No. 19-496

IN THE

Supreme Court of the United States

DISH NETWORK L.L.C.,

Petitioner,

v.

THOMAS H. KRAKAUER,
ON BEHALF OF A CLASS OF PERSONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

As the very first sentence of the Petition explains, this appeal presents the question whether Article III is satisfied by plaintiffs who never answered the phone, never heard it ring, were not aware the call was made, and were not the phone subscriber. Pet. 1; *accord* Pet. i (Question Presented). This raises foundational questions concerning Article III and, indeed, Krakauer does not deny that it would raise a *Spokeo* problem and implicate two separate circuit splits. Instead, tellingly, Krakauer dodges the question: The cornerstone of his Brief in Opposition is the oft-repeated assertion that there is no Article III problem because every plaintiff "received" a call. *E.g.*, BIO 1, 2, 8, 9, 10. This is just wordplay. The lower courts held that a call is "received" within the meaning of the TCPA even by someone who was not home. In fact, the district court squarely held—and the Petition emphatically underscored—that "class members did not necessarily pick up or hear ringing every call at issue in this case." Pet. App. 78a; *see* Pet. 9, 20, 26, 30. Krakauer has no response.

Pull out that cornerstone and each of his arguments collapses. As the Petition explains, this case presents two circuit conflicts: one concerning whether a bare violation of the TCPA constitutes concrete injury, Pet. 14-21, and the other concerning persistent confusion about the concrete injury requirement after *Spokeo*, Pet. 21-25. Because Krakauer's response depends so heavily on his wordplay about "receiving" a call, he all but concedes the existence of the first conflict, BIO 8 n.1, and he never seriously disputes the second. Instead, he argues that the decision below

does not implicate either split, BIO 6-9, which is simply incorrect in view of the district court's express holding that absent class members could recover thousands of dollars for telemarketing calls merely upon a showing that they were "associated with" the phone number that was called.

Because the class and the judgment plainly encompass plaintiffs who never interacted with any phone call, this case squarely presents the question whether such plaintiffs suffered concrete injury. This is an important question that affects litigation under numerous statutes, and the Court should resolve it now and in this case.

I. This Case Directly Implicates Two Issues On Which The Circuits Are Irretrievably Divided.

A. The decision below, and others like it, conflicts with *Salcedo*'s ruling that a bare TCPA violation does not constitute concrete injury.

In *Salcedo*, the Eleventh Circuit held that actual receipt of a single text message in violation of TCPA § 227(b)(3) does not by itself constitute concrete injury sufficient to confer Article III standing. *Salcedo v. Hanna*, 936 F.3d 1162, 1165 (11th Cir. 2019), *reh'g denied*, No. 17-14077 (11th Cir. Oct. 30, 2019). If interacting with one TCPA-violative text message does not result in concrete injury, then, *a fortiori*, interacting with *zero* TCPA-violative phone calls is legally insufficient to establish standing. Pet. 19.

Krakauer offers three responses.

First, he notes that "*Salcedo* was brought under a different cause of action, alleging a different violation." BIO 6; *see also* BIO 8 (asserting that the Petition "mischaracterizes the decision below" as applying to every possible theory of TCPA liability). But the Petition itself made clear that *Salcedo* concerns a provision of the TCPA adjacent to the one at issue here, Pet. 14, and Krakauer does not explain why this makes any difference in assessing whether a bare statutory violation necessarily establishes concrete harm.

Second, Krakauer focuses on *Salcedo*'s discussion of "concern for privacy within the sanctity of the home." BIO 6 (quoting 936 F.3d at 1169); *see also* BIO 2 ("'a single unwelcome text message' does not invade 'the privacy of the home in the same way that a voice call to a residential line necessarily does'" (quoting *Salcedo*, 936 F.3d at 1170)). And he asserts that, in contrast to *Salcedo*, each call "at issue here" does involve intrusion into the privacy of the home. BIO 6. This is one of several places in which Krakauer uses carefully crafted circumlocutions—like references to "people on the receiving end" of a call, BIO 4, or calls being "connected and picked up," BIO 9—to imply (without ever saying it) that every class member suffered the sort of intrusion upon household privacy that *Salcedo* said would suffice.

