No. 21-10199

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Susan Drazen, et. al., on behalf of herself and other persons similarly situated,

Plaintiffs-Appellees,

GoDaddy.com, LLC, a Delaware Limited Liability Company,

Defendant-Appellee,

v.

Juan Enrique Pinto,

Movant-Appellant.

On Appeal from a Final Judgment of the United States District Court for the Southern District of Alabama
(Case No. 1:19-cv-00563-KD-B)

PETITION FOR REHEARING *EN BANC*

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August 17, 2022

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 26.1-1, Plaintiffs-Appellees Susan Drazen and Jason Bennett state that they are individual persons and that there are no publicly held corporations that own ten percent or more of any stock issued by either Plaintiff. Plaintiffs further state that the following people are believed to have an interest in the outcome of this appeal:

- Bandas Law Firm, P.C. (representing Movant-Appellant Juan Enrique Pinto);
- Attorney Christopher A. Bandas (representing Movant-Appellant Juan Enrique Pinto);
- The Honorable Magistrate Judge Sonja F. Bivins (United States District Court for the Southern District of Alabama);
- Attorney Phillip A. Bock (representing Plaintiff-Appellee Susan Drazen);
- Bock Hatch & Oppenheim (representing Plaintiff-Appellee Susan Drazen);
- Attorney Robert W. Clore (representing Movant-Appellant Juan Enrique Pinto);
- Attorney John R. Cox (representing Plaintiff-Appellee Susan Drazen);
- Attorney Matthew B. Criscuolo (representing Defendant-Appellee GoDaddy.com, LLC);

- Attorney Thomas Jefferson Deen, III (representing Movant-Appellant Juan Enrique Pinto);
- Plaintiff-Appellee Susan Drazen;
- The Honorable Kristi K. DuBose (United States District Court for the Southern District of Alabama);
- Defendant-Appellee GoDaddy.com, LLC;
- Attorney Robert M. Hatch (representing Plaintiff-Appellee Susan Drazen);
- Objector Steven F. Helfand;
- Plaintiff John Herrick;
- Kenneth J. Reimer Attorney at Law (representing Plaintiff-Appellee Susan Drazen);
- Attorney Trinette G. Kent (representing Plaintiff-Appellee Susan Drazen);
- Kent Law Offices (representing Plaintiff-Appellee Susan Drazen);
- Law Offices of John R. Cox (representing Plaintiff-Appellee Susan Drazen);
- Mark K. Wasvary, P.C. (representing Plaintiff-Appellee Susan Drazen);
- Attorney Miles McGuire (representing Plaintiff-Appellee Susan Drazen);
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- Attorney Evan M. Meyers (representing Plaintiff-Appellee Susan Drazen);
- Attorney Cozen O'Connor (representing Defendant-Appellee GoDaddy.com, LLC);
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- Movant-Appellant Juan Enrique Pinto;
- Attorney Kenneth J. Reimer (representing Plaintiff-Appellee Susan Drazen);
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- Underwood & Riemer, P.C. (representing Plaintiff-Appellee Susan Drazen);
- Attorney Mark K. Wasvary (representing Plaintiff-Appellee Susan Drazen);
- Attorney Paula L. Zecchini (representing Defendant-Appellee GoDaddy.com, LLC)

I hereby certify that, except as disclosed above, I am unaware of any actual or potential conflict of interest involving the justices of the Eleventh Circuit Court of Appeals, and I will immediately notify the Court in writing upon learning any such conflict.

August 17, 2022

Respectfully submitted,

/s/*Earl P Underwood, Jr.*

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STATEMENT OF COUNSEL

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following question of exceptional importance:

Whether a person who receives a single text message in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq*. (TCPA), has suffered concrete injury sufficient to have Article III standing to pursue a TCPA claim Congress expressly authorized, as every other circuit to address the issue has held.

August 17, 2022

Respectfully submitted,

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ISSUE THAT MERITS *EN BANC* CONSIDERATION

The TCPA bars using an automatic telephone dialing system "to make any call" to a cellular number without prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). A text message is a "call" for purposes of the TCPA. *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 156 (2016). Congress expressly authorized individual actions for injunctive relief and recovery of at least $500 for each violation. 47 U.S.C. § 227(b)(3).

