No.

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

PETITION FOR A WRIT OF CERTIORARI

Eric A. Shumsky
Kelsi Brown Corkran
Jeremy R. Peterman
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
Peter A. Bicks
Elyse D. Echtman
John L. Ewald
Christopher J. Cariello
Paul David Meyer
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

QUESTION PRESENTED

In *Spokeo, Inc. v. Robins*, this Court held that a plaintiff does not automatically satisfy Article III's "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."

The question presented is whether a call placed in violation of the Telephone Consumer Protection Act, without any allegation or showing of injury—even that plaintiffs heard the phone ring—suffices to establish concrete injury for purposes of Article III.

CORPORATE DISCLOSURE STATEMENT

Petitioner in this Court, defendant-appellant below, is DISH Network L.L.C. DISH Network L.L.C. is not publicly traded. It is a wholly owned subsidiary of DISH DBS Corporation, a corporation with publicly traded debt. DISH DBS Corporation is a wholly owned subsidiary of DISH Orbital Corporation. DISH Orbital Corporation is a wholly owned subsidiary of DISH Network Corporation (NASDAQ: DISH), a publicly traded company. Based solely on a review of Form 13D and Form 13G filings with the Security and Exchange Commission, no entity owns more than 10% of DISH Network Corporation's stock other than The Vanguard Group, Dodge & Cox, and Telluray Holdings, LLC.

RELATED PROCEEDINGS

Thomas H. Krakauer v. DISH Network, L.L.C., No. 18-1518 (4th Cir.) (opinion and judgment issued May 30, 2019)

DISH Network, L.L.C. v. Thomas H. Krakauer, No. 15-303 (4th Cir.) (order denying motion for permission to appeal issued Dec. 18, 2015)

Thomas H. Krakauer v. DISH Network, L.L.C., No. 1:14-cv-00333-CCE-JEP (M.D.N.C.) (final judgment issued Apr. 5, 2018)

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

RELATED PROCEEDINGS.................................... iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

OPINIONS AND ORDERS BELOW........................ 3

JURISDICTION.. 4

STATUTORY AND REGULATORY PROVISIONS INVOLVED 4

STATEMENT OF THE CASE.................................. 5

Krakauer Files A Class Action Against DISH For Alleged TCPA Violations 5

The District Court Certifies A Class Defined In Terms Of A Bare TCPA Violation 7

The District Court Limits The Trial To Proof Of Bare TCPA Violations, And A Jury Finds DISH Liable 10

The Fourth Circuit Holds That Allegations Of A Bare TCPA Violation Establish Article III Standing.................... 11

REASONS FOR GRANTING THE PETITION 12

I. The Circuits Are Divided On Whether A Bare Violation Of The TCPA Constitutes Concrete Injury—And Even More Broadly Divided On The Meaning Of *Spokeo*................ 14

A. There is an acknowledged circuit split on whether a bare TCPA violation constitutes concrete injury.......................... 14

B. The circuits are sharply divided over whether *Spokeo* requires proof of actual harm to each plaintiff. 21

II. This Case Is An Ideal Vehicle For Resolving Recurring Issues Of Great Importance... 25

III. The Decision Below Is Wrong. 29

CONCLUSION... 33

APPENDIX A	Opinion of the Fourth Circuit (May 30, 2019) 1a
APPENDIX B	Memorandum Opinion and Order of the Middle District of North Carolina (September 9, 2015) 37a
APPENDIX C	Order of the Middle District of North Carolina (August 5, 2016) 75a
APPENDIX D	47 U.S.C. § 227...................... 81a
APPENDIX E	47 C.F.R. § 64.1200 .... 111a

TABLE OF AUTHORITIES

Page(s)

Cases

Ariz. Christian Sch. Tuition Org. v. Winn,
563 U.S. 125 (2011)..29

In re Asacol Antitrust Litig.,
907 F.3d 42 (1st Cir. 2018) 27

AT&T Mobility LLC v. Concepcion,
563 U.S. 333 (2011)..29

Braitberg v. Charter Commc'ns, Inc.,
836 F.3d 925 (8th Cir. 2016)..........................22, 23

Casillas v. Madison Avenue Assocs., Inc.,
926 F.3d 329 (7th Cir. 2019)................................24

Eichenberger v. ESPN, Inc.,
876 F.3d 979 (9th Cir. 2017)..........................22, 23

Frank v. Gaos,
139 S. Ct. 1041 (2019)..2

Gubala v. Time Warner Cable, Inc.,
846 F.3d 909 (7th Cir. 2017)..........................21, 22

In re Horizon Healthcare Servs. Inc. Data Breach Litig.,
846 F.3d 625 (3d Cir. 2017) 23

Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.,
106 F.3d 1146 (4th Cir. 1997)................................6

Macy v. GC Servs. Ltd. P'ship,
897 F.3d 747 (6th Cir. 2018)................................24

Melito v. Experian Mktg. Sols., Inc.,
923 F.3d 85 (2d Cir. 2019) 18

Messner v. Northshore Univ. HealthSystem,
669 F.3d 802 (7th Cir. 2012)................................27

Mims v. Arrow Fin. Servs., LLC,
565 U.S. 368 (2012)...5

Nicklaw v. CitiMortgage, Inc.,
839 F.3d 998 (11th Cir. 2016)..............................22

Salcedo v. Hanna,
936 F.3d 1162 (11th Cir. 2019)..............14, 15, 16,
19, 20, 31

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)...........1, 2, 9, 15, 29, 30, 32

Strubel v. Comenity Bank,
842 F.3d 181 (2d Cir. 2016) 24

Susinno v. Work Out World Inc.,
862 F.3d 346 (3d Cir. 2017) 17, 18

Tyson Foods, Inc. v. Bouaphakeo,
136 S. Ct. 1036 (2016)..27

United States v. DISH Network L.L.C., No. 17-3111 (7th Cir., argued Sept. 17, 2018) 3

Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037 (9th Cir. 2017) 14, 15, 16, 17, 22

Statutes

18 U.S.C. § 2710(b)(1) 23

28 U.S.C. § 1254(1) 4

47 U.S.C. § 227(b) 14

47 U.S.C. § 227(b)(1) 16

47 U.S.C. § 227(c) 2, 5, 14, 29, 31

47 U.S.C. § 227(c)(3) 31

47 U.S.C. § 227(c)(5) 4, 5, 7, 12, 25

47 U.S.C. § 227(c)(5)(B) 6

47 U.S.C. § 227(c)(5)(C) 6

Pub. L. No. 102-243, 105 Stat. 2394 (1991) 31

Regulations

47 C.F.R. § 64.1200(c)(2) 5

Other Authorities

137 Cong. Rec. S16,205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings) 6

Restatement (Second) of Torts § 652B 32

Restatement (Second) of Torts § 652H 32

WebRecon Stats for Dec. 2018, WebRecon L.L.C. (Jan. 23, 2019), https://tinyurl.com/TCPAstats 28

INTRODUCTION

It sounds like a riddle, but it is a critical legal issue worth huge sums of money: How can you suffer a concrete injury from a telemarketing call if you never answered the phone, never heard it ring, weren't even aware the call was made, and weren't the phone line subscriber?

The decision below authorized recovery under just those circumstances, to the tune of $61 million. A class of 18,000 unidentified people was certified, with each anonymous class member deemed to have standing—to have suffered concrete injury under Article III—in connection with purported violations of the Telephone Consumer Protection Act (TCPA). The only basis for standing was that the person's name was "associated with" a phone number that was listed on the national do-not-call registry and that was dialed by a DISH retailer, thus violating the TCPA. DISH has been ordered to pay some $1200 per call, despite no allegation and no evidence that a single class member (other than the named plaintiff) even knew a violative call occurred.

This ruling deepens a circuit split over how to assess standing under the TCPA, reflects broader confusion about how to determine when a statutory violation establishes Article III standing, and is unquestionably wrong.

In *Spokeo, Inc. v. Robins*, this Court held that Article III does not permit lawsuits to redress statutory violations that cause no actual injury. 136 S. Ct. 1540, 1550 (2016). *Spokeo* concerned provisions of the Fair

Credit Reporting Act (FCRA) that are designed to ensure the accuracy of consumer credit reports. Doubtless those provisions can protect people from real-life harms. But, *Spokeo* recognized, that does not mean that *every* FCRA violation causes harm. Some will, some won't. So *Spokeo* "rejected the premise … 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.'" *Frank v. Gaos*, 139 S. Ct. 1041, 1045 (2019) (quoting *Spokeo*, 136 S. Ct. at 1549).

Section 227(c) of the TCPA is similar in every relevant way. Some statutory violations may cause harm; some surely do not. Whereas *Spokeo* requires "*de facto*" injury—one that "actually exist[s]," 136 S. Ct. at 1548—the courts below dispensed with that requirement. According to the lower courts, a plaintiff could be included in the class even if they didn't answer a phone call, hear the phone ring, or even know that a relevant call was made. (For simplicity's sake, the Petition generally refers to this as "interacting with" an allegedly violative call.) So long as their name was associated with the number that was called at some point in time, they had a cause of action under the TCPA, and that was enough to confer standing. That ruling joins at least three other courts of appeals that have similarly erred, all in conflict with a recent decision of the Eleventh Circuit—which properly recognized that alleging a bare TCPA violation does not automatically establish concrete injury. That division of authority alone justifies this Court's intervention. And review is all the more important because this conflict reflects a deeper and broader rift about

Spokeo—between courts that find injury merely because a statutory violation harms certain types of interests generally, and courts that properly require each plaintiff to show real-world harm.

A fix is especially important because of the stakes. In cases around the country, huge numbers of plaintiffs—many of whom do not even know they've been "harmed" until a lawyer tells them—are aggregated in broad damages class actions without the faintest allegation or evidence of real-world injury. Each violation is then multiplied by significant statutory damage amounts to yield eye-popping liability—not for real-world harms, but for technical violations. It's one thing if state or federal regulators want to police those technical violations (as they did here, extracting penalties for some of the same phone calls). *United States v. DISH Network L.L.C.*, No. 17-3111 (7th Cir., argued Sept. 17, 2018). But private plaintiffs who did not allege and did not show they suffered any actual harm have no constitutional standing to do so.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The decision of the Fourth Circuit is reported at 925 F.3d 643, and reproduced in the Petition Appendix (Pet. App.) at 1a-36a. The district court's order certifying the class is published at 311 F.R.D. 384, and reproduced at Pet. App. 37a-74a. The district court's order denying DISH's motion to dismiss or decertify the class for lack of standing is reported at 168 F. Supp. 3d 843, and reproduced at Pet. App. 75a-80a.

JURISDICTION

The court of appeals entered judgment on May 30, 2019. Pet. App. 1a-2a. On August 19, 2019, the Chief Justice granted DISH's application to extend the time to file a petition for a writ of certiorari to and including October 15, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 227(c)(5) of title 47 of the United States Code provides in relevant part as follows:

> (5) Private right of action
>
> A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection 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 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 up to $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 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.

Section 227 is reproduced in full at Pet. App. 81a-110a. The implementing regulation, 47 C.F.R. § 64.1200(c)(2), is reproduced at Pet. App. 111a-133a.

