No. 21-_____

In the Supreme Court of the United States

MARK LEYSE,

Petitioner,

v.

BANK OF AMERICA, NATIONAL ASSOCIATION,

Respondent.

ON PETITION FOR WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

DANIEL A. OSBORN
OSBORN LAW PC
43 West 43rd Street
Suite 131
New York, New York 10036
(212) 725-9800
dosborn@osbornlawpc.com

Counsel for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED FOR REVIEW

The text of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), demonstrates Congress's determination that certain types of unsolicited telemarketing calls are inherently a nuisance and are harmful within the meaning of Article III of the Constitution. The question is whether Congress, which, as the branch charged with lawmaking, "is well positioned to identify intangible harms that meet minimum Article III requirements," such that its judgment is "instructive and important," *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016), is to have its judgment respected with regard to the TCPA's prohibition against the placing of unsolicited pre-recorded telephone calls to residential telephone lines.

LIST OF PARTIES AND RULE 29.6 DISCLOSURE

The caption lists all of the parties. Petitioner, Mark Leyse ("Leyse"), is a natural person. Therefore, no corporate-disclosure statement is required under Supreme Court Rule 29.6.

STATEMENT OF DIRECTLY RELATED PROCEEDINGS

There are no directly related proceedings.

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INTRODUCTION

Mark Leyse respectfully petitions this Court for a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

ORDERS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit, dated May 19, 2021 (the "Subject Opinion"), which is not reported, is reprinted in the Appendix to this Petition ("Appx.") at Appx. A, 1a-8a.

The Opinion of the District of New Jersey, dated March 13, 2020, which is not reported, is reprinted at Appx. B, 9a-29a.

The Order of the Court of Appeals denying Leyse's Petition for Rehearing with Suggestion for Rehearing *En Banc*, dated June 17, 2021, which is not reported, is reprinted at Appx. C, 30a-31a.

STATEMENT OF JURISDICTION

On May 19, 2021, the Subject Opinion was entered.

On June 2, 2021, Leyse filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*, which the Court of Appeals denied on June 17, 2021.

This Court has jurisdiction under 28 U.S.C. Section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Public Law 102-243

One Hundred Second Congress of the United States of America at the First Session

Begun and held at the City of Washington on Thursday, the third day of January, one thousand nine hundred and ninety-one

An Act

To amend the Communications Act of 1934 to prohibit certain practices involving the use of telephone equipment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Telephone Consumer Protection Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now

pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

(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.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(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.

(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.

(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 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.

(15) The Federal Communications Commission should consider adopting reasonable restrictions on automated or prerecorded calls to businesses as well as to the home, consistent with the constitutional protections of free speech.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

(a) AMENDMENT.--Title II of the Communications Act of 1934 (47 U.S.C. 201 et seq.) is amended by adding at the end the following new section:

"SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT.

47 U.S.C. § 227

(b) *Restrictions on use of automated telephone equipment.*

(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— . . .

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B) . . .

(2) *Regulations; exemptions and other provisions.* The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission— . . .

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement[.] . . .

(3) Private right of action

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: . . .

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

STATEMENT OF THE CASE

Leyse brought the underlying action in the District of New Jersey, which had jurisdiction under 28 U.S.C. Sections 1331 and 1332(d)(2)(A).

Leyse asserted that Respondent, Bank of America, National Association, violated Section 227(b)(1)(B) of the TCPA, which makes it "unlawful . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B).

REASONS FOR GRANTING THE PETITION

With respect to the Question Presented for Review, the Court of Appeals, along with the Eleventh Circuit, is in conflict with the Courts of Appeals for the Fifth, Seventh, and Eighth Circuits.

The Question Presented for Review is exceptionally important because TCPA enforcement depends upon class actions, which would not be feasible if each class member had to show harm beyond the statutory violation. *See TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, *10 (U.S. June 25, 2021) (each class member must have Article III standing).