In *Salcedo v. Hanna*, 936 F.3d 1162 (2019), a panel of this Court ruled that receipt of a single unlawful text message is not an injury sufficiently concrete so as to confer standing. *Id.* at 1172. According to *Salcedo*, the "chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waved in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts." *Id.*

The panel in this case was duty-bound to follow *Salcedo* and, consequently, vacated the class definition and approved settlement on the ground that some class members received only a single text message and thus lacked standing. *See* Slip. Op. at 18. This Court should grant a

rehearing *en banc* to reevaluate the *Salcedo* holding and to clarify the law regarding the elements necessary to pursue a TCPA claim.

This standing issue is exceptionally important and warrants *en banc* review. The decision in *Salcedo* hinders the ability of Congress to effect enforcement of federal law prohibiting unwanted calls and texts through private litigation, disregarding both the concrete harm to the recipient and the widespread damage the practice inflicts on public phone and data networks.

Every other circuit court to address the issue has held that a person does, in fact, have standing to sue based on receipt of an unlawful communication. *See Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686, 690 (5th Cir. 2021); *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462 (7th Cir. 2020) (Barrett, J.); *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 93 (2d Cir. 2019); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017).

The panel decision in *Salcedo* not only stands alone among the circuit courts, but its analysis is in tension with other decisions from this Court. *See, e.g.*, *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015) (*Sarris*). Additionally, its

reasoning clashes with the doctrine of representational standing, which the Supreme Court discussed at length in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000).

COURSE OF PROCEEDINGS AND CASE DISPOSITION

Plaintiff Susan Drazen brought this class-action lawsuit in 2019 against Defendant GoDaddy.com, LLC, alleging that GoDaddy violated the TCPA by using an automatic telephone dialing system to send promotional calls and text messages to her cell phone number. After years of litigation, the parties submitted a proposed class settlement, and the District Court for the Southern District of Alabama certified the class and approved the settlement. An objector, Juan Enrique Pinto, filed an appeal.

Without the benefit of any briefing or argument on the issue of standing – an issue that was not raised on appeal – the panel ruled that the class definition improperly included members that had received only one text and therefore did not have standing, based on *Salcedo* and the Supreme Court's decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). The panel also considered but did not decide whether a single cellphone call meets the concrete injury requirement. Instead, the panel vacated the certification and settlement and remanded the case to allow the parties "to redefine the class with the benefit of *TransUnion* and its common-law analogue analysis." Slip Op. at 20.

STATEMENT OF FACTS

The District Court certified the class and approved the proposed settlement based on the following class definition (with some exclusions not relevant here):

> All persons within the United States to whom, from November 4, 2014 through December 31, 2016, Defendant placed a voice or text message call to their cellular telephone pursuant to an outbound campaign facilitated by the web-based software application used by 3Seventy, Inc., or the software programs and platforms that comprise the Cisco Unified Communications Manager.

Slip Op. at 5.

After notice of the settlement was sent to the class members, thousands of claims for benefits were submitted. The objector, Mr. Pinto's, appeal was limited almost exclusively to the issue of the District Court's award of attorneys' fees, and the appellate briefing and oral argument, likewise, only addressed the issue of attorneys' fees and not the issue of standing. Nonetheless, the panel decision held that "the class definition does not meet Article III standing requirements," and therefore vacated the District Court's order certifying the class and granting final approval to the settlement. *Id.* at 10–11.

REASONS FOR *EN BANC* REVIEW

Federal Rule of Appellate Procedure 35 states that *en banc* consideration "is not favored and ordinarily will not be ordered unless" necessary for uniformity or "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). The holding in *Salcedo* – which the panel in this case was required to follow – sets the bar for access to the courts too high and separates this Court from all other circuits to reach the issue. The standing ruling is also counter to other decisions of this Court and disregards the doctrine of representational standing. It is an issue of exceptional importance.

