No. 22-_____

In The
Supreme Court of the United States

VISALUS, INC.,

Petitioner,

v.

LORI WAKEFIELD, individually and on behalf of all others similarly situated,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises from the intersection of this Court's opinion in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), with a class action lawsuit under the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227. *TransUnion* limited Article III standing by holding that all plaintiffs in a class action must have suffered a "concrete injury in fact"—not just a bare statutory violation—in order to bring suit in federal court. Petitioner ViSalus, Inc. ("ViSalus") was sued in 2015 by named plaintiff Lori Wakefield, a former ViSalus promoter, on behalf of herself and a class of others who had provided their phone numbers to ViSalus and consented to receive marketing communications, but whose written consent did not meet the technical requirements of a newly adopted FCC regulation. Plaintiffs claimed only statutory damages. The harm from receiving a phone call after opting in to a marketing list is far from "concrete," and the impact of *TransUnion* on class action lawsuits brought under the TCPA has been assessed unevenly by federal courts nationwide, creating a conflict between the Ninth and Eleventh Circuits. The question presented is:

Whether, in light of *TransUnion*, receipt of a phone call after opting in to receive marketing communications is a "concrete injury in fact" sufficient to confer Article III standing for purposes of a TCPA action.

PARTIES

The following individuals or entities are or were parties to the proceedings below:

ViSalus, Inc.

Lori Wakefield, individually and on behalf of all others similarly situated

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 14(b)(ii) and 29.6, Petitioner states as follows:

No parent or publicly traded corporation owns 10% or more of the stock of ViSalus, Inc.

STATEMENT OF RELATED PROCEEDINGS

This case arises from, and is related to, the following proceedings in the U.S. District Court for the District of Oregon and the U.S. Court of Appeals for the Ninth Circuit:

Wakefield v. ViSalus, Inc., No. 3:15-cv-1857, U.S. District Court for the District of Oregon, order denying post-trial motion to decertify class entered August 21, 2019; order denying post-trial motion challenging statutory damages entered August 14, 2020; judgment entered August 27, 2020; order denying renewed motion for judgment as a matter of law and for new trial entered February 16, 2021.

STATEMENT OF RELATED PROCEEDINGS
—Continued

Wakefield v. ViSalus, Inc., No. 21-35201, U.S. Court of Appeals for the Ninth Circuit, opinion issued October 20, 2022.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Petitioner ViSalus, Inc. ("ViSalus") petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in *Wakefield v. ViSalus, Inc.*, No. 21-35201, 41 F.4th 1109 (9th Cir. 2022).

OPINIONS BELOW

The Ninth Circuit's opinion of October 20, 2022 is published at 41 F.4th 1109 and is reproduced at App. 1 to App. 31. The Oregon district court's February 16, 2021 order denying ViSalus's renewed motion for judgment as a matter of law and for a new trial is unpublished and is reproduced at App. 32 to App. 42. The district court's August 27, 2020 judgment is unpublished and is reproduced at App. 43 to App. 45. The district court's August 14, 2020 order denying ViSalus's post-trial motion challenging statutory damages is unpublished and is reproduced at App. 46 to App. 63. The district court's August 21, 2019 order denying ViSalus's motion to decertify the class is unpublished and is reproduced at App. 64 to App. 92.

STATEMENT OF JURISDICTION

The U.S. Court of Appeals for the Ninth Circuit issued its opinion on October 20, 2022. ViSalus applied for and was granted an extension of time in which to file a petition for writ of certiorari in this matter to and

including March 19, 2023. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, provides in relevant part: "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" 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, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted by rule or order by the Commission under paragraph (2)(B)." 47 U.S.C. § 227(b)(1)(B).

STATEMENT OF THE CASE

I. Factual Background

The facts of this case are straightforward. ViSalus is a direct-to-consumer personal health product company that uses a community of promoters to market and distribute its products. App. 7. Customers and promoters join the ViSalus community by voluntarily filling out an enrollment application on which they can voluntarily provide their phone number and set their

communication preferences. ViSalus uses this dataset—not a purchased list of phone numbers or a random number generator—to create call lists for its communications campaigns. *Id*.