I. THERE IS AN INTER-CIRCUIT CONFLICT REGARDING THE QUESTION OF WHETHER A TCPA VIOLATION IS ITSELF HARMFUL WITHIN THE MEANING OF ARTICLE III OF THE CONSTITUTION

A. A Violation of the TCPA is *Itself* a Harm Under Article III

The Subject Opinion's majority provides, as its sole legal reasoning, the following: "the TCPA is intended to prevent harm stemming from nuisance, invasions of privacy, and other such injuries. Therefore, Leyse must allege one of those injuries . . . . Leyse did not assert such an injury. Leyse does not dispute this finding. Accordingly, Leyse cannot show a concrete harm that is necessary to demonstrate an injury-in-fact." Appx. A,

7a (footnote omitted). This reasoning erroneously rests upon the unstated, but unmistakable, assumption that harm within the scope of Article III does not inhere in a violation of the Robocall Provision of the TCPA.

Section 227(b)(1) of the TCPA (the "Robocall Provision") restricts the placement, to residential and cellular numbers, of unsolicited telephone calls that employ an artificial or prerecorded voice. The Robocall Provision is not procedural, but *substantive*. Thus, in *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037 (9th Cir. 2017), the court "held that the TCPA was established to protect the plaintiff's *substantive right* to privacy, namely the right to be free from unsolicited telemarketing phone calls or text messages that 'invade the privacy and disturb the solitude of their recipients,'" *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1271 (9th Cir. 2019), quoting *Van Patten*, 847 F.3d at 1043 (emphasis added); and, "[b]ecause the telemarketer's conduct impacted this privacy right, [*Van Patten*] concluded that the plaintiff did not need to allege any additional harm beyond the one Congress identified, and therefore had alleged a concrete injury-in-fact sufficient to confer Article III standing." *Id.* As the plaintiff did not allege any harm apart from his claim that he had been on the receiving end of a TCPA violation, *see Van Patten*, 847 F.3d 1043 at 1042-1043, the harm that he *did* allege, and that the court found sufficient, was the violation *itself*. *See also Spokeo v. Robins*, 136 S. Ct. 1540 at 1552, 1553 (2016) (Thomas, *J.* conc.):

> The separation-of-powers concerns

underlying our public-rights decisions are not implicated when *private individuals sue to redress violations of their own private rights*. But, when they *are* implicated, standing doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of *government* action. . . . But where *one private party* has alleged that *another private party* violated his *private rights*, there is generally *no danger that the private party's suit is an impermissible attempt to police the activity of the political branches* or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual.

When Congress creates new private causes of action to vindicate private or public rights, these Article III principles circumscribe federal courts' power to adjudicate a suit alleging the violation of those new legal rights. Congress can create new private rights and authorize private plaintiffs to sue *based simply on the violation of those private rights*. A plaintiff seeking to vindicate a *statutorily created private right* need not allege actual harm *beyond the invasion of that private right*. . . . [whereas] [a] plaintiff

> seeking to vindicate a *public right* embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population.

(emphases added; citations omitted). The TCPA, of course, creates *private* rights regarding violations of the Robocall Provision. *See* 47 U.S.C. § 227(b)(3) (creating private right of action).

Opinions of other Courts of Appeals have also held that Article III standing for a TCPA claim does not require any allegation of harm beyond the violation itself, such that the allegation of the violation *is* an allegation of Article III harm. In *Van Patten*, the Court explained:

> The TCPA establishes the *substantive right* to be *free from certain types of phone calls and texts* absent consumer consent. *Congress identified unsolicited contact as a concrete harm*, and gave consumers a means to redress this harm. . . . *Unlike* in *Spokeo*, where a violation of a procedural requirement minimizing reporting inaccuracy may not cause actual harm or present any material risk of harm, *see* [*Spokeo*, 136 S. Ct.] at 1550, the telemarketing text messages at issue here, absent consent, *present the precise harm and infringe the*

> *same privacy interests Congress sought to protect in enacting the TCPA. Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients*. A plaintiff alleging a violation under the TCPA "*need not allege any additional harm beyond the one Congress has identified*." *Id.* at 1549 (emphasis [of "additional"] in original).