I. EVERY OTHER FEDERAL APPELLATE COURT TO ADDRESS TCPA STANDING HAS RULED CONTRARY TO *SALCEDO*.

The panel in *Salcedo* stated that it would "look to history and the judgment of Congress" to determine whether harms from a single text message suffice to confer standing, as the Supreme Court instructed in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016). *Salcedo*, 936 F.3d at 1168. The court noted the absence of findings on harms from unsolicited text messages while acknowledging the technology did not exist when Congress enacted the TCPA in 1991. *Id.* at 1169. It construed the

congressional record to "suggest that the receipt of a single text message is qualitatively different from the kinds of things Congress was concerned about when it enacted the TCPA." *Id.*

According to the *Salcedo* panel, Congress enacted the TCPA based on "a concern for privacy within the sanctity of the home that [does] not necessarily apply to text messaging." *Salcedo*, 936 F.3d at 1169. Congress's "privacy and nuisance concerns about residential telemarketing are less clearly applicable to text messaging." *Id.*

Before *Salcedo*, the Ninth Circuit had addressed whether receipt of two text messages conferred standing in *Van Patten v. Vertical Fitness*, 847 F.3d 1037 (9th Cir. 2017). The Ninth Circuit had reviewed many of the same congressional findings and concluded that the plaintiff had standing, but the *Salcedo* panel found *Van Patten* "unpersuasive" because the Ninth Circuit purportedly did not examine "whether isolated text messages not received at home" came within Congress's stated purpose of protecting consumers from unwanted calls. *Id.*

The court in *Salcedo* considered historical causes of action, such as the tort of intrusion upon seclusion, trespass, and nuisance, and it declared there was no analogue: "History shows that Salcedo's allegation

is precisely the kind of fleeting infraction upon personal property that tort law has resisted addressing." *Salcedo*, 936 F.3d at 1172.

The Ninth Circuit had, again, reached the opposite conclusion, holding that actions "to remedy defendants' invasions of privacy, intrusion upon seclusion, and nuisance have long been heard by American courts, and the right of privacy is recognized by most states." *Van Patten*, 847 F.3d at 1043. The *Salcedo* court disagreed, stating that "an examination of those torts reveals significant differences in the kind and degree of harm they contemplate providing redress for." *Salcedo*, 936 F.3d at 1172.

The Third Circuit also sided in favor of standing to sue for a single unlawful call to a cellphone in *Susinno v. Work Out World Inc.*, 862 F.3d 346 (3rd Cir. 2017)—although the *Salcedo* decision makes no reference to that case. In *Susinno*, the Third Circuit construed the legislative findings and history differently than the panel in *Salcedo*. For example, the court in *Susinno* found that the particular emphasis on residential calls "does not limit—either expressly or by implication—the statute's application to cell phone calls." *Susinno*, 862 F.3d at 349. And it found that the complaint asserts "the very harm that Congress sought to

prevent, arising from prototypical conduct prescribed by the TCPA." *Id.* at 351 (cleaned up).

A few months before the *Salcedo* ruling, the Second Circuit decided *Melito v. Experian Marketing Solutions, Inc.*, 923 F.3d 85 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 677 (2019), holding that "Plaintiff's receipt of the unsolicited text messages, sans any other injury, is sufficient to demonstrate injury-in-fact." *Id.* at 88. The court in *Melito* found the alleged injury "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit," as both the Ninth and Third Circuits had ruled. *Id.* at 93 (citing *Van Patten* and *Susinno*). The *Salcedo* decision does not reference *Melito*.

In 2020, then-Judge Amy Coney Barrett authored a unanimous decision for the Seventh Circuit in *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458 (7th Cir. 2020). On the historical front, the court observed that the "common law has long recognized actions at law against defendants who invaded the private solitude of another by committing the tort of 'intrusion upon seclusion.'" *Id.* at 462. It expressly disagreed with *Salcedo*'s historical analysis, noting that courts have "recognized liability for intrusion upon seclusion for irritating intrusions," and the "harm

posed by unwanted text messages is analogous to that type of intrusive invasion of privacy." *Id.*

The Seventh Circuit also disagreed with the way the *Salcedo* panel applied *Spokeo*. As Judge Barrett explained in the court's decision, the instruction to evaluate harms recognized at common law requires that courts "look for a 'close relationship' in kind, not degree." *Gadelhak*, 950 F.3d at 462 (quoting *Spokeo*, 578 U.S. at 341). "A few unwanted automated text messages may be too minor an annoyance to be actionable at common law. But such texts nevertheless pose the same *kind* of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable." *Id.* at 463. It agreed with the decisions in *Van Patten* and *Melito* "that unwanted text messages can constitute a concrete injury-in-fact for Article III purposes." *Id.*

The Fifth Circuit joined the majority view in *Cranor v. 5 Star Nutrition, LLC*, 998 F.3d 686 (5th Cir. 2021), holding that standing exists to pursue a claim based on receipt of an unlawful text message. It observed that under similar facts, the Second, Third, Seventh, and Ninth Circuits had all "reached the same conclusion: Telemarketing text messages present the precise harm and infringe the same privacy

interests Congress sought to protect in enacting the TCPA." *Id.* at 690 (cleaned up). The Fifth Circuit rejected the *Salcedo* panel's view that Congress enacted the TCPA to remedy harms solely related to residential calls and that harms from unwanted cellular messages were somehow "qualitatively different." *Cranor*, 998 F.3d at 690.