Named plaintiff and Respondent Lori Wakefield signed up to be a ViSalus promoter in 2012, and voluntarily provided her phone number on her enrollment application. App. 8. She terminated her relationship with ViSalus in 2013. *Id*. Between 2012 and 2015, ViSalus engaged in a "win back" campaign, by which it placed calls to customers and promoters offering discounts and special savings on further purchases of ViSalus products. *Id*. Some calls contained prerecorded messages. *Id*. Wakefield received promotional "win back" calls in April 2015, at the phone number she provided to ViSalus in 2012. *Id*.

II. Procedural History

In October 2015, Wakefield brought claims against ViSalus under the TCPA on behalf of herself and thousands of ostensible "class members" whom she alleges received automated "win back" calls from ViSalus without their "prior express written consent," as that term is defined in FCC regulations effective October 16, 2013. App. 5-7. On June 23, 2017, the district court granted certification of the "Robocall Class" consisting of:

> All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus's products

> or services; (2) where such call featured an artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of *prior express written consent* to place such call at the time such call was made.

App. 8-9 (emphasis added). The class is estimated to include over 800,000 members. App. 88. No serious effort has been made to date to identify absent class members, nor to establish that any class member besides Wakefield actually considered a call unwanted when it was received. It was not disputed that all class members, including Ms. Wakefield, had voluntarily provided their phone numbers to ViSalus and had provided some form of consent to receive marketing and promotional communications from ViSalus. The class allegations were only actionable under an October 2013 change in the FCC regulations requiring a heightened form of consent, namely "prior express written consent."[1] ViSalus petitioned for a retroactive

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[1] When the questioned calls in this case were made, the FCC's regulations enforcing the TCPA required callers using an automated voice recording for telemarketing calls to obtain a signed written consent agreement from any call recipient specifically disclosing that calls may be made for telemarketing purposes and may contain an automated voice—the "prior express written consent" rule. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1833 ¶ 7 (2012). Prior to this heightened standard becoming effective on October 16, 2013, call recipients were deemed to have given "prior express consent" by simply providing their phone number to the callers, as long as the subject matter for which the number was provided "relates" to the subject calls. *See Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1044-45 (9th Cir. 2017).

waiver of the "prior express written consent requirement in September 2017. App. 5-7.

In April 2019, while the petition for a retroactive waiver was pending, the matter went to a three-day jury trial. App. 69. On April 12, 2019, the jury returned a verdict finding that ViSalus had violated the TCPA by making 1,850,436 telemarketing calls without satisfying the FCC's "prior express written consent" requirement. App. 3, App. 47.

On June 13, 2019, the FCC granted ViSalus's petition for a retroactive waiver of the "prior express written consent" rule for calls made on or before October 7, 2015, where some written form of consent was obtained prior to October 16, 2013, the date the heightened requirement was effective. App. 10-11, App. 72. ViSalus moved for a new trial and judgment as a matter of law on this and other grounds, but was denied. App. 32-42. The trial court awarded $925,220,000 in statutory damages, which at the time was the largest TCPA award in history. App. 47.

ViSalus timely appealed the judgment, the denial of its post-trial motions, and the damages award to the Ninth Circuit. In particular, ViSalus pointed to this Court's intervening decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) (class action plaintiffs must show concrete injury in fact in order to have Article III standing; mere technical statutory violation does not suffice), to argue that Plaintiffs had not shown that every member of the class had standing to sue, and that accordingly the class should not have been

certified. ViSalus also argued that the jury should have been permitted to consider evidence that Plaintiffs had consented to receive calls, and that the nearly $1 billion damages award was unconstitutional.

Following full briefing, the matter was argued orally on May 11, 2022. On October 20, 2022, this Court, in a published opinion, affirmed the judgment, finding in particular that the statutory violations claimed by Plaintiffs were analogous to the common-law tort of invasion of privacy and therefore Plaintiffs had Article III standing to sue. App. 1-19. The Court, however, vacated the damages award on constitutional grounds and remanded the matter for further proceedings in the district court on that issue. App. 30-31. The mandate is currently stayed pending review in this Court.

REASONS FOR GRANTING THE PETITION

This Court held in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), that all plaintiffs in a class action must have suffered a "concrete injury in fact" in order to have Article III standing. Whether and when receipt of a marketing phone call to which one has given some form of consent constitutes a "concrete injury in fact" under *TransUnion* is an issue that has divided the circuit courts of appeal and created uncertainty for businesses nationwide.