STATEMENT OF THE CASE

Krakauer Files A Class Action Against DISH For Alleged TCPA Violations

In 1991, Congress enacted the Telephone Consumer Protection Act to combat "abuses of telephone technology" such as "computerized calls dispatched to private homes." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371 (2012). As part of that effort, Congress created the framework for a national do-not-call registry to permit phone line subscribers to opt out of receiving telemarketing calls. 47 U.S.C. § 227(c). Residential telephone subscribers may place their phone numbers on the Registry. 47 C.F.R. § 64.1200(c)(2). Once the subscriber has done so, callers then are prohibited from "initiat[ing] any telephone solicitation to … [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." *Id.* Section 227(c)(5) of the statute then provides a cause of

action to a "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity" in violation of the regulations.

The statute imposes significant penalties. Plaintiffs may seek "actual monetary loss…, or … up to $500 in damages for each such violation, whichever is greater." 47 U.S.C. § 227(c)(5)(B). In short, the statute on its face would permit a plaintiff to claim $500 without proving actual harm. In addition, those damages may be trebled for violations that are knowing or willful. *Id.* § 227(c)(5)(C). Congress provided for substantial statutory damages because it expected TCPA cases to be resolved in "small claims court." 137 Cong. Rec. S16,205-06 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings); *see also Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1152-53 (4th Cir. 1997) (discussing legislative history).

In 2011, Thomas Krakauer received several live phone calls from a company, Satellite Systems Network (SSN), seeking to market DISH's satellite television services. SSN was one of thousands of third-party retailers authorized by contract to market DISH's services. Court of Appeals Appendix (C.A.) 477-78, 764. DISH had instructed SSN, as it instructs all retailers who market its services, to comply with the TCPA. C.A. 781. In addition, it had instructed SSN not to call Krakauer specifically. C.A. 1048. It did so because Krakauer previously had complained to DISH about receiving DISH-related calls from SSN, at which point DISH told SSN not to call Krakauer. C.A. 1036, 1048. SSN called him anyway, contrary to DISH's instructions. Believing the calls

violated the TCPA, Krakauer filed this putative class action—against DISH, notwithstanding that it was SSN who placed the calls. He sought $1500 in trebled statutory damages for each call SSN placed to him and approximately 18,000 other phone numbers between May 1, 2010 and August 1, 2011. Pet. App. 10a, 16a.

The District Court Certifies A Class Defined In Terms Of A Bare TCPA Violation

Class certification was hotly disputed for reasons intimately related to Article III standing.

Krakauer moved to certify a class using a definition that tracked the statutory language—specifically, "all persons … whose telephone numbers were listed on the [do-not-call Registry] … but who received telemarketing calls from [SSN] to promote [DISH] from May 1, 2010 to August 1, 2011." C.A. 80; *compare* 47 U.S.C. § 227(c)(5).

DISH opposed certification (among other reasons) because Krakauer had not provided a mechanism for identifying the class members—that is, a way to match the people who actually received the calls with the numbers SSN called. Nor did he demonstrate how claims involving numerous calls to different people could be proven with common proof. C.A. 129-36. Krakauer responded that identifying class members would be simple. His expert would use SSN's call records to determine what number SSN had called, and then would cross-reference those records against commercial databases that list the names of individuals

historically "associated with" a given number. C.A. 95.

But Krakauer's databases weren't nearly up to the task. First and foremost, the databases often associate *multiple* people with a phone number. C.A. 113, 140, 142. If you fill out a form that asks for a phone number, and the company collecting that information sells it to a database, then the database will "associate" you with the phone number you gave. So a given database may associate a phone number with multiple members of the same family, others who lived in a house long enough to fill out an application (roommate; exchange student; nanny; live-in grandparent), and even former users of the number.

Moreover, SSN's call records didn't and couldn't specify whether any of these people interacted in any way with an allegedly violative call. For some calls, the records merely indicated whom SSN *intended* to call, based on leads SSN had purchased. C.A. 95. For over 4000 numbers, SSN's records didn't even include a name, address, or other potential identifying information of the intended recipient. C.A. 95, 229. And for *no* call did the records identify what person subscribed to the phone line at the time the call was placed, or show who (if anyone) answered the phone, heard it ring, or was home at the time a call came in. C.A. 93-95. But so long as a call to a number was "connected"—even if only because an answering machine picked up—Krakauer's expert would peg that number (and a lucky one of the several people "associated with" it) to be included in the class.

The district court nevertheless certified the class, finding it sufficient that the call records and databases would identify most "persons associated with the[] numbers during the class period." Pet. App. 48a.

Following the decision in *Spokeo*, DISH moved to dismiss the case or decertify the class because numerous class members lacked Article III standing. C.A. 230-37. This was the natural result of the class the district court had certified. Krakauer had attempted to define that class solely on the basis of a bare statutory violation, and the court had permitted him to establish class membership merely by associating phone numbers with names—that is, without showing that any class members were the phone subscribers for particular numbers or had ever actually interacted with any violative call. C.A. 233-35. But a bare statutory violation isn't always enough to establish standing, *see Spokeo*, 136 S. Ct. at 1549, and here, the plaintiffs had not shown anything else. Indeed, the district court specifically acknowledged that class members "*did not necessarily pick up or hear ringing every call at issue in this case*." Pet. App. 78a (emphasis added). That should have been dispositive. Instead, the court determined that each class member suffered injury simply on the theory that calls violating the statute had been made to a phone number with which their name was, or had once been, associated. *Id.*

The District Court Limits The Trial To Proof Of Bare TCPA Violations, And A Jury Finds DISH Liable

At trial, Krakauer did not attempt to prove that any class member (other than him) had ever answered a call, heard the phone ring, or even lived at the home where the phone rang. And the district court never required him to do so. On the contrary, the court "remove[d] from the … trial" any question about who actually received the calls. C.A. 274.