"First, the TCPA expressly covers cellular phones" and "includes text messaging in its prohibitions on transmitting false caller ID information." *Cranor*, 998 F.3d at 690. Thus, "it would make little sense to prohibit telemarketing to mobile devices designed for use *outside the home*" if Congress were concerned only with "nuisances *in the home*." *Id.* at 691. Second, "the TCPA addresses 'nuisance and invasion of privacy' in a variety of other non-residential contexts." *Id.* Third, Congress authorized the FCC to exempt calls that are not a nuisance or privacy invasion, and "[n]o part of this delegation limits the FCC to considering nuisance and privacy only in the home." *Id.*

The Fifth Circuit also took issue with the *Salcedo* panel's historical view that a single unwanted text message is "the kind of fleeting infraction upon personal property that tort law has resisted addressing." *Cranor*, 998 F.3d at 692 (quoting *Salcedo*, 936 F.3d at 1172). Among other

things, the court noted that the *Salcedo* decision never addressed public nuisance. *Id.* at 693. And it highlighted two other significant mistakes in the reasoning laid out in *Salcedo*.

"First, *Salcedo*'s view of trespass to chattels is substantially narrower than the scope of that action at common law." *Cranor*, 998 F.3d at 693. The *Salcedo* court was led astray by "mistak[ing] the twentieth-century Restatement for the eighteenth-century common law." *Id.* Second, echoing concerns (now) Justice Amy Coney Barrett had made in *Gadelhak*, the Fifth Circuit said that "*Salcedo*'s focus on the substantiality of the harm in receiving a single text misunderstands *Spokeo*." *Id.* at 693. A proper historical inquiry focuses "on the types of harms protected at common law, not the precise point at which those harms become actionable." *Id.* (quoting *Krakauer v. Dish Network, LLC*, 925 F.3d 643, 654 (4th Cir. 2019)).

In short, no federal appellate court has endorsed *Salcedo*. The Eleventh Circuit stands alone in rejecting subject matter jurisdiction based on receipt of a text message, making it exceptionally important for this Court to reconsider that issue *en banc*. *See* Fed. R. App. P. 35(b)(1)(B).

II. THE STANDING ANALYSIS IN *SALCEDO* RUNS COUNTER TO OTHER DECISIONS FROM THIS CIRCUIT.

This Court in *Sarris* held there is standing to pursue TCPA claims because receipt of a single junk fax briefly ties up the fax machine, even if there is no proof a fax was ever printed: "This occupation of Plaintiff's fax machine is among the injuries intended to be prevented by the statute and is sufficiently personal or particularized … to provide standing." *Sarris*, 781 F.3d at 1252. Similarly, in *Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC*, 858 F.3d 1362 (11th Cir. 2017), this Court held "the clinic established that it suffered a concrete injury" because "the clinic's fax machine was occupied and rendered unavailable for legitimate business while processing the unsolicited fax." *Id.* at 1366.

The *Salcedo* panel acknowledged those TCPA junk fax cases but deemed them "inapplicable" because intangible costs imposed by an unwanted text purportedly "differ in kind" from a fax message, in that a "cell phone user can continue to use all the device's functions, including receiving other messages, while it is receiving a text message." *Salcedo*, 936 F.3d at 1168. But that reasoning fails. There is no legitimate basis why Article III of the United States Constitution would permit individual suits based on receipt of a single junk fax but bar a text message claim.

Indeed, if anything, a junk text message can be more injurious than a junk fax. Texts are now used for things like schools contacting parents and healthcare providers communicating test results. A person rushing to school to pick up a sick child or awaiting a COVID-19 test result before boarding a plane would not mute his phone, and getting a spam text would be worse than a single unwanted fax printing on the recipient's fax machine back in the office.