Van Patten, 847 F.3d at 1043 (emphases added). In *Gadelhak v. AT&T Svcs, Inc.*, 950 F.3d 458 (7th Cir. 2020), which concerned the sending of text messages in violation of the Robocall Provision, the Court explained that "both *history* and *Congress's judgment*," *id.* at 462 (emphases added), made clear that a TCPA violation is an Article III injury in and of itself. *See id.* at 461-463. The court also explained:

> The Eleventh Circuit arguably limited its holding to the receipt of *one* text message in violation of the Act, *see Salcedo* [*v. Hanna*], 936 F.3d [1162] at 1174 (J. Pryor, *J.*, concurring in judgment only) [(11th Cir. 2019)], suggesting that it *might come out differently in a case in which a greater number of texts strengthened the analogy to the common[-]law tort*. The *Second Circuit*, by *contrast*, *did not even mention the number of texts* at issue in *Melito* [*v. Experian Mtkg. Sols., Inc.*], 923 F.3d [85]

> at 92-93 [(2d Cir. 2019)], and the Ninth Circuit held that standing existed in *Van Patten* when the defendant allegedly sent *only two texts*, 847 F.3d at 1041-43. . . . [W]e agree with the Second and Ninth Circuits that *the number of texts is irrelevant to the injury-in-fact analysis*.

Id. at 463, n.2 (emphases added). *See also Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("our standing cases confirm that a plaintiff must demonstrate standing for each claim he seeks to press"); *La Vigne v. First Cmty Bancshares, Inc.*, 215 F. Supp. 3d 1138, 1141 (D.N.M. 2016) ("[e]ach alleged violation of the TCPA is considered a separate claim, meaning that a plaintiff must establish standing (an injury-in-fact) for each individual call. In other words, for each call [the] [p]laintiff must establish an injury in fact as if that was the only TCPA violation alleged in the complaint.").

In *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686 (5th Cir. 2021), the court found in favor of Article III standing with respect to a single text message that was sent in violation of the Robocall Provision. The court noted that, "[a]ccording to [the plaintiff], the unsolicited text message caused him 'the very harm that Congress sought to prevent [in enacting the TCPA]—namely, a nuisance and invasion of privacy,'" *id.* at 689, and that the plaintiff "further alleged that the text message 'trespassed upon and interfered with [the plaintiff's] rights and interests in his cellular telephone and cellular telephone line, and intruded

upon [his] seclusion.'" *Id.* As this Court recently observed: "[v]arious intangible harms can also be concrete. Chief among them are injuries with a close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts. Those include, for example, . . . *intrusion upon seclusion*. . . . *see* . . . *Gadelhak v. AT&T Services, Inc.*, 950 F.3d 458, 462 (CA7 2020) (Barrett, J.) (intrusion upon seclusion)." *TransUnion LLC v. Ramirez*, No. 20-297, 2021 WL 2599472, *7 (U.S. June 25, 2021) (citation omitted).

Cranor continued: "[a]nd the text 'harmed [the plaintiff] by depleting the battery life on his cellular telephone, and by using minutes allocated to [him] by his cellular telephone service provider.'" *Cranor*, 998 F.3d at 689. However, the court clearly did not rely on the plaintiff's allegations of harm beyond the receipt of the text message itself, as the court relied on several Robocall Provision cases in which the courts held that the violation gave rise to Article III standing even though the plaintiffs had *not* alleged harm beyond the violation itself. That is, the court relied upon *Van Patten*, *Gadelhak*, and *Melito*. *See id.* at 690. As *Cranor* explained:

> In enacting the TCPA, Congress found that "unrestricted telemarketing can be an intrusive invasion of privacy" and a "nuisance." Pub. L. No. 102–243, § 2, ¶¶ 5, 10, 105 Stat. 2394, 2394 (1991); *see also Salcedo v. Hanna*, 936 F.3d 1162, 1168 n.6 (11th Cir. 2019) ("[B]ecause the

> Supreme Court has instructed us to consider the judgment of Congress in assessing Article III standing, we will consider the congressionally enacted findings as informative of that judgment." (quotation omitted)). The Act itself was prompted by consumer outrage at the "proliferation of intrusive, nuisance" calls from telemarketers. TCPA § 2, ¶ 6. A balance had to be struck between "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade" so as to "protect the privacy of individuals and permit[ ] legitimate telemarketing practices." *Id. ¶ 9.* In Congress's view, the only way to achieve that end was to completely ban certain types of calls, while permitting the FCC regulatory flexibility to allow others not at issue here. *Id. ¶ 12.*

Cranor, 998 F.3d 686 at 690.

