No. 18-_____

In the
Supreme Court of the United States

ST. LOUIS HEART CENTER, INC.,

Petitioner,

v.

NOMAX, INC.,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Following this Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), three circuit courts of appeals have held that a failure to disclose information required by various federal consumer-protection laws is a "concrete" Article III injury, with no requirement that the consumer show "additional harm" resulting from the disclosure violation. *See Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 759 (6th Cir. 2018); *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017); *Strubel v. Comenity Bank*, 842 F.3d 181, 190, n.8 (2d Cir. 2016) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982)).

The Eighth Circuit in this case, however, held there was no concrete injury from Respondent Nomax, Inc.'s failure to make "legally mandated disclosures in its opt-out notice" required by the Telephone Consumer Protection Act of 1991 ("TCPA") and related regulations on facsimile advertisements Nomax sent Petitioner, on the basis that Petitioner "never attempted to opt-out of receiving future faxes" or showed that Nomax "would have ignored such a request" if it had been made.

The question presented is whether a failure to disclose information mandated by federal law that is necessary for a consumer to exercise her rights under those laws—such as the right to "opt out" of future fax advertisements—is a "concrete" injury in itself, as held by the Second, Sixth, and Ninth Circuits, or whether a plaintiff must show additional harm resulting from the failure to disclose, as the Eighth Circuit held in this case.

PARTIES TO THE PROCEEDING

Petitioner is St. Louis Heart Center, Inc. Respondent is Nomax, Inc.

RULE 29.6 STATEMENT

Petitioner states that it has no parent company, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, 899 F.3d 500 (8th Cir. 2018). (Pet. App. A1). The district court's order is available at *St. Louis Heart Ctr., Inc. v. Nomax, Inc.*, No. 4:15-CV-517 RLW, 2017 WL 1064669 (E.D. Mo. Mar. 20, 2017). (Pet. App. A11).

JURISDICTION

The court of appeals entered its judgment on August 6, 2018. (Pet. App. A1). The court of appeals denied a petition for rehearing on September 18, 2018. (Pet. App. A20). Petitioner filed this Petition for a Writ of Certiorari on December 17, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

47 U.S.C. § 227(b)(1)(C):

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

. . . .

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone

facsimile machine, an unsolicited advertisement, unless--

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through--

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

. . . ; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D) . . . .

47 U.S.C. § 227(b)(2):

The Commission shall prescribe regulations to implement the requirements of this subsection. . . . .

47 U.S.C. § 227(b)(3):

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

47 C.F.R. § 64.1200:

(a) No person or entity may:

. . .

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless--

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through--

(A) The voluntary communication of such number by the recipient directly to the

sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution . . .

(C) . . . ; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. . . .

. . . .

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out notice that complies with the requirements in paragraph (a)(4)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send

such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

STATEMENT OF THE CASE

A. District Court Proceedings.

On February 6, 2015, Petitioner, a cardiology practice in St. Louis, Missouri, filed this putative class action in Missouri state court, alleging Nomax sent Petitioner and a class of others fax advertisements that failed to comply with the "regulations prescribed under" the TCPA, in violation of 47 U.S.C. § 227(b)(3). Nomax removed the case to the Eastern District of Missouri, invoking federal jurisdiction under 28 U.S.C. § 1331. Petitioner filed the operative Third Amended Complaint ("TAC") on May 18, 2016.

The TAC alleges Nomax sent Petitioner and a class of others 12 fax advertisements during the class period, each promoting the product "Effer-K" and offering free samples to doctors, which are attached to the TAC as Exhibits A–L. Two examples of these faxes, Exhibit A and Exhibit C to the TAC, are included in Petitioner's Appendix.

The TAC alleges that these 12 faxes "do not contain a notice compl[ia]nt with 47 C.F.R. § 64.1200," which requires that all fax advertisements, even those sent pursuant to an "established business relationship" or with the recipient's "prior express invitation or permission," contain certain opt-out notice "inform[ing] the recipient of the ability and means to avoid future unsolicited advertisements." 47 C.F.R. § 64.1200(a)(4)(iii). The TAC alleges that the TCPA,

47 U.S.C. § 227(b)(3), allows Petitioner to sue for a violation of "the regulations prescribed under" the TCPA and to recover injunctive relief and statutory damages of $500 per violation, which the district court may increase up to $1,500 per violation.

