Id.* However, this observation has little application to TCPA claims. Such claims are not based on “bare procedural violations,” but rather on substantive statutory prohibitions.

In short, *Spokeo* issued a narrow ruling remanding the case to revisit whether Robins’ injuries were “concrete” as opposed to merely “particularized.” *Id.* at 1545. The Supreme Court explicitly took no position on whether Robins’ injuries were in fact concrete for standing purposes. *Id.* at 1550. *Spokeo* creates no new law. As Justice Alito noted, that injuries must be both concrete and particularized is something the court made clear “time and time again.” *Id.* at 1548.

III. MR. VAN PATTEN HAS ARTICLE III STANDING AFTER SPOKEO.

Here, Appellant suffered “particularized” injuries that are also “concrete,” satisfying the “injury in fact” requirement.

1. Mr. Van Patten suffered “particularized” injuries.

Injury in fact must be “particularized.” in that it “must affect the plaintiff in a personal and individual way.” *Spokeo*, 136 S. Ct. at 1548. In other words, standing requires that the plaintiff “has suffered some actual or threatened injury.” *Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982). Here, Defendants sent text messages to the Class’, including Mr. Van Patten’s, telephone in violation of the TCPA.

The unlawful telemarketing messages that caused harm were received by Mr. Van Patten individually and he, like his fellow class members, had to deal with the nuisance and costs that came with those messages. Because Mr. Van Patten suffered such harms individually, the injury is particularized.

2. Mr. Van Patten suffered “concrete” injuries.

Mr. Van Patten suffered both intangible and tangible harms that are sufficiently concrete. An intangible harm is concrete if it has either: (1) a “close relationship to a harm” that provided a basis for a lawsuit at common law, or, (2) if it is a harm identified by Congress. *Id.* Mr. Van Patten suffered concrete harm under either approach. He suffered an invasion of privacy, intrusion upon his cellular telephone, waste of time, aggravation, and nuisance. Indeed, as early as in his pleadings, Mr. Van Patten described the “annoying and time consuming” nature of these “intrusive” robo-calls, as well as the “aggravation” that they typically engender. (2 ER 204 at ¶ 3; 2 ER 206-207 at ¶ 15.)

Each of these intangible harms has a “close relationship” to a harm traditionally recognized at common law. Further, the legislative history of the TCPA demonstrates that Congress sought to “elevate to the status of legally cognizable injuries” the privacy and nuisance harms that the TCPA seeks to prevent, thus conferring standing under *Spokeo*.

a. *The invasion of privacy gives Article III standing.*

Appellees invaded Van Patten’s privacy. Invasion of privacy is an intangible harm that is recognized by the common law. American courts have long recognized that “[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the

other.” Restatement (Second) Torts § 652A (1977). Nearly every state currently recognizes invasion of privacy in its tort law. See 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).

The Supreme Court and circuit courts have also recognized that “[t]he [Telephone Consumer Protection] Act bans certain practices invasive of privacy.” *Mims v. Arrow Financial Services, LLC*, 132 S.Ct. 740, 744 (2012); see also *Owens Ins. Co. v. European Auto Works, Inc.*, 695 F.3d 814, 819-20 (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.”). In addition, courts have recognized direct application of common law invasion of privacy claims to unwanted telephone calls. See, e.g., *Charvat v. NMP, L.L.C.*, 656 F.3d 440, 452–453 (6th Cir. 2011) (Ohio law) (repeated telemarketing calls may be invasion of privacy). Indeed, the TCPA can be seen as merely liberalizing and codifying the application of this common law tort to unwanted telephone calls.

Also, in enacting the TCPA, Congress repeatedly referenced its purpose to protect consumers’ privacy rights. The congressional findings accompanying the TCPA stress this:

(5) Unrestricted telemarketing, however, can be an *intrusive invasion of privacy*...

(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*.