The *Salcedo* decision runs into a similar problem with circuit precedent addressing standing for TCPA claims based on an unwanted call. This Court in *Glasser v. Hilton Grand Vacations Co., LLC*, 948 F.3d 1301 (11th Cir. 2020), held that "receipt of more than one unwanted telemarketing call" meets the "concrete injury" requirement for standing—even where two plaintiffs sue after each received just one call. *Id.* at 1305–06 (quoting *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1273 (2019)).

The panel decision in this case acknowledged the *Glasser* decision in a footnote, stating this Court has "been less than a model of clarity in *Cordoba* and *Glasser* for purposes of Article III analysis." Slip. Op. at 18 n.14. And the decision recognizes that "[w]e have a problem here." *Id.* at

19 n.14. "The difference between *Cordoba* and *Glasser* and our case may present the need to reexamine *Glasser* in the future because it may affect both the injury-in-fact requirement and the causation analysis." *Id.* Because the decision in *Glasser* predated the historical analysis now called for under *Spokeo*, the panel decision declared *Glasser* "suspect on that ground alone." *Id.*

On the contrary, time has revealed the *Salcedo* decision as the suspect one. Not only does it create tension with other circuit decisions addressing standing in similar contexts but it puts this circuit at odds with all others with respect to text message claims. This Court can set things straight by granting this petition for *en banc* review.

III. THE PANEL DECISION CONFLICTS WITH SUPREME COURT JURISPRUDENCE ON REPRESENTATIONAL STANDING.

The *Salcedo* decision purported to embrace *Spokeo*'s instruction that standing requires "a 'close relationship' to traditionally redressable harm." *Salcedo*, 936 F.3d at 1172. As the Fifth Circuit observed in *Cranor*, however, the *Salcedo* panel neglected to consider common law causes of action available to address a public nuisance. *Cranor*, 998 F.3d at 693. There is likewise a "well-established exception" for *qui tam*

actions that allow "private plaintiffs to sue in the government's name for the violation of a public right," as Justice Thomas observed in his concurrence in *Spokeo*, 578 U.S. at 345.

In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), the Supreme Court held that a plaintiff has standing to assert a *qui tam* claim on behalf of the government where Congress assigns the right to do so.[1] "Although we have never expressly recognized 'representational standing' on the part of assignees, we have routinely entertained their suits." *Id.* at 774–75 (citing cases). The Court recounted the history of such actions going back to the 13th century, including "informer statutes" that permit the plaintiff to share in recovery as a bounty, which the First Congress employed in several different settings. *Id.* at 776 & n.5.

The instant case involves an express right of action by Congress to pursue claims based on certain insidious telemarketing practices that cause harm to public phone and data networks. As the Supreme Court's

[1] "*Qui tam* is short for the Latin phrase *qui tam pro domino rege pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.' The phrase dates from at least the time of Blackstone. *See* 3 W. Blackstone, Commentaries, *160." *Ex rel. Stevens*, 529 U.S. at 768 n.1.

decision in *ex rel. Stevens* makes plain, Congress is well within constitutional bounds assigning the right to pursue claims to individuals who encountered the problem firsthand. The *Salcedo* panel's failure to consider those actions in its analysis has led this Circuit astray, and *en banc* review is necessary to correct course.

CONCLUSION

The standing issue at the heart of the panel's ruling presents an issue of exceptional importance that warrants *en banc* review. The decision in *Salcedo* frustrates the ability of Congress to authorize suit not only to protect individuals from harm but also to safeguard public rights from interference. This Court should overrule *Salcedo* and hold that all class members have standing to pursue their TCPA claims, consistent with congressional intent and consistent with the rulings from all other circuits to consider the issue. This Court should therefore affirm the District Court's order certifying the class and approving the proposed settlement.

August 17, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 28(b), Fed. R. App. P. 32(a)(7)(B) and Eleventh Circuit Rule 28-1 and 32 because this brief contains 3,233 words, excluding the parts of the brief exempted by Eleventh Circuit Rule 32-4, as counted by Microsoft Word.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century SchoolBook font and is double spaced.

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CERTIFICATE OF SERVICE

The undersigned certifies that on August 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and separately mailed 15 paper copies to the Court.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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COPY OF OPINION

[[SEE 11th Cir. R. 35-5(k)]]