This case is an ideal vehicle to settle the issue. It is undisputed that the only "harm" suffered by the

plaintiffs in this case was receiving a phone call from a company of which they had become a promoter or purchasing customer, voluntarily provided their number, and opted in to receive marketing communications. The enrollment form ViSalus used for marketing opt-ins merely failed to meet a technical requirement of a 2013 FCC regulation, which in any event the FCC later retroactively waived. Sole named plaintiff Lori Wakefield conceded she had no claim for compensatory damages, and instead sought only statutory penalties. No testimony was heard from any other putative class member. If ever there was a bare statutory violation without a concrete injury in fact standing behind it, this is it. The result was that ViSalus was smacked with what was at the time the largest damages award in TCPA history, totaling close to $1 billion, without a showing that any of the class members were actually harmed by the conduct charged.

TCPA class actions such as this one are on a collision course with *TransUnion*, which denies Article III standing for claims arising from a bare statutory violation. This Court should step in to give much-needed guidance on the showing of actual harm required to confer Article III standing on a putative TCPA plaintiff.

I. Standard for Granting Petition

In deciding whether to grant a petition for a writ of certiorari, the Court generally considers whether:

> . . . a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . ;
>
> [or]
>
> . . . a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court.

S. Ct. R. 10(a), (c). Both prongs are satisfied here, for the reasons set forth below.

II. The Ninth Circuit's Ruling Is Inconsistent with *TransUnion*

A. The *TransUnion* Decision's Implications for TCPA Class Actions

The holding of *TransUnion* put significant limitations on the ability of class action plaintiffs to sue based on statutory violations. Congress may "elevate to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law," but Congress "may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *TransUnion*, 141 S. Ct. at 2205 (citations omitted). This is so because Article III standing requires a concrete injury even in the context of a statutory violation, and 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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *see also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620-21 (2020) (same); *Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (per curiam) (vacating and remanding Ninth Circuit order affirming class certification and settlement under Stored Communications Act for further proceedings addressing Article III standing in light of *Spokeo*).

To determine whether an injury elevated by Congress is sufficiently "concrete" to confer Article III standing, a court must analyze (1) whether the alleged harm has a "close relationship" to a harm "traditionally" recognized as a basis for a lawsuit in American courts, and (2) the "instructive" view of Congress, and its ability to elevate concrete de facto injuries that were previously insufficient under common law to legally cognizable harms. *TransUnion*, 141 S. Ct. at 2204.

TransUnion involved a class of plaintiffs whose credit reports contained erroneous information labeling them as potential terrorists, causing them to sue for violations of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. *TransUnion*, 141 S. Ct. at 2200. Only a subset of the class had actually had reports containing the erroneous information disseminated to third parties. *Id*. at 2202. The Court ruled that the 1,853 class members whose inaccurate credit reports were disseminated to third parties had standing

because the plaintiff established the harm they suffered (being labeled a "potential terrorist" to a third party) had a "close relationship" with the concrete reputational harm "traditionally" associated with the longstanding common law tort of defamation. *Id*. at 2209-10. The remaining purported class members did not have standing because they had not shown a concrete "injury in fact." Unlike the analog between the harm suffered by those class members whose information was disseminated, "there is no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury." *Id*. at 2210 (citing *Owner-Operator Indep. Drivers Ass'n v. United States DOT*, 879 F.3d 339, 344-45 (2018)). "The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm." *Id*.

Moreover, the Court observed that in a class action lawsuit that proceeds to trial, even in the context of a statutory violation, plaintiffs bear the burden to establish through adequate evidence that every member of the class suffered a concrete injury in fact. *Id*. at 2190 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). This is true at every stage of the litigation, including post-trial:

> As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing. Every class member must have Article III standing in order to recover individual damages. Article III does not give federal courts the power to order relief to

> any uninjured plaintiff, class action or not. Plaintiffs must maintain their personal interest in the dispute at all stages of litigation. A plaintiff must demonstrate standing with the manner and degree of evidence required at the successive stages of the litigation. . . . Therefore, in a case like this that proceeds to trial, the specific facts set forth by the plaintiff to support standing must be supported adequately by the evidence adduced at trial. And standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press. . . .

TransUnion, 141 S. Ct. at 2207-08 (quotes and citations omitted). Thus, although the parties both acknowledged and this Court assumed that FCRA violations had occurred as to all plaintiffs, because a post-trial analysis of the evidence showed that standing had *not* been established as to all class members, the judgment was reversed and the matter remanded for reconsideration of class certification. *Id*. at 2214.