The jury ultimately found DISH liable and awarded $400 for each call placed by SSN. C.A. 508-09. That amounted to some $20 million, which the district court tripled on the ground that the violations had been willful. C.A. 576-79. Because a statutory violation requires a plaintiff to have received two calls, the court awarded each purported class member at least $2400—with many set to receive over $10,000—with no proof that any class member heard their phone ring. C.A. 993.

Following the trial, the district court acknowledged that none of the class members had been identified. For that reason, the court initially declined to enter judgment. C.A. 625-27. It acknowledged that DISH had not had an opportunity to litigate whether identifiable people received the calls. DISH believed no post-trial process could cure the errors from class certification and trial, but nonetheless proposed that each claimant complete a form and submit evidence that they were a subscriber or actually received the calls. C.A. 538-39, 542.

The court rejected DISH's proposal. It concluded that approximately 11,000 class members were adequately identified in Krakauer's records—the same records that only identified individuals "associated with" numbers—and precluded DISH from challenging whether those people had a valid claim. C.A 671. The court did so even though Krakauer's own records identified multiple people as associated with many of those phone numbers, and Krakauer had never provided a way to determine which single person should recover. *E.g.*, C.A. 546-47, 985-91. For the remaining numbers, the court required class members to submit a form that asked only whether "you *or someone in your household* ha[d] this number" during the class period. C.A. 643 (emphasis added).[1]

The Fourth Circuit Holds That Allegations Of A Bare TCPA Violation Establish Article III Standing

DISH appealed. As relevant here, DISH argued that the district court erred in concluding that every class member had established Article III standing. The district court, DISH explained, presumed concrete injury based merely on the allegation of a TCPA violation, and never required Krakauer to demonstrate that any class member was a subscriber or had a real-world interaction with a call.

[1] The district court completed the claims process on July 10, 2019 when it resolved the parties' objections to a special master's determinations about class membership. Dkt. 515. The district court has indicated it will order funds to be disbursed once the Court resolves DISH's petition.

The court of appeals affirmed. Like the district court, it focused on the TCPA cause of action. Like the district court, the panel did not conclude that class members had picked up any call, heard the phone ring, or suffered any actual injury. Even so, it held that every class member had Article III standing because the "class definition hewed tightly to the language of the TCPA's cause of action, and that statute itself recognizes a cognizable constitutional injury." Pet. App. 12a. It determined that injury "accrues … once a telemarketer disregards the registry," and concluded that no further proof of individual harm is required. Pet. App. 16a.

REASONS FOR GRANTING THE PETITION

In decisions colored by their patent frustration with telemarketing calls, the courts below found that every violation of § 227(c)(5) of the TCPA automatically causes concrete injury. That provision prohibits telemarketers from making two calls within one year to a number on the national do-not-call Registry. To bring a private action, those courts held, a plaintiff need not have been injured in any concrete way—need not have been a subscriber, answered a telemarketing call, heard the phone ring, or even lived in the home when the call was placed. So despite the lack of any such allegations or evidence to satisfy Article III here, the court of appeals affirmed the certification of a class comprising some 18,000 members, each of whom will receive thousands of dollars merely because their name is somehow associated with a phone number that was called.

The Fourth Circuit's ruling shrinks Article III's concrete injury requirement to a nullity, and it does so in a context—class action litigation—in which diluting standing requirements is most dangerous. This sprawling TCPA class action is built of nothing but a telemarketer's call records that reveal that a small fraction of its calls transgressed the do-not-call Registry. Without any showing that class members suffered real-world injury, this class action serves not to redress tangible or intangible harms but to police a company's alleged noncompliance with a complicated regulatory scheme—something properly left to the appropriate regulatory authorities. The Fourth Circuit's decision here and others like it will only invite more litigation built on claimed legal harms without actual injury.

This Court should intervene. The Petition should be granted to resolve a circuit conflict concerning whether a bare violation of the TCPA is sufficiently concrete to establish injury-in-fact, as well as to address radically conflicting approaches in the lower courts on the proper application of *Spokeo*, *infra* § I; recurring issues of extraordinary importance, *infra* § II; and the Fourth Circuit's erroneous decision, *infra* § III.

I. The Circuits Are Divided On Whether A Bare Violation Of The TCPA Constitutes Concrete Injury—And Even More Broadly Divided On The Meaning Of *Spokeo.*

A. There is an acknowledged circuit split on whether a bare TCPA violation constitutes concrete injury.

At least five courts of appeals have addressed whether a violation of the TCPA always establishes Article III standing. These decisions do not each address the same provision of the TCPA, but they each confront the same critical legal question presented here: whether a bare statutory violation necessarily creates standing. In *Salcedo v. Hanna*, the Eleventh Circuit held that a TCPA violation does *not* by itself establish concrete injury for purposes of Article III. 936 F.3d 1162, 1165 (11th Cir. 2019). In reaching that conclusion, the Eleventh Circuit expressly split with the Ninth Circuit's decision in *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017). The Second and Third Circuits previously allied themselves with the Ninth Circuit, and now the Fourth Circuit has done so too. Pet. App. 15a. Only this Court can resolve this persistent conflict, and it should do so now and in this case.

1. *Salcedo* was a putative class action that alleged violations of TCPA § 227(b), a provision immediately adjacent to § 227(c)'s do-not-call provisions. This provision prohibits certain telemarketing phone calls and text messages. Salcedo alleged that he received a "multimedia text message" that violated the TCPA. His complaint therefore "facially appear[ed] to state a

cause of action." 936 F.3d at 1166. The case thus presented a *Spokeo* question materially identical to the one presented here: whether "receiving a single unsolicited text message, sent in violation of [the TCPA], [is] a concrete injury in fact that establishes standing to sue in federal court." *Id*. at 1165.