Cranor distinguished *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019), explaining that, "the [Robocall Provision] expressly covers cellular phones," *id.*; likewise, the TCPA, in the Robocall Provision, expressly covers residential telephone lines. *Cranor* further reasoned:

> Congress delegated authority to the FCC to 'prescribe regulations' implementing the TCPA, *id. § 227*(b)(2), and to *exempt*

> *commercial calls only where such exemptions "will not adversely affect the privacy rights"* the TCPA protects, *id. § 227*(b)(2)(B)(ii). It did so after finding that the FCC "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*." TCPA § 2, ¶ 13.

Id. at 691 (emphases added). With respect to robocalls made to residential telephone lines, the FCC indeed found that certain types of those calls do not adversely affect the privacy rights that the TCPA protects, *see* 47 C.F.R. § 64.1200(a)(3)(i)-(v), but did *not* exempt the type of call at issue here, *i.e.*, a call that "[i]s made for a commercial purpose [and] . . . include[s] or introduce[s] an advertisement or constitute[s] telemarketing." 47 C.F.R. § 64.1200(a)(3)(iii).

The *Cranor* court also found that "[the plaintiff]'s injury 'has a close relationship to' common[-]law public nuisance." *Cranor*, 998 F.3d at 692, quoting *Spokeo*, 136 S. Ct. at 1549. That is, a TCPA violation is *inherently* harmful within the meaning of Article III, which is why a plaintiff is not required to allege harm beyond the violation itself.

Just as a TCPA violation is inherently a nuisance, it is also inherently a trespass to chattels, and *Cranor* criticized *Salcedo*'s contrary view of the latter tort as "substantially narrower than the scope of that action at common law," *Cranor*, 998 F.3d at 693, explaining that,

"*Salcedo* . . . mistakes the twentieth-century Restatement [(Second) of Torts] for the eighteenth-century common law." *Id.*

Finally, *Cranor* explained: "*Salcedo*'s focus on the *substantiality* of an alleged harm threatens to make this already difficult area of law even more unmanageable. We therefore reject it." *Id.* (emphasis added). Although a bright-line rule is more practicable, such a rule, with respect to the Robocall Provision, need not rest on policy considerations, as a violation of that provision is, again, inherently harmful within the meaning of Article III.

In *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019), in which the plaintiff "received two answering[-]machine messages," *id.* at 955, in violation of the Robocall Provision, the Court also found in favor of Article III standing, *see id.* at 957-959, explaining that, "it [does not] matter that the harm suffered here was minimal; in the standing analysis we consider *the nature or type of the harm, not its extent*. *See generally* [*Spokeo*]." *Id.* at 959 (emphases added).

In *Leyse v. Lifetime Entm't Svcs, LLC*, 679 F. Appx. 44 (2d Cir. 2017), the court found as follows in a case that concerned the Robocall Provision:

> We need not here decide whether the alleged violation of 47 U.S.C. § 227(b)(1)(B) would, by itself, be sufficient to establish injury in fact because the evidentiary record establishes that [the

> defendant] *left a prerecorded voicemail message, to which [the plaintiff] later listened, on an answering device in the place where [the plaintiff] resided and to which he had legitimate access*. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411-412 (2013) (noting that standing at summary judgment stage is demonstrated by record evidence). Insofar as the TCPA protects consumers from certain telephonic contacts, we conclude that [the plaintiff]'s *receipt of such an alleged contact* in the way described demonstrates *more than a bare violation* and *satisfies the concrete-injury requirement for standing*.

Id. at 46 (emphases added). In the present case, as the Subject Opinion described, "DialAmerica Marketing, Inc., on behalf of Bank of America, called the residential telephone line that Leyse shared with his roommate, Genevieve Dutriaux. Leyse answered the call." Appx. A, 2a. Accordingly, Leyse clearly had Article III standing.