He never comes out and says it because the implication is false. As the district court made absolutely clear, "[c]lass members did not necessarily pick up or hear ringing every call at issue in this case," Pet.

App.78a. Instead, class members were required to show merely that they were "associated with" a phone number that received telemarketing calls. Pet. App. 48a; *see* Pet. 7-9. If *anyone* answered—not necessarily the claimant—or even if an answering machine answered and the caller left no message, that would be enough. That makes this case just like *Salcedo*. There, the Eleventh Circuit explained that "Salcedo has not alleged that he was in his home when he received [the] message," 936 F.3d at 1170, or that he suffered "anything like … having the domestic peace shattered by the ringing of the telephone," *id.* at 1172. And in this case, "no plaintiff here pleaded (much less proved) that they were present when the calls were made, nor that there was any intrusion upon their seclusion." Pet. 19. So DISH is not "simply wrong to say," BIO 7, that this case would be decided differently in the Eleventh Circuit. Rather, *Salcedo* holds that a bare TCPA violation, without more, does not satisfy the concrete-injury requirement. Instead, the plaintiff needs to plead (and ultimately prove) that he actually received a call "in his home." 936 F.3d at 1170.

That legal rule conflicts not only with the decision below, but with the decisions of three other circuits. Pet. 16-18. Tellingly, Krakauer ignores the other decisions. He does not even cite the Second Circuit decision. While he at least cites the Third Circuit decision, claiming that it supports the decision below, he makes no effort to reconcile it with *Salcedo*, *see* BIO 2, 13. And, buried in a footnote, he *concedes* that *Salcedo* rejected the Ninth Circuit's approach, BIO. 8 n.1.

Third, and relatedly, Krakauer has filed a Supplemental Brief arguing that *Cordoba v. DIRECTV, LLC*, __ F.3d __, 2019 WL 6044305 (11th Cir. Nov. 15, 2019), "eliminate[s] any doubt" about whether *Salcedo* conflicts with the decision below. It does, but not in the way Krakauer says. *Cordoba* addresses a narrower question than the one presented here or in *Salcedo*: "whether the members of the internal do-not-call list[1] class who did not ask to be put on the internal do-not-call list have standing." *Id.* at *4. The question presented here—whether plaintiffs have standing when they did not allege even that they heard the phone ring—was not presented in *Cordoba*. The *Cordoba* plaintiffs specifically alleged and undertook to prove that the defendants "caused a nuisance to, and invaded the privacy of, Plaintiff and each of the members of [the proposed classes]." Second Am. Compl. ¶ 77, Dkt. 61, *Cordoba v. DIRECTV, LLC*, No. 1:15-cv-3755-MHC (N.D. Ga. Oct. 12, 2016). And *Cordoba* itself explained that *Salcedo*, in contrast, had relied on the absence of allegations concerning a ringing phone or an intrusion upon seclusion. 2019 WL 6044305, at *6 (citing *Salcedo*, 936 F.3d at 1172). As in *Salcedo*, the complaint here contains no such allegations, but the Fourth Circuit's conclusion was nevertheless the opposite of the Eleventh Circuit's.

[1] Under the TCPA, telephone subscribers may ask that their number be included on telemarketers' internal do-not-call registries, in addition to the National Do-Not-Call Registry, and may bring suit based on calls placed in disregard of either list.

There is a clear division of authority on this important question, and the Court should grant the Petition to resolve it.

B. Lower courts also are divided over whether *Spokeo* requires proof of actual harm to a plaintiff.

There is a second circuit split as well. And importantly, Krakauer does not contest that "[c]ourts are hopelessly conflicted on the proper standard for evaluating whether a statutory violation has produced a concrete injury." Pet. 21. Nor does he dispute that there is a clear division between "courts that ask whether the plaintiff *himself* suffered *actual* real-world harm from a statutory violation versus courts that presume such harm when an alleged statutory violation is *of the type* that tends to implicate the generalized interests protected by the statute at issue." Pet. 21.