The Eleventh Circuit held that it is not: "[A]n act of Congress that creates a statutory right and a private right of action to sue does not automatically create standing." *Id.* at 1167. A plaintiff still must plead and prove concrete injury, and that "'injury must be *de facto*; that is, it must actually exist,' as opposed to being hypothetical or speculative." *Id.* (quoting *Spokeo*, 136 S. Ct. at 1548).

Applying *Spokeo*, the Eleventh Circuit looked at both "history and the judgment of Congress." *Id.* (quoting *Spokeo*, 136 S. Ct. at 1549). As to the latter, Salcedo argued that "the particular privacy interest Congress has identified is 'the freedom from unwanted robocalls.'" *Id.* at 1170. The court rejected that interest as "too general." *Id.* Similarly "overgeneraliz[ed]," the Eleventh Circuit held, was the Ninth Circuit's equally abstract characterization in *Van Patten*—that "'Congress identified unsolicited contact as a concrete harm.'" *Id.* (quoting *Van Patten*, 847 F.3d at 1043). Rather, Congress was specifically "concerned about intrusive invasions of privacy into the home." *Id.* (internal quotation marks omitted); *see also id.* ("As we have noted, a single unwelcome text message will not always involve an intrusion into the privacy of the home in the same way that a voice call to a residential line necessarily does."). But "Salcedo ha[d] not alleged that he was in his home when he

received [the text] message." *Id.* And because he did not personally suffer an intrusion upon his own residential seclusion, he could not claim that Congress's "judgment" alone established concrete injury.

The court next considered whether Salcedo's "alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* at 1170-72. It found no such relationship. The closest common-law analogue was the tort of "intrusion upon seclusion," but Salcedo had not alleged the sort of actual "intrusion upon the solitude or seclusion of another" that historically has supported such a claim. *Id.* at 1171. Thus, because the alleged harm of Salcedo's bare TCPA violation was different "in kind and in degree" from harms redressed by the tort of intrusion upon seclusion, there was no basis for treating that bare violation as categorically generating concrete injury. *Id.*

2. The Ninth, Third, and Second Circuits each have reached directly contrary results. In those circuits, *any* TCPA violation—no matter the medium of communication, the place in which the communication is received, or the way that the plaintiff interacted with the communication—is sufficient to establish injury-in-fact. The plaintiff class representative need only plead that a violation occurred.

Ninth Circuit. In *Van Patten*, the Ninth Circuit held that a violation of § 227(b)(1), standing alone, categorically causes concrete injury. 847 F.3d at 1043. The court's brief analysis rested principally on the

finding, noted above, that "Congress identified unsolicited contact as a concrete harm." *Id.* Having stated the legal interest in those broad terms, the court had little trouble finding that "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." *Id.* The court seems to have thought that *every* actionable telemarketing communication would "invade the privacy and disturb the solitude of their recipients." *Id.* It thus held that "[a] plaintiff alleging a violation under the TCPA need not allege any additional harm beyond the one Congress has identified." *Id.*

Third Circuit. In *Susinno v. Work Out World Inc.*, the Third Circuit followed *Van Patten*. 862 F.3d 346, 351-52 (3d Cir. 2017). *Susinno* involved a "single prerecorded telephone call." *Id.* at 351. The court found this categorically sufficient to confer standing. It concluded that Congress was broadly focused on "complaints that 'automated or prerecorded telephone calls are a nuisance [and] … an invasion of privacy.'" *Id.* Accordingly, in order to ensure that they allege the "very injury [the statute] is intended to prevent," the plaintiff need only "assert[] 'nuisance and invasion of privacy.'" *Id.*

Regarding the historical component of *Spokeo*'s analysis, the court compared the TCPA to the tort of intrusion upon seclusion—the same common-law comparison rejected in *Salcedo*. But, unlike the Eleventh Circuit, the Third Circuit thought this historical comparison pointed in favor of standing because both the common-law claim and the TCPA concern "inva-

sion of privacy." *Id.* at 351-52. It reached this conclusion notwithstanding that "[t]raditionally, a plaintiff's 'privacy is invaded' for the purpose of an intrusion upon seclusion claim by telephone calls 'only when [such] calls are repeated with such persistence and frequency as to amount to … hounding." *Id.* at 351 (first alteration added). Because the plaintiff claimed that the sole telemarketing call she received was a nuisance and invaded her privacy, the court concluded that she satisfied injury in fact—even though she had not pleaded any real-world harm.

Second Circuit. The Second Circuit adopted *Van Patten* and *Susinno* wholesale in *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85 (2d Cir. 2019). The court found that "text messages … present the same 'nuisance and privacy invasion' envisioned by Congress when it enacted the TCPA." *Id.* at 93. It seems to have believed that *every* unwanted text message invades those interests. And it followed *Van Patten* and *Susinno* in concluding that the TCPA is like the common-law tort of intrusion upon seclusion. *Id.*

3. This case presents the same *Spokeo* question addressed in the cases above: Whether the absent class members' bare allegations of a TCPA violation were sufficient to establish concrete injury for purposes of Article III standing.

Under the rule of *Salcedo*, these class members would lack standing. Like the plaintiff there, the putative class members here pleaded only a bare statutory violation—that SSN placed two calls to a number on the Registry, and that the call was connected. *See* Pet. App. 16a. To be sure, *Salcedo* noted in dicta that

voice calls to a residential line are a greater intrusion on residential seclusion than text messages are. 936 F.3d at 1169. But even if that is true, 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.