Each of the 12 faxes at issue contains one of two varieties of opt-out notice. The first type of opt-out notice, contained on Exhibits A, B, F, J, K, and L to the TAC, states the following:

> If you wish to no longer receive faxes from Nomax Inc. Please check here. [ ]

(Pet. App. A21).

The second variety of opt-out notice, contained on Exhibits C, D, E, G, H, and I to the TAC, states as follows:

> □ Please do NOT fax to this office.

(Pet. App. A22).

Both opt-out notices violate the "regulations prescribed under" the TCPA in at least six ways:

(1) they are not "clear and conspicuous," as required by 47 C.F.R. § 64.1200(a)(4)(iii)(A).

(2) they do not contain a domestic fax number and telephone number to which to send an opt-out request, as required by § 64.1200(a)(4)(iii)(D)(1).

(3) they do not state that a sender's failure to honor a compliant opt-out request within 30 days is unlawful, as required by § 64.1200(a)(4)(iii)(B).

(4) they do not state that an opt-out request complies (and is thus enforceable) only if it identifies the fax number to which the request relates, as required by § 64.1200(a)(4)(iii)(C).

(5) they do not state that an opt-out request complies only if it is made using the instructions in the notice, as required by § 64.1200(a)(4)(iii)(C).

(6) they do not state that an opt-out request complies only if the recipient does not subsequently give the sender express permission to send fax advertisements, as required by § 64.1200(a)(4)(iii)(C).

On April 4, 2016, Nomax took the deposition of Dr. Ronald A. Weiss, Petitioner's principal. The transcript of Dr. Weiss's deposition was before the Eighth Circuit in the parties' Joint Appendix at A141–269.

Dr. Weiss testified that Petitioner did not give Nomax "prior express invitation or permission" to send fax advertisements (Weiss Dep. at 165–66), but that this issue was irrelevant because the opt-out notices on Exhibits A–L violate the FCC regulations, where, among other things, they do not contain "a fax number to opt out" or state that the sender "will comply within thirty days or they are in violation of the law." (*Id.* at 61).

Dr. Weiss testified that he ordinarily attempts to opt out of faxes that contain compliant opt-out notice, but did not do so with respect to Nomax's

faxes because there was no fax number or phone number in the opt-out notice. (*Id.* at 73). He stated that his previous attempts to opt out where the sender did not include compliant opt-out notice were "ineffective" and so "my policy is to opt out if there is a proper opt-out notice, but not to call every advertising fax that is sent violating TCPA." (*Id.*) Dr. Weiss testified that "[i]f there would have been an appropriate opt-out notice on the fax I would have tried to opt out, but it was not a proper notice so there was no point in me trying to call" the telephone number provided on the faxes for requesting free samples of Effer-K, and that he does not "have the time and hours in my day to sit and make a bunch of fruitless phone calls." (*Id.* at 74).

On December 6, 2016, despite having removed based on federal-question jurisdiction, Nomax filed a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. Nomax argued that, even if its opt-out notice was inadequate, Petitioner lacked a "concrete" Article III injury from the lack of compliant opt-out notice under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

On March 20, 2017, the district court granted Nomax's motion to dismiss for lack of subject-matter jurisdiction, holding that Petitioner "has not alleged a concrete and particularized injury arising from the

alleged deficiency in the opt-out notice." (Pet. App. A15).[1]

B. Eighth Circuit Proceedings.

On appeal, Petitioner argued to the Eighth Circuit that the district court's Article III ruling contradicts *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982), which held that a plaintiff suffered concrete injury when denied "truthful housing information" in violation of a statute, even though she had no "intention of buying or renting a home," as well as two post-*Spokeo* decisions finding Article III "concrete" injury from a failure to disclose required information, citing *Strubel v. Comenity Bank*, 842 F.3d 181, 190, n.8 (2d Cir. 2016) (citing *Havens Realty*), and *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017).

Petitioner's brief also explained that after the appeal was filed, on March 31, 2017, the D.C. Circuit issued its opinion in *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (D.C. Cir. 2017), which vacated an order of the FCC issued October 30, 2014, on the basis that the regulation requiring opt-out notice on fax advertisements sent with the recipient's "prior express invitation or permission," 47 C.F.R. § 64.1200(a)(4)(iv), which was in turn issued in the

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[1] The district court dismissed the case rather than remanding to Missouri state court, as required by 28 U.S.C. § 1447(c). The Eighth Circuit correctly reversed on this issue (Pet. App. A9), and Petitioner does not seek certiorari on this issue.