B. TCPA Violations Are Not Inherently Concrete Injuries in Fact

This Court's holding in *TransUnion* has significant implications for the viability of TCPA class actions like this one. Like the FCRA, the TCPA creates a statutory cause of action for consumers to sue and recover statutory damages for certain violations. 47 U.S.C. § 227(b)(3)(B). And, like the FCRA, violations of the TCPA by themselves are not necessarily analogous to any harm traditionally remediable at common law.

The evidence ViSalus produced at trial establishes the calls in question were not unsolicited, but rather were made with some form of consent. This was not disputed by Plaintiffs. Plaintiffs merely proved that ViSalus did not obtain consent from the class members in the form required by the FCC's "prior express written consent" rule (and subsequently waived as to ViSalus). As in *TransUnion*, there is no harm that traditionally serves as the basis for litigation in American courts that is analogous to receiving a telephone call for which one consented, but not in the form newly required by federal regulation (and subsequently waived by the FCC as to ViSalus).

The Ninth Circuit found standing based on an analogy to invasion of privacy or intrusion upon seclusion. App. 15-16 & n.6. Its analysis relies heavily on *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037 (9th Cir. 2017), decided before *TransUnion*. In *Van Patten*, the plaintiff had provided his phone number to a gym when applying for membership. *Id*. at 1040. Later, after terminating his membership, he received two unwanted text messages inviting him to rejoin. *Id*. at 1041. The Ninth Circuit concluded the plaintiff had Article III standing because "Congress identified unsolicited contact as a concrete harm, and gave consumers a means to redress this harm," and noted that, in its view, a TCPA plaintiff "need not allege any additional harm beyond the one Congress has identified." *Id*. at 1043. Ultimately, *Van Patten*'s substantive holding was to find that the plaintiff had consented to receive the text messages at issue and had

not revoked his consent. *Id*. at 1046-1048. Therefore, summary judgment for defendants was appropriate. *Id*. at 1048.

Van Patten's jurisdictional holding is in conflict with *TransUnion*. In particular, *Van Patten*'s assertion that mere Congressional codification of a statutory harm and a means to redress it are sufficient to confer Article III standing is no longer good law after *TransUnion*. This Court should grant this petition to make clear that *Van Patten* is overruled and to ensure that courts do not erroneously continue to follow it, as the Ninth Circuit did here.

It is not enough to blithely conclude, as the Ninth Circuit did here, that the analogous common-law injury to any TCPA violation, no matter how technical, is an invasion of privacy. This is particularly true since *Van Patten* itself found that a win-back communication to someone who had voluntarily provided his phone number, like the ones at issue here, was not actually even violative of the TCPA. Instead, the Court must look at the evidence presented at trial to determine whether all class members suffered the requisite concrete injury in fact. That analysis was not done, and that showing was not made.

The Ninth Circuit assumed without explanation that receipt of a single automated telemarketing call is a concrete injury sufficient to confer Article III standing. App. 15-16. As discussed below, there is a growing circuit split on that issue, with the Eleventh Circuit in particular having found that a single unsolicited

automated communication is *not* sufficiently concrete or injurious to confer standing. But this argument also misses the import of *TransUnion*'s holding. A telephone call is not unsolicited, and therefore is not harmful, when the called party provided consent for it, as the class members did in this case.[2] Even assuming that receipt of one unsolicited phone call may truly be a concrete harm, that does not mean that a phone call made with ordinary consent but without "prior express written consent" as defined by a subsequently waived FCC regulation is also a concrete harm with an analog to something traditionally remediable at common law. As the *Van Patten* court itself noted: "The TCPA establishes the substantive right to be free from *certain types* of phone calls and texts *absent consumer consent*." 847 F.3d at 1043 (emphasis supplied). Implicit in this holding is that calls made with consent are not unsolicited and do not implicate the privacy interests Congress intended to protect, or the harm that Congress intended to elevate to be legally cognizable under the TCPA. There is no traditional privacy interest involved in ensuring compliance with an FCC regulation that, in any event, was later waived. This is precisely the type of bare statutory violation without concrete

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[2] The Ninth Circuit found that ViSalus waived consent as an affirmative legal defense (because the consent given admittedly did not comport with the October 2013 regulation requiring "prior express written consent"). App. 16-App. 17. The undisputed fact that Plaintiffs voluntarily provided their phone numbers to ViSalus, however, is relevant to the question of whether Plaintiffs showed each class member suffered a concrete injury in fact, as required for Article III standing.

injury for which *TransUnion* holds that standing is absent.