Perhaps matters might be different if plaintiffs had pleaded (or proved) that they answered the phone, heard it ring, or otherwise were disturbed or injured by the call. But plaintiffs and the court thought it enough—both to state a cause of action and to establish injury—if *someone* (including someone other than the claimant) had answered, or even if just an answering machine had picked up the call. *Supra* 10-12. And the court did not require them to establish anything about any call, leave aside that they were injured. Instead, it was enough if plaintiffs merely were "associated with" a phone number to which an allegedly impermissible call was made. *Supra* 11. In the Eleventh Circuit, however, a lack of standing would have followed *a fortiori* from *Salcedo*. There, the plaintiff at least claimed to have interacted with the violative text message—"caus[ing] [him] to waste his time answering or otherwise addressing the message," and leaving "both [him] and his cellular phone … unavailable for otherwise legitimate pursuits." 936 F.3d at 1167 (quoting Salcedo's allegations). Here, many class members would not even have known about the calls if it weren't for a lawyer alerting them to this class action.

The Fourth Circuit, however, rejected the standing challenge, thereby concluding that every class

member had a concrete injury and Article III standing. Pet. App. 12a-16a. It asserted that, "[t]o bring suit, the plaintiffs here must have *received* unwanted calls on multiple occasions." Pet. App. 14a (emphasis added); *see also id.* ("[t]he statute requires that an individual *receive* a call on his own residential number, a call that he previously took steps to avoid") (emphasis added). It is of course correct that the statute uses the word "received"—but other than Krakauer himself, there is no evidence that *any* plaintiff "received" a call in the ordinary sense of answering the phone. The panel knew well, as the district court specifically found, that the class members "did not necessarily pick up or hear ringing every call at issue in this case." Pet. App. 78a. Nevertheless, the Fourth Circuit found that each class member had alleged a TCPA violation merely because two calls had been placed to phone numbers with which they were associated. *See* Pet. App. 27a n.3. That was categorically sufficient, the Fourth Circuit held, to establish standing for every class member.

Ultimately, therefore, the court was left to rely on the generalities that *Van Patten* and *Susinno* accepted and *Salcedo* rejected. The Fourth Circuit reasoned that "[o]ur legal traditions … have long protected privacy interests in the home," citing to the tort of intrusion upon seclusion. Pet. App 14a. At the very highest level of generality, that's of course true—but as *Salcedo* explained, such harms to privacy can differ both "in kind and in degree." 936 F.3d at 1171. And here, a plaintiff who never even heard the phone ring because she no longer lived in the home, or wasn't home when an answering machine or another

household member picked up the call, didn't suffer any harm.

These courts' radically different treatment of the standing inquiry in TCPA cases requires the Court's intervention.

B. The circuits are sharply divided over whether *Spokeo* requires proof of actual harm to each plaintiff.

The circuit split over the TCPA is emblematic of a broader post-*Spokeo* divide. Courts are hopelessly conflicted on the proper standard for evaluating whether a statutory violation has produced a concrete injury. In particular, the circuit split described above tracks a divide between two camps: 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. This distinction has proven outcome-determinative in numerous cases.

1. Unlike the Fourth Circuit in the decision below, some courts of appeals properly require plaintiffs to show that *they themselves* suffered (or were likely to suffer) a "concrete injury." *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 913 (7th Cir. 2017). The Seventh Circuit assessed the plaintiff's allegation that the defendant had failed to discard personal information, in violation of the Cable Communications Policy Act. *Id.* This type of violation, he said, generally puts subscribers' privacy at risk. *Id.* at 912. As the

Seventh Circuit explained, however, that is not enough. A plaintiff must point to "concrete injury inflicted or likely to be inflicted on [him] as a consequence" of the particular violation. *Id.* at 913; *accord Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930-31 (8th Cir. 2016).

The Eleventh Circuit understood statutory standing the same way in *Nicklaw v. CitiMortgage, Inc.*, 839 F.3d 998 (11th Cir. 2016). The plaintiff there sued under a New York statute that requires lenders to record the satisfaction of a mortgage by a particular date. *Id.* at 1000. The Eleventh Circuit found no standing—notwithstanding that this statutory requirement is designed to protect a mortgagor's credit and that noncompliance can undermine a mortgagor's interest. *This* plaintiff did not "allege that he lost money," that "his credit suffered," nor "even … that he or anyone else was aware" of the conduct constituting the violation. *Id.* at 1003. Accordingly, he had not satisfied Article III. *Id.*

2. Other courts, by contrast, do not require plaintiffs to show that they themselves suffered any harm. Instead, these courts interpret *Spokeo* to mean that alleging a statutory violation is enough, so long as the alleged violation "present[s] the precise harm and infringes the same … interests Congress sought to protect." *Eichenberger v. ESPN, Inc.*, 876 F.3d 979, 984 (9th Cir. 2017) (quoting *Van Patten*, 847 F.3d at 1043). Most prominently, this approach has been endorsed by the Ninth, Third, and Second Circuits—the very courts, not coincidentally, that find that a bare TCPA violation automatically yields concrete injury, *supra* 16-19.

The Ninth Circuit, for example, has considered standing under the Video Privacy Protection Act, which prohibits a video service provider from disclosing "personally identifiable information" about a person's movie-watching habits. 18 U.S.C. § 2710(b)(1); *see Eichenberger*, 876 F.3d at 983. The plaintiff alleged that the defendant had impermissibly revealed the serial number of the device on which he watched sports videos, and which videos he watched. *Id.* at 981. The Ninth Circuit held that this bare statutory violation established concrete injury: "[*E*]*very* disclosure of an individual's 'personally identifiable information' and video-viewing history offends the interests that the statute protects." *Id.* at 983.

The Third Circuit held likewise in *In re Horizon Healthcare Services Inc. Data Breach Litigation,* 846 F.3d 625 (3d Cir. 2017). Like *Spokeo*, that case arose under the Fair Credit Reporting Act (FCRA). The Third Circuit recognized that "it is possible to read … *Spokeo* as creating a requirement that a plaintiff show a statutory violation has caused a 'material risk of harm' before he can bring suit." *Id.* at 637. And it acknowledged that other courts had read *Spokeo* that way. *Id.* at 637 n.17 (citing *Braitberg*, 836 F.3d at 930). But it declined to require the plaintiff to make any such showing. Because the FCRA's aim was to prohibit "unauthorized dissemination of personal information," *any* such dissemination—no matter the nature of the information, the disclosure, or the effect—constituted concrete injury. *Id.* at 639-40.