FCC's 2006 Order, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787, 3812 ¶¶ 45–48 (rel. Apr. 6, 2006), exceeded the agency's statutory authority. Petitioner argued that the D.C. Circuit's decision "has no effect in this case, and this Court remains bound by the Hobbs Act," 28 U.S.C. § 2342(1), "to apply the plain language of § 64.1200(a)(4)(iv)." (Appellant's Br. at 31). In its Brief, Nomax conceded that "the D.C. Circuit's decision is not binding on this Court," while stating that "Nomax reserves the right to challenge the validity of the disputed FCC regulation" in its own Hobbs Act proceeding. (Appellee's Br. at 17, n.9).

On August 6, 2018, the Eighth Circuit issued its opinion affirming the district court's ruling on lack of Article III standing. (Pet. App. A1). The Eighth Circuit reasoned that Nomax's failure to disclose the required opt-out information was not a "concrete" injury because Petitioner did not "attempt[] to opt-out of receiving future faxes" or show that Nomax "would have ignored such a request" if Dr. Weiss had attempted to convey an opt-out request using the information provided for requesting free samples of Effer-K. (Pet. App. A8). The Eighth Circuit's opinion does not mention *Havens Realty*, *Strubel*, or *Syed*. (Pet. App. A1–A10).

On August 17, 2018, Petitioner sought en banc review on the Article III standing issue. Petitioner argued the panel ignored this Court's decision in *Havens Realty*, as well as the two post-*Spokeo*

circuit court decisions discussed in Petitioner's briefs finding Article III "concrete" injury from a failure to disclose required information in *Strubel* and *Syed*. Petitioner also noted that, just days before the Eighth Circuit issued its decision, the Sixth Circuit found Article III injury in a failure-to-disclose case in *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 759 (6th Cir. 2018).

On September 18, 2018, the Eighth Circuit denied the petition for rehearing. (Pet. App. A20). Petitioner timely filed this Petition on or before December 17, 2018.

REASONS FOR GRANTING THE PETITION

I. The Court should resolve the circuit split regarding whether a consumer can plead a "concrete" injury from a disclosure violation standing alone, or whether the consumer must show "additional harm" resulting from the disclosure violation.

The Eighth Circuit's ruling that Petitioner lacks Article III standing because Dr. Weiss did not "attempt[] to opt-out of receiving future faxes" or show that Nomax "would have ignored such a request" if he had done so conflicts with the decisions of three other circuits finding "concrete" injury in failure-to-disclose cases involving federal consumer-protection statutes, with no requirement that the disclosure violation result in additional harm. The Court should grant review to resolve this split.

A. The Second, Sixth, and Ninth Circuits correctly hold that a disclosure violation can be "concrete" without any showing of additional harm.

In *Strubel*, the Second Circuit held the plaintiff alleged a concrete injury for two claims under the Truth in Lending Act ("TILA") where the defendant failed to disclose in a credit-card agreement that "(1) certain identified consumer rights pertain only to disputed credit card purchases not yet paid in full," and that "(2) a consumer dissatisfied with a credit card purchase must contact the creditor in writing or electronically." 842 F.3d 190.

The *Strubel* plaintiff did not allege that she actually had a disputed credit-card purchase that was not yet paid in full. *Id.* Nor did she allege that she was dissatisfied with any credit-card purchase. *Id.* Rather, the Second Circuit held the omitted information "serves to protect a consumer's concrete interest in 'avoid[ing] the uninformed use of credit,' a core object of the TILA," and so the denial of that information was "by itself" enough to show "a 'risk of real harm' to the consumer's concrete interest in the informed use of credit," and the plaintiff "was not required to allege 'any *additional* harm' to demonstrate the concrete injury necessary for standing." *Id.* at 190–91 (quoting *Spokeo*, 136 S. Ct. at 1549)).[2] In reaching this conclusion, the court

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[2] As other examples of procedural violations that are "concrete" injuries, the Second Circuit cited *Fed. Election Comm'n v.*

relied on *Havens Realty*, 455 U.S. at 373–74, discussed in Section II, below. *Id.* at 190, n.8.