Pub. L. 102-243, § 2, 105 Stat. 2394 (1991) (emphasis added); *see also In re Rules & Regulations Implementing the [TCPA] of 1991*, 30 F.C.C.R. 7961, 7967, ¶ 4 (July 15, 2015). The Act’s sponsor, Senator Hollings, stated that “[c]omputerized 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.” 137 Cong. Rec. 30,821–22 (1991). Because the invasion of privacy harm caused by these calls is both traditionally recognized at common law and is the very harm that Congress sought to prevent in enacting the TCPA, Mr. Van Patten satisfies the concrete injury requirement.

b. *The intrusion upon and occupation of Mr. Van Patten’s telephone gives Article III standing.*

Mr. Van Patten also suffered intrusion upon and occupation of his telephone. The harm recognized by the common law claim of trespass and, more specifically, trespass to chattels—the intentional dispossession of chattel, or the use of or intermeddling with a chattel that is in the possession of another—is a close analog for the harm caused by the unlawful text messages here. *See* Restatement (Second) of Torts § 217 (1965). Common-law courts recognized an action for trespass to chattels for temporary dispossession of personal objects “although there has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor,” and “he is not deprived of the use of the chattel for any substantial length of time.” Restatement (Second) of Torts § 218 cmt. D (1965).

Multiple courts have held that temporary electronic intrusion upon another person’s electronic equipment constitutes trespass to chattels. *See, e.g., Register.com, Inc. v. Verio, Inc.,*

126 F. Supp. 2d 238, 249 (S.D.N.Y. 2000) (finding that intruding electronically into business's database causes harm by reducing the system's capacity and that "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); *Am. Online, Inc. v. IMS*, 24 F. Supp. 2d 548, 550-51 (E.D. Va. 1998) (granting summary judgment against spammer on trespass to chattels claim because the plaintiff's "possessory interest in its computer network ha[s] been diminished by the bulk e-mailing").

In fact, Courts have found this tort theory applicable to unwanted text and voice messages. *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.*, 2015 WL 3953325, at *8 (N.Y. Sup. Ct. June 29, 2015).

Mr. Van Patten here suffered harms analogous to the common law claim for trespass to chattels. His phone received and stored multiple unwanted messages, taking up personal cell phone memory unless and until deleted. This is concrete harm of a type traditionally recognized at common law and recognized by Congress and courts as a harm the TCPA sought to address. Mr. Van Patten has standing.

c. *The nuisance, interruption, and waste of time also give Mr. Van Patten standing.*

Mr. Van Patten also suffered nuisance, interruption, and waste of time. The interruption naturally caused by a text message alert, causing a person to divert his attention from whatever he

is doing to pick up his phone, read the text message, and possibly respond to it, is wasteful of the precious resource of time and constitutes a nuisance. The first post-*Spokeo* decision to address a TCPA violation holds that wasting the recipient's time is a concrete injury that satisfies Article III. (*Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) (“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.”)).

When it enacted the TCPA, Congress emphasized the nuisance aspect of automated calls, showing that it considered the interruptions they cause and the time they waste to be one of the harms the TCPA sought to remedy. As detailed above, Congress repeatedly identified such calls as a “nuisance.” Here, Mr. Van Patten suffered the very nuisance, interruption, and waste of time that Congress identified and that courts have found sufficient to support standing.¹

d. *Mr. Van Patten also suffered tangible harms.*

Mr. Van Patten also sustained “tangible” harm. There is no dispute that the calls at issue were received on a cell phone paid for by Mr. Van Patten. The FCC has long recognized that the recipient of telemarketing calls to a cell phone is monetarily “charged” for such calls, even if the recipient pays a flat monthly rate for the plan. *See In re Rules & Regulations Implementing the*

¹ This Court should not let Appellees confuse the issue if and when they point to Mr. Van Patten's testimony where he confirms that he suffered no physical “injury” such as “continuing” bodily injury or “emotional distress.” *See* SER 26-28, 34, 37 (Van Patten Depo). Emotional distress was never required. Indeed, *Spokeo* re-affirms that *intangible* harms will suffice. Upon a close reading, one sees that Appellees' vague questions at Mr. Van Patten's deposition never sufficiently explored intangible harms like invasions of privacy, nuisance, waste-of-time, trespass to his phone, etc.