Importantly, Krakauer also does not dispute that the Fourth Circuit used the latter approach here. Krakauer was the *only* class member to allege an actual invasion of his interests, but the Fourth Circuit overlooked that failing precisely because it concluded that telemarketing calls that violate § 227(c)(5) are *the sort* that may invade such interests. To be sure, Krakauer says that each plaintiff "actually suffered … harm," BIO 9, but, as his argument makes clear, what he actually means is that each plaintiff alleged a bare statutory violation.

The Fourth Circuit agreed that this suffices, and so have some other courts. Pet. 22-24. In contrast, the

Seventh and Eleventh Circuits require a plaintiff to allege that *they themselves* actually suffered the harm that the statute aims to redress. Pet. 22-24 & n.2. If the Fourth Circuit had employed that approach here, the result would have been different.

Seemingly recognizing as much, Krakauer ultimately does address the fact that "'there is no evidence that *any* plaintiff "received" a call in the ordinary sense of answering the phone.'" BIO 9 (quoting Pet. 20). First, he calls this a "factbound objection [that] has nothing to do with Dish's question presented." *Id.* No, it is an undisputed *fact*, not a "factbound objection." And its existence is precisely what tees up the question of law presented by the Petition: "whether a call placed in violation of the [TCPA], without any allegation or showing of injury—even that plaintiffs heard the phone ring—suffices to establish concrete injury." Pet. i. Notably, Krakauer never disputes that critical fact; indeed, he himself repeatedly has argued that absent class members in TCPA cases do not have to prove that they personally interacted with any call. *See* Pet. 7-8, 10. The district court accepted that argument when it acknowledged that "class members did not necessarily pick up or hear ringing every call at issue in this case." Pet. App. 78a.[2]

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[2] Krakauer suggests that the combination of the trial and subsequent claims administration process somehow muddies the record on this. BIO 9. But he never denies that "[t]he trial did not attempt to establish the identity of anyone who actually interacted with a telemarketing call in the real world." Pet. 27. Nor does he contest that the "claims administration process" did not

In short, the district court authorized a class to proceed that contains members who perhaps could state a TCPA claim, but never alleged or established that they were harmed—even by hearing the phone ring. Whether such people have standing directly implicates the post-*Spokeo* divide described above. The Court should grant certiorari to resolve that critically important question.

II. This Case Is An Ideal Vehicle For Resolving Recurring Issues Of Great Importance.

The Petition also established that this case is an ideal vehicle for resolving these important questions, which are certain to recur. Pet. 25-29. Yet again, what is most telling is what Krakauer does not dispute. He does not dispute that these issues are certain to recur. *See* Pet. 28-29. Nor does he contest that these issues are hugely important with regard to an array of federal statutes—and especially so in light of the in terrorem effect of class actions. *Id.*

Instead, Krakauer argues that the "case is an unsuitable vehicle" for resolving these questions. BIO 10. But yet again, his objections depend on ignoring (without ever disputing) that he did not plead or prove that any absent class member interacted with a telemarketing call.

Krakauer first says that the "court below did not answer th[e] question" DISH presented—"'whether a

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even attempt to determine "whether or not the alleged class member interacted with any call." *Id.*

call placed in violation of the [TCPA], without any allegation or showing of injury[,] … suffices to establish concrete injury.'" BIO 10. Contrary to Krakauer's claim that DISH improperly framed the question at "the Act level" rather than "the claim level," *id.*, DISH of course is not suggesting that the Fourth Circuit addressed standing for *every* type of TCPA liability; the Fourth Circuit was addressing the cause of action actually at issue here. *Id.*; *cf. supra* 3. The rest of Krakauer's critique consists of new versions of the same game concerning the word "received." He asserts that DISH "resists the premise that the class here 'received' calls," and he notes that "[t]he class definition … requires exactly that, as does section 227(c)(5)." BIO 10. This is wrong for the reasons discussed above (at 3-4, 6-7 & n.2). There was no proof—whether at trial or during claims administration—that any plaintiff was home, heard a phone ring, or otherwise interacted with a violative call.[3]