In *Syed*, the Ninth Circuit held the plaintiff alleged "concrete" injury in an action under the Fair Credit Reporting Act ("FCRA"), where a prospective employer failed to make a stand-alone disclosure stating that it would obtain the plaintiff's consumer report. 853 F.3d at 499. The court held this disclosure requirement "secur[es] job applicants' privacy rights by enabling them to withhold authorization to obtain their consumer reports," and promotes "error correction" by allowing applicants "an opportunity to warn a prospective employer of errors in the report," *id.* at 497, and since the disclosure violation "deprived [applicants] of their ability to meaningfully authorize the credit check," as guaranteed by FCRA, it was thus a "concrete" injury, *id.* at 499.

In *Macy*, the Sixth Circuit held the plaintiffs alleged a "concrete" injury for failure to disclose information required by the Fair Debt Collection Practices Act ("FDCPA"). 897 F.3d at 759. The plaintiffs alleged the defendant's failure to disclose

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Akins, 524 U.S. 11, 20–25 (1998) (holding "voters' inability to obtain information that Congress had decided to make public is a sufficient injury in fact to satisfy Article III"), and *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) (holding "inability to obtain information subject to disclosure" by statute "constitutes a sufficiently distinct injury to provide standing to sue"). *Strubel*, 842 F.3d at 190.

in a debt-collection letter that a dispute over the debt must be made in writing "could lead" consumers to waive their rights by disputing the debt orally, which has no effect. *Id.* at 758.

The defendant in *Macy* argued there was no concrete injury because the plaintiffs did not "allege they wished to dispute their debt," and so "its failure to include the in-writing requirement never materialized into actual harm." *Id.* at *759 & n.10. The Sixth Circuit rejected that argument, holding that the plaintiffs alleged "a risk of harm that is traceable to [defendant's] purported failure to comply with federal law, namely, *the possibility of* an unintentional waiver of FDCPA's debt-validation rights," and that the plaintiffs were "not required to allege 'any *additional* harm' to demonstrate the concrete injury necessary for standing." *Id.* at 758 (quoting *Strubel*, 842 F.3d at 191 (quoting *Spokeo*, 136 S. Ct. at 1549)); *see also Church v. Accretive Health, Inc.*, 654 Fed. App'x 990, 994 (11th Cir. July 6, 2016) (unpublished) (finding concrete injury for failure to make FDCPA disclosures, citing *Havens Realty* and holding "[w]hile this injury may not have resulted in tangible economic or physical harm that courts often expect, the Supreme Court has made clear" in *Spokeo* that "an injury need not be tangible to be concrete").

In sum, the Second, Sixth, and Ninth Circuits hold that a failure to disclose information required by federal consumer-protection laws is itself a concrete injury, with no requirement that the

plaintiff show additional harm to establish Article III standing.

B. The Eighth Circuit erroneously held that Petitioner could not show concrete injury without alleging additional harm resulting from the non-compliant opt-out notice.

In contrast to the Second, Sixth, and Ninth Circuits, the Eighth Circuit in this case required Petitioner to show that Dr. Weiss unsuccessfully "attempted to opt-out of receiving future faxes from Nomax" using the information provided for requesting free samples of Effer-K or show that Nomax "would have ignored such a request" if he made that attempt. (Pet. App. A8). This is precisely the type of "*additional* harm" this Court recognized was not required to establish an "intangible," yet "concrete" injury in *Spokeo*, 136 S. Ct. 1549.

As with the TILA disclosures in *Strubel*, the FCRA disclosures in *Syed*, and the FDCPA disclosures in *Macy*, the TCPA's opt-out-notice requirements are designed to protect the "concrete interests" of fax recipients by enabling them to avoid future unwanted fax advertisements, precisely the harm the TCPA was passed to remedy. Thus, the judgment of Congress (and the FCC, through its delegated powers) is that recipients denied these disclosures suffer concrete injury. 47 U.S.C. §§ 227(b)(1)(C)(iii), § 227(b)(2)(D); 47 C.F.R. § 64.1200(a)(4)(iii)–(iv). That injury stands on its own, and does not require Petitioner to show that it

unsuccessfully attempted to opt-out using the non-compliant opt-out notice, or any other additional harm.

