

**In the Supreme Court of the United States**

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No. 23 \_\_\_\_

DIRECT ENERGY, LP, APPLICANT

*v.*

MATTHEW DICKSON, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED

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**APPLICATION FOR AN EXTENSION OF TIME  
TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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To the Honorable Brett M. Kavanaugh  
Associate Justice of the Supreme Court of the United States  
and Circuit Justice for the Sixth Circuit

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Pursuant to Rules 13.5, 30.1, and 30.2 of this Court, counsel for Direct Energy, LP respectfully requests a 60-day extension of time, to and including October 30, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. Unless extended, the time for filing a petition for a writ of certiorari will expire on August 30, 2023. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

1. This case presents an important question of Article III standing—namely, whether a plaintiff can establish a concrete injury in fact by identifying a common-law analogue to an alleged harm, regardless of whether the alleged harm differs in degree to harms actionable at common law. In the decision below, the Sixth Circuit deepened an acknowledged circuit split and held that an alleged harm, however small, can constitute a concrete

injury as long as it is “similar in *kind*” to a harm actionable under common law. *Dickson v. Direct Energy, LP*, 69 F.4th 338, 348 (6th Cir. 2023) (emphasis in original). The court thus held that receipt of a single unsolicited voicemail was similar in kind to the harm suffered from an intrusion upon seclusion, and therefore constituted a concrete injury under the Telephone Consumer Protection Act’s prohibition against unsolicited automated calls. *Id.* at 340-41, 348-49.

Like the Sixth Circuit, the Second, Third, Fifth, Seventh, Eighth, and Ninth Circuits have held that an alleged harm need only be similar in kind, and not in degree, to a harm actionable under common law to constitute a concrete injury. Thus, the Third and Eighth Circuits have held that receiving only one or two unsolicited calls and voicemails still constitutes a concrete injury under the Telephone Consumer Protection Act. *See Susinno v. Work Out World Inc.*, 862 F.3d 346, 350-52 (3d Cir. 2017); *Golan v. FreeEats.com, Inc.*, 930 F.3d 950, 957-59 (8th Cir. 2019). Similarly, the Second, Fifth, Seventh, and Ninth Circuits have held that receiving even one or two unsolicited text messages gives rise to a concrete injury. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92-93 (2d Cir. 2019); *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 689-93 (5th Cir. 2021); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 461-63, 463 n.2 (7th Cir. 2020) (Barrett, J.); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).

By contrast, the Eleventh Circuit has repeatedly held that an alleged harm that “bear[s] a passing resemblance” to a harm actionable under common law, yet “differ[s] so significantly in degree,” does not constitute a concrete injury. *See Salcedo v. Hanna*, 936 F.3d 1162, 1172 (11th Cir. 2019) (receipt of unsolicited text does not constitute concrete

injury in fact); *Grigorian v. FCA US LLC*, 838 F. App'x 390, 392-94 (11th Cir. 2020) (per curiam) (receipt of unsolicited ringless voicemail does not constitute concrete injury in fact); *Drazen v. Pinto*, 41 F.4th 1354, 1362 (11th Cir. 2022) (reaffirming *Salcedo*), *reh'g en banc granted and opinion vacated*, 61 F.4th 1297 (11th Cir. 2023) (oral argument held on June 13, 2023).

This circuit split is well-recognized. *See, e.g., Gadelhak*, 950 F.3d at 461 (noting that whether plaintiffs have standing after receiving an unsolicited automated text is a question “difficult enough to have divided the circuits”); *Cranor*, 998 F.3d at 692-93 (recognizing the circuit split).

2. Applicant Direct Energy, LP provides electricity and natural gas services to homes and small businesses, and offers maintenance and protection plans for residential heating, cooling, electrical, and plumbing systems. Direct Energy retained a third-party marketing company, Total Marketing Concepts, to advertise its services. Mr. Dickson received an unsolicited ringless voicemail from Total Marketing Concepts, and his iPhone transcribed that voicemail into text. *Dickson v. Direct Energy, LP*, 2022 WL 889207, at \*3 (N.D. Ohio Mar. 25, 2022). Mr. Dickson was never charged for the voicemail. *Id.* His “only recollection appears to be that at one point in time he read the [voicemail] and subsequently forwarded it on to [his] counsel.” *Id.* Nevertheless, Mr. Dickson filed a class action lawsuit, asserting that Direct Energy had violated the Telephone Consumer Protection Act. *See* 47 U.S.C. § 227(b). He sought \$500 in statutory damages for every unsolicited ringless voicemail that Total Marketing Concepts allegedly distributed on Direct Energy’s behalf,

with potential treble damages for willful violations bringing the total per violation up to \$1,500. *See id.* § 227(b)(3).

3. On March 25, 2022, the U.S. District Court for the Northern District of Ohio dismissed Mr. Dickson’s complaint for lack of standing. The court noted that circuits are “divided over the issue of standing as it relates to [text messages and ringless voicemails]” and evaluated a “plethora of authorities reaching varying conclusions.” *Dickson*, 2022 WL 889207, at \*2-3. The court held that Mr. Dickson’s allegation was “the ‘bare procedural violation’ that *Spokeo* has held cannot give rise to standing.” *Id.* at \*3 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016)). The court observed that “Dickson’s sole alleged harm appears to be the *de minimus* [sic] time he took to read the [ringless voicemail], a time so limited that he did not even recall its contents.” *Id.*

The Sixth Circuit reversed. 69 F.4th at 349. The court “d[id] not agree” with the Eleventh Circuit’s approach to “measur[ing] . . . concreteness.” *Id.* at 347. It thus “diverge[d]” from its sister court, holding instead that Mr. Dickson had “alleged an intangible harm that bears a sufficiently close relationship to the traditional common law tort of intrusion upon seclusion.” *Id.* at 346, 348. The Sixth Circuit reasoned that any alleged intrusion, no matter how small, sufficiently resembled an intrusion upon seclusion because “the inquiry centers on the *kind* of harm at issue rather than the *degree* of that harm.” *Id.* at 345-46.

4. Counsel for applicant respectfully requests a 60-day extension of time to and including October 30, 2023, within which to file a petition for a writ of certiorari. Undersigned counsel did not represent the applicant below and was retained after the Sixth Circuit’s

decision. An extension would allow counsel time to analyze the issue presented, review the record, and prepare the petition for filing.

The undersigned counsel also has several proximate briefing deadlines, including: (1) a forthcoming petition for certiorari in *Seaview Trading, LLC v. Commissioner*, No. 20-72416, due August 7, 2023, in this Court; (2) a forthcoming petition for certiorari due September 13, 2023, in this Court; (3) a response brief in *KPH Healthcare Services, Inc. v. Pfizer*, No. 23-3014, due July 31, 2023, in the U.S. Court of Appeals for the Tenth Circuit; (4) a reply brief for appellant in *9REN Holding S.À.R.L. v. Kingdom of Spain*, No. 23-7032, due July 20, 2023, in the U.S. Court of Appeals for the D.C. Circuit. Other trial and appellate co-counsel, who have their own prior commitments, will also require time to review the draft petition. Additional time is therefore needed to prepare and print the petition in this case.

Respectfully submitted,

/s/ Sarah M. Harris

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JULY 21, 2023

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**CERTIFICATE OF SERVICE**

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I, Sarah Harris, counsel for applicant Direct Energy, LP and a member of the Bar of this Court, certify that, on July 21, 2023, one copy of the Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari in the above-captioned case was sent, by third-party commercial carrier for delivery overnight, to the following counsel:

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I further certify that all parties required to be served have been served.

/s/ Sarah M. Harris  
SARAH M. HARRIS