C. This Case Is an Excellent Vehicle to Clarify the Threshold Level of Harm Necessary to Bring a TCPA Action

By virtue of the interstate communication technology involved, TCPA questions are among the most frequently litigated in federal courts and this Court. This Court has opined on the TCPA in six separate opinions since 2010, including one opinion every year for the three years from 2019 to 2021. *See Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1167 (2021) (To qualify as an "automatic telephone dialing system," a device must have the capacity either to store a telephone number using a random or sequential generator or to produce a telephone number using a random or sequential number generator); *Barr v. Am. Ass'n of Political Consultants*, 140 S. Ct. 2335, 2347 (2020) (government-debt exception to robocall restriction unconstitutional content-based restriction on speech); *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019) (vacating ruling that Hobbs Act compelled district court to follow FCC's interpretation of TCPA and remanding for further proceedings).[3]

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[3] The others are *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 136 S. Ct. 663 (2016) (unaccepted settlement offers do not moot plaintiff's TCPA action; federal government contractors do not share government's immunity from liability and litigation); *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 132 S. Ct. 740 (2012) (federal courts have concurrent jurisdiction over private actions

TransUnion is a watershed for class-action claims based on alleged statutory harms, and it raises obvious questions about the viability of certain types of class action lawsuits under the TCPA. Receipt of a single phone call from a business to which one voluntarily provided a phone number is not obviously inherently harmful, and violates no particular established legal interest on the part of the recipient.

This case is a perfect vehicle to address the impact of *TransUnion* on TCPA class actions, and in particular to set standards for what level of harm each plaintiff must show in order to have standing to sue. ViSalus undisputedly obtained some form of consent from each plaintiff, who provided his or her phone number voluntarily and understood it was for marketing purposes. ViSalus made over a million calls to an estimated 800,000 or more recipients, meaning that a significant number of class members likely received only a single call. Many of those were likely ignored, or even welcomed. We do not know, because the lower court did not require any showing of actual harm or even inconvenience to Wakefield or any other putative absent "class member." The TCPA violations arise solely from the difference between ordinary consent and "prior express written consent" as defined by the FCC. Plaintiffs claimed only statutory penalties, and sought no compensatory damages whatsoever. This is a clear

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brought under the TCPA); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S. Ct. 1431 (2010) (Fed. R. Civ. P. 23 supersedes state procedural law barring class actions under TCPA).

example of a bare statutory harm that has no analog to a traditional legal wrong. The Court should grant certiorari in order to address the impact of *TransUnion* on cases brought under the TCPA.

III. The Circuits Are Split on the Showing of Harm Required to Maintain Standing Under the TCPA

The Ninth Circuit's analogy with invasion of privacy or intrusion upon seclusion is in conflict with a line of case law out of the Eleventh Circuit holding that receipt of a single unwanted communication is not a sufficiently tangible injury to confer Article III standing. This Court should step in to resolve this split and clarify what threshold showing of harm is needed to establish a "concrete injury in fact" in putative class actions under the TCPA.

Shortly before the instant case was decided, in July 2022, the Eleventh Circuit applied *TransUnion* to vacate a TCPA class certification and settlement in a similar case for lack of standing. *See Drazen v. Pinto*, 41 F.4th 1354, 1362-63 (11th Cir. 2022). In *Drazen*, the named plaintiff claimed to have received unwanted text messages and cellular phone calls from a telemarketer using an autodialer system, and sued on behalf of herself and others. 41 F.4th at 1355-56. The relevant class was defined to include all persons who had received an unwanted cellular phone call or text message from the defendant using the autodialing system over an approximately two-year period. *Id*. at 1362.

The *Drazen* court considered standing *sua sponte* and observed that, in light of *TransUnion* and *Gaos*, 139 S. Ct. at 1046, and according to circuit precedent, receipt of a single text message was not a sufficiently concrete harm to confer Article III standing. *Id*. It also observed that "[c]ell phone calls may involve less of an intrusion than calls to a home phone," and suggested therefore that the receipt of a single cell phone call might not be sufficient to confer standing either, although that question had not been briefed and was not before it. *Id*. This observation is consistent with preexisting Eleventh Circuit precedent requiring *more* than a single phone call to establish an invasion of privacy or similar tort. *Salcedo v. Hanna*, 936 F.3d 1162, 1171 (11th Cir. 2019) (pre-*TransUnion*, noting that tort of invasion of privacy or intrusion on seclusion requires that the intrusion be "substantial" and "strongly object[ionable]," and that "one, two, or three phone calls" is not enough); *see also Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1269 (11th Cir. 2019) ("receipt of *more than one* unwanted phone call is enough to establish injury in fact.") (emphasis supplied).