Like the disclosure violations in *Strubel*, *Syed*, and *Macy*, denying fax recipients the required opt-out notice also creates a real "risk of harm" that they will receive unwanted fax ads in the future. The only way for a fax recipient to make an opt-out request that "complies with" the TCPA, and thus make an enforceable *demand* that future faxes stop (as opposed to merely requesting it), is to follow the instructions on the fax. 47 U.S.C. § 227(b)(2)(E); 47 C.F.R. § 64.1200(a)(4)(v). Since Nomax's opt-out notice contains no instructions, other than "check this box," without providing a fax number to which to send the form with the checked box, this denial has real-world consequences and is "concrete." *See Boelter v. Advance Magazine Publishers, Inc.*, 2016 WL 5478468, at *5–6 (S.D.N.Y. Sept. 28, 2016) (*Spokeo* satisfied in claim under state statute requiring defendant to give notice of plaintiff's ability to "remove his or her name" from defendant's marketing database, holding failure to disclose was "concrete" injury because "[t]he harm resulting from failing to satisfy this notice requirement is not simply lack of notice itself, but *denial of the right to prevent disclosure*").

Although no other circuit court decision has directly addressed whether denial of compliant opt-out notice on a fax advertisement is a concrete injury, several district court decisions have found

standing in such cases. *See, e.g.*, *Fauley v. Heska Corp.*, 326 F.R.D. 496, 506 (N.D. Ill. 2018) (holding plaintiff "ha[s] standing to sue on a TCPA claim of failure to provide the required opt-out notice"); *Gorss Motels, Inc. v. AT&T Mobility, LLC*, 299 F. Supp. 3d 389, 394–95 (D. Conn. 2018) (holding "the same concrete interests Congress sought to protect by prohibiting unsolicited fax advertisements also pertain when the opt-out language is non-compliant, as is alleged here"); *Fauley v. Royal Canin U.S.A., Inc.*, 2017 WL 2955351, at *2 (N.D. Ill. July 10, 2017); *Swetlic Chiropractic & Rehab. Ctr., Inc. v. Foot Levelers, Inc.*, 2017 WL 373514, at *3–4 (S.D. Ohio Jan. 26, 2017) (holding "[w]hile the failure to include proper opt-out language seems like only a technical violation of law," the statute "makes no differentiation in the harm caused or the penalty assessed whether a defendant fails to meet the opt-out language required or lacks permission to send the fax").

In *Gorss Motels, Inc. v. Sysco Guest Supply, LLC*, 2017 WL 3597880, at *7 (D. Conn. Aug. 21, 2017), the plaintiff received three faxes lacking compliant opt-out notice, and the plaintiff satisfied *Spokeo*, in part, because "[h]ad Defendant complied with the opt-out requirement of the TCPA, Plaintiff would have been able to avoid the loss and intrusion occasioned by the second and third faxes." That reasoning is particularly apposite here because Nomax sent Petitioner 12 fax advertisements, and if the first fax had contained a compliant opt-out

notice, Petitioner could have avoided the subsequent 11 faxes. Dr. Weiss testified that "[i]f there would have been an appropriate opt-out notice on the fax I would have tried to opt out, but it was not a proper notice so there was no point in me trying to call" the phone number for requesting samples of Nomax products, and that he does not "have the time and hours in my day to sit and make a bunch of fruitless phone calls." (Weiss Dep. at 74).

The Eighth Circuit ignored *Strubel* and *Syed*, which Petitioner relied on heavily in its briefs (Pet. App. A1–A10), and it ignored the later-decided *Macy*, which Petitioner discussed in its petition for rehearing (Pet. App. A20). This Court should not ignore these cases, and it should grant certiorari to resolve the split of authority between the Second, Sixth, and Ninth Circuits, on one hand, and the Eighth Circuit, on the other, and hold that Nomax's failure to disclose in this case is a concrete injury in itself, with no required additional harm.

II. The Court should grant review because the Eighth Circuit's decision contradicts this Court's holding in *Havens Realty* that a disclosure violation can be "concrete" without any showing of additional harm.