Finally, Krakauer argues that this case is an unsuitable vehicle for assessing whether a class containing uninjured class members must be decertified. BIO 11. Yet again, Krakauer's argument depends on ignoring the district court's candid acknowledgment that "class members did not necessarily pick up or hear ringing every call at issue in this case." Pet. App.78a. Krakauer does not dispute that multiple

[3] Krakauer invokes the possibility that DISH "may eventually appeal" after the claims administration process. BIO 11. That has no relevance to the Petition, which follows from DISH's challenge to class certification and entry of judgment despite the presence of uninjured class members.

other courts of appeals would not permit certifying a class with significant numbers of uninjured class members. Pet. 27.[4] He does not dispute that "[a]n award in a class action 'cannot stand' if 'there is no way to ensure that [the] damages award goes only to injured class members.'" Pet. 27 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring)). He does not dispute that, in this case, "there is not and never has been any mechanism for determining which class members actually suffered some real-world harm." Pet. 27. And most importantly, even if Krakauer were correct, that would not affect the certworthiness of this case; these critiques only speak to whether the class must be decertified in addition to the judgment being vacated.

III. The Decision Below Is Wrong.

Finally, the Fourth Circuit's decision is wrong. Pet. 29-32. Krakauer's response (BIO 12-13) does not show otherwise.

To begin with, Krakauer ignores our showing that the Fourth Circuit improperly limited its inquiry to whether the TCPA "itself recognizes a cognizable constitutional injury." Pet. 29-30 (citing Pet. App. 12a). That inquiry was legally insufficient; a plaintiff also must show either concrete injury or that *every* violation of the statute establishes standing. Pet. 30. Far

[4] The Fourth Circuit did not dispute this either. The long quotation reprinted by Krakauer (at 11) merely says that the question of whether a class with uninjured class members can be certified is presented when there are indeed uninjured class members.

from responding, Krakauer employs the Fourth Circuit's flawed approach, suggesting that because the TCPA "recognizes" that *some* TCPA violations result in "cognizable constitutional injury," alleging a TCPA violation *necessarily* is enough. That is incorrect. *Spokeo* squarely rejected the notion that a plaintiff "automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

As to "history and the judgment of Congress," *Spokeo*, 136 S. Ct. at 1549, Krakauer purports to defend the decision below but actually runs away from it.

Regarding "the judgment of Congress," the Fourth Circuit relied on a "broad overgeneralization" that Congress meant to protect privacy interests writ large. Pet. 30-31 (quoting *Salcedo*, 936 F.3d at 1170). Congress actually had a much narrower focus—"unrestricted telemarketing"—which is why the statute is aimed at people who "object to receiving telephone solicitations." Pet. 31 (quoting Pub. L. No. 102-243, § 2 and 47 U.S.C. § 227(c)(3)). Seemingly recognizing the error in the Fourth Circuit's broad assertion, Krakauer tries to narrow things by arguing that a plaintiff has a claim only when he suffers "'a concrete burden on his privacy'"—specifically, when "'an individual receive[s] a call on his own residential number.'" BIO 12-13 (quoting Pet. App. 14a). This is, yet one last time, game-playing with the word "receive." It is simply not true that the Fourth Circuit required

each class member to have interacted with a call. *Supra* 6-7. And Krakauer does not even attempt to defend the absurd result that follows—that the statute now authorizes a plaintiff to seek redress for the "injury" of having his phone number called even if he never knew it happened.

Nor does "history" support Krakauer's exceptionally broad conception of standing. *Spokeo* specifically distinguishes between causes of action for which injury is presumed—like slander per se—and those for which injury must be established. 136 S. Ct. at 1549. Krakauer, like the Fourth Circuit, analogizes to the tort of intrusion upon seclusion. BIO 13. But as the Petition explains (at 31-32), the common law does not allow recovery for intrusion upon seclusion absent a showing of actual harm. That is the closest historical analogue to the TCPA, and it shows that a bare violation does *not* automatically result in concrete injury. *Id.* Krakauer offers no response.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Petition should be granted.

Respectfully submitted,

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