Because *TransUnion* requires that all class members have standing, and because the *Drazen* class included some putative members who did not (i.e. those who received a single text message, and potentially also those who received no more than one cell phone call), the Eleventh Circuit held that it was without subject matter jurisdiction. *Drazen*, 41 F.4th at 1363. Thus, the class certification and settlement were vacated. *Id*.

As discussed above, the Ninth Circuit's ruling on standing in the instant case relies upon an analogy to invasion of privacy. But, in stark contrast to *Drazen*, the harm from such quasi-invasion was assumed, rather than concretely identified. The class here was not defined by the number or type of communications or the level of harm to privacy (or any other traditionally recognized interest) created thereby. There was no distinction between calls made to cellular phones versus landlines, or between recipients of one call versus several calls. Rather, the class was defined by the presence or absence of compliance with the FCC's heightened consent standard: "All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus's products or services; (2) where such call featured an artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of *prior express written consent* to place such call at the time such call was made." App. 9 (emphasis supplied). Indeed, by its plain terms the class does not exclude current or former ViSalus promoters who subjectively consented to the calls and did not consider them unwanted.

As discussed *supra*, *TransUnion* itself, by its own express terms, demands a "concrete," recognizable harm in order to confer Article III standing. Even conduct that is surely unwanted and objectionable, such as being erroneously labeled a potential terrorist, does not automatically meet this standard. *TransUnion*, 141 S. Ct. at 2208. Technical noncompliance with an October 2013 FCC regulation certainly does not

qualify as a "concrete" harm "traditionally" remediable at law, for the reasons ViSalus argued above.

The Eleventh Circuit's approach, by contrast, is in harmony with *TransUnion*, and if adopted here would have caused ViSalus to prevail. Had the "harm" to Plaintiffs been quantified here as it was in *Drazen*, it is clear that at least some putative class members lack standing, either because they did not in fact consider the calls unwanted or because they received only a single call whose intrusion was too minimal to invoke Article III. Thus, applying the Eleventh Circuit's interpretation of *TransUnion* here would destroy class certification for lack of standing. This is precisely the type of rift between the circuits that cries out for Supreme Court review and clarification.

There is also suggestion from other circuits that putative TCPA class members who do not consider the subject electronic communications harmful do not have standing to sue. In *Urgent One Med. Care v. Co-Options, Inc.*, No. 21-CV-4180 (JS) (SIL), 2022 U.S. Dist. LEXIS 180889, at *14-*15 (E.D.N.Y. June 1, 2022), Defendant moved to dismiss a putative class action under the TCPA's "junk fax" provision, 47 U.S.C. § 227(b)(1)(C), for lack of standing under *TransUnion*. In support of their motion, they adduced declarations of four putative class members who stated that they had "agreed to receive fax offers" like the faxes at issue. Although the district court denied the motion as to the class as a whole, it disqualified the four declarants from joining the proposed TCPA class, implicitly finding that having agreed to receive such communications

may defeat any claim to the type of concrete and particularized injury in fact needed to establish Article III standing.

As the Ninth Circuit begrudgingly recognized in its opinion here, communications technology has created means of violating the plain terms of the TCPA without creating the level of per-violation damages contemplated by the statute's drafters. App. 30 (noting "vast cumulative damages can be easily incurred" at the touch of a button). In the wake of *TransUnion*, a plaintiff's standing to bring suit for statutory violations causing minimal or nebulous "harms" must be revisited and some threshold established for plaintiffs to enter federal court. While the Ninth Circuit found an inherent analogy to the tort of invasion of privacy for every technical violation of the TCPA, the Eleventh Circuit has demanded some quantification of actual harms and a showing that they are more than de minimis. The resulting split of authority and the technical nature of the violations in this matter cries out for this Court's review.

CONCLUSION

For the foregoing reasons, ViSalus's petition for a writ of certiorari should be granted.

Respectfully submitted,

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