The seminal case on Article III standing for a failure to disclose required information is *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982). In *Havens Realty*, an African-American "tester" approached the leasing agent for an

apartment building and was told there were no available apartments, which the tester alleged was a discriminatory misrepresentation in violation of her right to "truthful information about available housing" under the Fair Housing Act. *Id.* at 369. The tester plaintiff—as opposed to the "renter" plaintiff—had no "intention of buying or renting a home" from the defendants. *Id.* at 374. The defendants argued the tester lacked "concrete" injury because she would not have used accurate information about apartment availability if had been given to her, and the district court agreed, dismissing her claim. *Id.* at 369. The Fourth Circuit reversed, and this Court affirmed the reversal. *Id.*

The Court held the tester plaintiff suffered a "concrete" injury at the moment she was denied "truthful housing information" as required by the statute. *Id.* at 374. The Court held "[t]hat the tester may have approached the real estate agent fully expecting that [s]he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of" the statute. *Id.* Additionally, the Court held that "[w]hereas Congress, in prohibiting discriminatory refusals to sell or rent in § 804(a) . . . required that there be a 'bona fide offer' to rent or purchase" in order to sue for a refusal to sell or rent, "Congress plainly omitted any such requirement insofar as it banned discriminatory representations in § 804(d)," and so there was no requirement that a plaintiff suing for a disclosure

violation attempt to rent or purchase, or even have any "intention" to rent or purchase at the time of the disclosure violation. *Id.*

The Eighth Circuit's decision in this case conflicts with *Havens Realty*, calling for the Court's review. Like the tester plaintiff in *Havens Realty*, Petitioner has a statutory right to an opt-out notice that (1) is "clear and conspicuous," (2) provides a domestic fax number and telephone number to which to send an opt-out request, (3) states that Nomax's failure to honor a compliant opt-out request within 30 days is unlawful, (4) discloses that an opt-out request complies (and is thus enforceable) only if it identifies the fax number to which the request relates, (5) discloses that an opt-out request complies only if it is made using the instructions in the notice, and (6) discloses that an opt-out request complies only so long as the recipient does not subsequently give the sender express permission to send fax ads. 47 U.S.C. § 227(b)(2)(D) & (E); 47 C.F.R. § 64.1200(a)(4)(iii).

The opt-out notices on the 12 fax advertisements Nomax sent to Petitioner meet *none* of these requirements, merely stating "If you wish to no longer receive faxes from Nomax Inc. Please check here. [ ]" (Pet. App. A21), or "□ Please do NOT fax to this office" (Pet. App. A22). Under *Havens Realty*, Petitioner has Article III standing to sue for this

disclosure violation, regardless whether Petitioner had "any intention of" using the opt-out notice.[3]

In addition, like the statute in *Havens Realty*—which required a plaintiff to make a "bona fide offer" to rent or purchase in order to sue for a discriminatory refusal to rent or purchase, but "plainly omitted any such requirement" for a disclosure violation—the TCPA contains separate sections (1) requiring a plaintiff to "make a request to the sender" to stop sending fax advertisements in order to sue for an unlawful "failure to comply" within a reasonable time, 47 U.S.C. § 227(b)(2)(D)(ii); and (2) allowing a plaintiff to recover for a defendant's failure to disclose how to make a compliant opt-out request, a provision which "plainly omit[s]," per *Havens Realty*, 455 U.S. at 374, any requirement that a plaintiff actually make an opt-out request in order to sue for a disclosure violation. *See* 47 U.S.C. § 227(b)(1)(C)(iii); 47 C.F.R. § 64.1200(a)(4)(iii).

Under the Eighth Circuit's rationale in this case—that a lack of compliant opt-out notice does not constitute concrete injury unless Petitioner unsuccessfully "attempted to opt-out" of receiving future faxes (Pet App. A8)—the tester plaintiff in

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[3] Dr. Weiss testified that he *would have* attempted to use the opt-out notice on Nomax's faxes if they had contained a fax number (Weiss Dep. at 74), making Petitioner akin to the "renter" plaintiff in *Havens Realty*, who intended to apply to rent an apartment if he was given truthful information about availability and unquestionably had standing. 455 U.S. at 369.

Havens Realty would have lacked a concrete Article III injury because she never "attempted to" rent housing, and in fact never had any intention of attempting to rent housing from the defendants, regardless of whether the defendants disclosed accurate information. The Eighth Circuit's reasoning contradicts *Havens Realty*, and the Court should grant certiorari to reverse that ruling.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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