The Second Circuit took the same view of standing in a case addressing claims based on a lender's failure to provide required notices under the Truth in

Lending Act. *Strubel v. Comenity Bank*, 842 F.3d 181 (2d Cir. 2016). It did not analyze whether this failure affected the plaintiff in any way. Rather, it reasoned that the statute "serves to protect a consumer's concrete interest in 'avoid[ing] the uninformed use of credit,'" and that "[a] consumer who is not given notice of his obligations is likely not to satisfy them." *Id.* at 190. Whether the non-disclosure harmed *this* plaintiff was beside the point.[2]

3. The circuit conflict concerning the TCPA reflects this very same divide. The Eleventh Circuit in *Salcedo* held that the particular plaintiff before the court needed to show that he himself suffered concrete injury in order to have standing. It was not enough that text messages like the one sent to Salcedo *generally* implicate *the interests* protected by the TCPA. Not all such communications cause such harm, and the plaintiff had not pleaded or proved concrete injury to himself.

The decision below takes the opposite approach—as did cases like *Van Patten*, *Susinno*, and *Melito*. None of them requires a plaintiff to demonstrate that she *actually* suffered the harm the TCPA seeks to pre-

---

[2] Indeed, this divergence in approaches has given rise to a variety of conflicts that reviewing this case likely would resolve. *Compare, e.g.*, *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747 (6th Cir. 2018) (failure to inform creditors that certain disputes must be in writing, thereby violating the Fair Debt Collection Practices Act, establishes concrete injury because this type of violation can harm some consumers), *with Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019) (rejecting *Macy*).

vent. To these courts, the bare fact that a telemarketer placed a call or sent a text that violates the TCPA is enough, regardless of the message's real-world effect. This Court's intervention is sorely needed to address widespread disarray in the lower courts in the wake of *Spokeo*.

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

This case is an ideal vehicle for resolving the question presented, and for clarifying the meaning of *Spokeo*.

1. This case squarely presents the issue of whether a bare statutory violation of the TCPA always produces concrete injury.

The standing defect was laid bare when DISH moved to decertify the class following the decision in *Spokeo*. The class definition tracked the statutory language of § 227(c)(5) of the TCPA, which prohibits two calls within one year to a residential phone number listed on the Registry. The class thus included all persons "(1) whose numbers were on the [Registry] …; and (2) received two calls in a single year." Pet. App. 8a. Subsequently, the court held, determining membership in that class merely required Krakauer to identify some person who was "associated with" the registered phone number in some data source (like LexisNexis). *Supra* 11. As long as SSN called a phone number at least twice within one year, and the call was connected, anyone who Krakauer had identified as associated with the number could recover thousands of dollars.

DISH objected that many such class members had not alleged or shown that they interacted with the telemarketing calls. These class members may not even have been home—or lived at that home—when the calls were placed. The district court agreed, finding that class members "did not necessarily pick up or hear ringing every call at issue in this case." Pet. App. 78a. That has never been disputed—not by Krakauer or the Fourth Circuit—and there has never been proof that any of the 18,000 absent alleged class members here ever interacted with any call at issue.

It is thus undisputed that the district court certified a class of people based solely on allegations of a bare TCPA violation—that is, with no additional allegations of the real-world effects of any telemarketing call. It is further undisputed that, in order to be identified as a class member, a person was not required to show that they interacted with any of the allegedly violative calls. *Supra* 10-11.

This case thus presents a clean vehicle to resolve whether allegations of a statutory violation automatically confer Article III standing.

2. The answer to this question is central to resolving this case. It is dispositive of both class certification and of the validity of the judgment.

Regarding class certification: Because there was no particularized showing of injury for the putative class members, the class must be decertified unless alleging a TCPA violation automatically establishes concrete injury for anyone (and everyone) "associated with" a called number. A class "defined so broadly as

to include a great number of members who for some reason could not have been harmed … is defined too broadly to permit certification." *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824-25 (7th Cir. 2012). As the First Circuit has explained, where numerous alleged class members "in fact suffered no injury," certification is inappropriate unless the plaintiff identifies a way to determine who was injured in a way that is "both administratively feasible and protective of defendant's Seventh Amendment and due process rights." *In re Asacol Antitrust Litig.*, 907 F.3d 42, 52, 53 (1st Cir. 2018). But Krakauer has never proposed a mechanism for determining who actually answered the phone, heard it ring, or was harmed by a call. Reversing the Fourth Circuit's decision would therefore necessitate decertifying the class.

In addition, reversal would require overturning the judgment. An award in a class action "cannot stand" if "there is no way to ensure that [the] damages award goes only to injured class members." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring). Here, however, there is not and never has been any mechanism for determining which class members actually suffered some real-world harm. The trial did not attempt to establish the identity of anyone who actually interacted with a telemarketing call in the real world. C.A. 274. Nor did the claims administration process, which at most attempted to establish that would-be class members lived in the household that received telemarketing calls, regardless of whether or not the alleged class member interacted with any call. C.A. 643.

3. This issue is certain to recur and to be dispositive in future cases. TCPA litigation is booming. About 4000 TCPA complaints are filed each year.[3] These cases are bound to present the same *Spokeo* question over and over again, as defendants push plaintiffs to demonstrate that they suffered some actual, real-world harm, while plaintiffs insist that courts should certify classes based on allegations of bare statutory violations alone.