B. Petitioner's Investigation of the Call at Issue Did Not Deprive Petitioner of Article III Standing

The Subject Opinion states:

> At the time of the call, Leyse worked as an investigator for Attorney Todd C.

> Bank [("Bank")], helping him prepare TCPA lawsuits.[2] In this role, Leyse made investigative calls to companies to determine the number and frequency of the calls they made. During these calls, Leyse used a false name, withheld the true purpose of the calls, and secretly recorded them. He then provided the recordings to Bank to use in TCPA suits *such as this one*.
>
> [2] Bank represents Leyse in this appeal.
>
> After the March 11 call, Leyse placed and recorded over 20 calls to DialAmerica and provided the recordings to Bank. During these calls, Leyse used a false name and employer and asked DialAmerica about the services it provided, the numbers it called, the dialing system it used, the number of recorded messages it left per day, and whether the representatives knew that the call violated the TCPA.

Appx. A, 3a (emphasis added).

Notwithstanding that the District Court acknowledged that, "'Plaintiff disputes that he [investigated the call at issue] in his capacity as a paid investigator for Mr. Bank," Appx. B, 12a, n.3, the Subject Opinion left the reader with the impression that Leyse's counsel paid Leyse to investigate the call. Not only is such an

impression false, but there had not been a genuine dispute in the first place, as Respondent had simply told a lie to the District Court, a lie that Leyse refuted. *See* Leyse Principal Brief (No. 20-1666, 3d Cir. (Doc. 10)) at 13-14; Leyse Reply Brief (No. 20-1666, 3d Cir. (Doc. 21)) at 7-8.

The Subject Opinion's reliance upon Leyse's post-call investigation was erroneous for another reason: the range of one's potential *responses* to a TCPA violation, *e.g.*, from doing nothing to turning into Captain Ahab, does not bear on whether he has Article III standing. More fundamentally, the notion that Leyse, on account of his having responded to Respondent's call by engaging in the same *type* of standard investigatory activities in which he had engaged in his role as a paid investigator, was retroactively deprived of Article III standing is obviously erroneous. Indeed, Leyse should have been commended for serving as a diligent putative class representative; yet, according to the Subject Opinion, Leyse, in order to preserve his rights with respect to Respondent's call, was obligated to *not* investigate it, or at least not to do so with more than an unknown amount of thoroughness or expertise, the permissible amounts of which it was the duty of the District Court to determine (or perhaps the Subject Opinion did not object to the nature of the investigation, but rather relied upon the incorrect, and irrelevant, belief that Bank paid Leyse to conduct the investigation).

C. The Fact that Petitioner Declined to Have Respondent's Telemarketing Company Put Petitioner's Telephone Number on the Telemarketing Company's Do-Not-Call List Did Not Deprive Petitioner of Article III Standing

The Subject Opinion noted, in regard to Leyse's investigation of the call at issue, that, "[w]hen twice asked by DialAmerica representatives if he wanted to be added to their Do-Not-Call list, Leyse declined." Appx. A, 3a. The suggestion that Leyse had thereby been deprived of standing is plainly illogical. The Subject Opinion's 'sin-of-omission' argument would not even have any merit with respect to unlawful calls that are made *after* one declines to take a prophylactic measure, as there is, of course, no obligation to take such a measure in order to cause the legal obligations of others to remain intact. *See*, *e.g.*, *Swinter Group, Inc. v. Nationwide Truckers' Ins. Agency*, No. 17-cv-2310, 2018 WL 306024, *3 (E.D. Mo. Jan. 5, 2018) ("recipients of [TCPA-violating communications] have *no duty* . . . to ask senders to *stop* transmitting such advertisements" (emphases added)).

CONCLUSION

This Petition should be granted.

Respectfully submitted,

DANIEL A. OSBORN
OSBORN LAW PC
43 West 43rd Street
Suite 131
New York, New York 10036
(212) 725-9800
dosborn@osbornlawpc.com

Counsel for Petitioner

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