[TCPA] of 1991, 18 F.C.C.R. 14014, 14115, ¶ 165 (July 3, 2003); *In re Rules & Regulations Implementing the [TCPA] of 1991*, 23 F.C.C.R. 559, 562, ¶ 7 (Jan. 4, 2008).

Because Mr. Van Patten paid monthly bills for the phone on which he received the texts, he suffered a tangible injury in fact. In fact, Mr. Van Patten presented unrefuted expert evidence directly on-point, from a telecommunications industry insider. *See* 2 ER 218-227 (Expert Decl. of Randall A. Snyder). All “usage,” especially spam usage and “traffic” is reflected in the plan price, even if it is a “bundled” plan price. *Id.* at ¶¶ 8-10. This tangible harm confers standing.

- e. *The violation of Plaintiffs’ substantive rights under the TCPA confers standing.*

Spokeo reaffirms that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Spokeo*, 136 S.Ct. at 1549 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992)).² But *Spokeo* limited its comments to procedural rights because that was the case before it (regarding the Fair Credit Reporting Act). *See id.* at 1545 (citing, *inter alia*, 15 U.S.C. §1681e (“Compliance Procedures”)). The *Spokeo* majority did not discuss violations of *substantive* rights.

Unlike the procedural requirements at issue in *Spokeo*, Plaintiffs’ rights under the TCPA are *substantive*. *See Mims*, 132 S.Ct. at 751 (“[Congress] enacted detailed, uniform, federal

² Congress has the power to define injuries because “Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amount of data’ bearing upon” legislative questions. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994) (citation omitted); *see also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 n.12 (1985) (“When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference...”).

substantive prescriptions.”) (italics added). Accordingly, violations of those rights are themselves sufficient to constitute a concrete injury in this case.

B. Post-*Spokeo* Decisions Support Standing.

Since the Supreme Court decided *Spokeo*, multiple courts have decided the standing issue. In *Mey v. Got Warranty Inc.*, the court cited the “intangible” injuries of invasion of privacy, trespass to chattels, and nuisance harms resulting from telemarketing calls as a basis for finding standing to bring TCPA claims. 5:15-CV-101, 2016 WL 3645195, at *8 (N.D. W. Va. June 30, 2016) (rejecting motion to dismiss under *Spokeo*). Other courts have followed suit. See *Appstack*, 2016 WL 3030256, at *5 (finding that plaintiffs had standing because the defendant’s actions “required Plaintiffs to waste time answering or otherwise addressing widespread robocalls”); *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441, 2016 WL 3513782, at *7-8 (3d Cir. June 27, 2016); *Altman v. White House Black Market, Inc.* (N.D. Ga., July 13, 2016, No. 1:15-CV-2451-SCJ) 2016 WL 3946780

C. The Supreme Court’s Exercise of Jurisdiction over *Campbell-Ewald* is Instructive.

Any assertion that *Spokeo* divests federal courts of jurisdiction over TCPA claims is at odds with the Supreme Court’s decision in *Campbell-Ewald v. Gomez*, a case decided earlier in the same term. 136 S. Ct. 663 (2016). It is axiomatic that a federal court may not adjudicate an action which does not present a “case or controversy” within the meaning of Article III. *Id.* at 669. Further, “[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.” *Gonzalez v.*

Thaler, 132 S. Ct. 641, 648 (2012). 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, Justice Roberts noted the Court's agreement that the receipt of unwanted telephone calls was indisputably an injury in fact. *Campbell-Ewald*, 136 S. Ct. at 679 (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.").

In short, Mr. Van Patten had standing to bring his claims and he has it now. If this Court, though, has any lingering doubt concerning Mr. Van Patten's standing, it should remand the case to undertake the standing inquiry in the first instance especially in light of the fact that no Defendant/Appellee ever challenged Article III standing below or on Appeal. But it need not do so because, for the reasons described above, Mr. Van Patten has already established his standing.

Respectfully submitted,



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