The issue is not limited to the TCPA. On top of the thousands of TCPA suits, there are tens of thousands more under the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Fair and Accurate Credit Transactions Act, and other class-action favorites that repeatedly present *Spokeo* questions.[4] These questions are not going away. And as long as courts of appeals continue to disagree about whether *Spokeo* requires actual harm to a plaintiff, or merely an allegation of the type of harm the statute is designed to avoid, plaintiffs' counsel will shop for favorable forums, and defendants will face uncertain and massive potential exposure.

The need for clarity is most acute in the context of class actions. Class actions under the TCPA and the other statutes described above are popular for a reason: These statutes authorize significant statutory

[3] In 2017 and 2018 TCPA plaintiffs respectively filed 4380 and 3803 TCPA actions. *See WebRecon Stats for Dec. 2018*, WebRecon L.L.C. (Jan. 23, 2019), https://tinyurl.com/TCPAstats.

[4] Since *Spokeo* was decided, over 500 lower court opinions have addressed *Spokeo* at Westlaw's highest "depth of treatment," and over 2000 have cited the decision.

damages, which successful plaintiffs multiply across large numbers of ostensible violations. Damages quickly rise into the millions or billions of dollars. And "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011). Simply put: "In an era of frequent litigation [and] class actions, … courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

III. The Decision Below Is Wrong.

Finally, review is warranted because the Fourth Circuit misunderstood *Spokeo* and reached the wrong result. The panel erred at every step of the analysis. When properly applied to § 227(c) of the TCPA, *Spokeo* requires a plaintiff to allege more than a bare statutory violation to establish concrete injury.

1. At the outset, the Fourth Circuit answered the wrong question. It began by stating its conclusion:

> The class definition hewed tightly to the language of the TCPA's cause of action, and that statute itself recognizes a cognizable constitutional injury.

Pet. App. 12a. But the question under *Spokeo* is not whether "a statute … recognizes a cognizable constitutional injury" as a general matter. *See* 136 S. Ct. at

1550 (finding that the FCRA "sought to curb the dissemination of false information" but rejecting the notion that every violation implicates that injury). After all, *Spokeo* itself emphasized that a plaintiff does not "automatically satisf[y] 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." *Id.* at 1549; *see id.* at 1550 (While some violations of the FCRA may cause harm, others "may result in no harm.").

A plaintiff therefore has two choices. He can plead and prove that he (and each class member) suffered concrete injury. Krakauer did not do that here. *See* Pet. App. 78a (district court finding that class members "did not necessarily pick up or hear ringing every call at issue in this case"). Or, he can seek to show that *every* violation of the relevant statute produces a concrete injury satisfying Article III. (Many statutes will satisfy this standard easily—for instance, statutes for which a violation necessarily causes tangible injury.) If so, "a plaintiff need not allege any *additional* harm beyond the one identified by Congress." *Spokeo*, 136 S. Ct. at 1544. But if not, the case must be dismissed for lack of standing.

2. The court also erred in its assessment of "history and the judgment of Congress." *Id.* at 1549 (prescribing this inquiry when evaluating whether intangible harm constitutes injury in fact). It conducted these inquiries at such a high level of generality as to render them meaningless.

In analyzing the judgment of Congress, the court observed that "[i]n enacting § 227(c)(5) of the TCPA,

Congress responded to the harms of actual people by creating a cause of action that protects their particular and concrete privacy interests." Pet. App. 14a. But as *Salcedo* explains, this is a "broad overgeneralization." 936 F.3d at 1170. It fails to assess or identify the specific intangible harms that Congress recognized as sufficiently injurious. Certainly it does not show that Congress meant to address a "harm" suffered by people who weren't even home when the call came in or who had only a tangential or prior connection with the phone number in question.

The proper analysis reveals that Congress's focus was far narrower. Congress did not view *all* telemarketing calls as necessarily intrusive; it found that "*[u]nrestricted* telemarketing … *can be* an intrusive invasion of privacy." Pub. L. No. 102-243, § 2, ¶¶ 5, 6, 105 Stat. 2394, 2394 (1991) (emphases added). That is why § 227(c) does not ban all telemarketing calls. Instead, Congress created the Registry, designed to protect the privacy of "residential subscribers *who object to receiving telephone solicitations*." 47 U.S.C. § 227(c)(3) (emphasis added). A person therefore can be injured under § 227(c) *only* by being subjected to a telemarketing call they took steps to avoid.

Nor does history support the notion that every violation of the TCPA produces concrete injury. Like *Van Patten*, the decision below invoked the tort of intrusion upon seclusion, noting that "[o]ur legal traditions … have long protected privacy interests in the home." Pet. App. 14a. But it is not enough merely to invoke a common-law tort that addresses similar concerns. That is clear from *Spokeo* itself, which noted that the common-law tort of slander per se requires

no showing of harm. 136 S. Ct. at 1549. Unlike slander per se, the common law does not permit recovery for intrusion upon seclusion without showing harm. *See* Restatement (Second) of Torts § 652H (recognizing damages "to recover … for" "harm to … interest in privacy," "mental distress," or "special damage"); *id.* cmt. a (recognizing entitlement to recover for "harm to the particular element of … privacy that is invaded," *e.g.*, "the deprivation of … seclusion"). Nor does the common law recognize a cause of action at all for a single isolated phone call, knock at the door, or unwanted bit of mail. *See* Restatement (Second) of Torts § 652B cmt. d ("there is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion, or even two or three"). So while it is true that the common law protects against intrusion on seclusion, it is not true that a bare violation authorizes suit without a showing that harm resulted. History belies the notion that a bare statutory violation of the TCPA necessarily yields concrete injury.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

Eric A. Shumsky
Kelsi Brown Corkran
Jeremy R. Peterman
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
Peter A. Bicks
Elyse D. Echtman
John L. Ewald
Christopher J. Cariello
Paul David Meyer
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

October 15, 2019