No. 16-56265

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELISA R. ROMERO,
Plaintiff-Appellant,

v.

DEPARTMENT STORES NATIONAL BANK; FDS BANK;
DOES 1 through 10, inclusive,
Defendants-Appellees.

Appeal from the U.S. District Court for the Southern District of California
No. 3:15-cv-00193-CAB-MDD

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over Appellant Elisa Romero's Telephone Consumer Protection Act (TCPA) claim under 28 U.S.C. § 1331 and supplemental jurisdiction over her state-law claims under 28 U.S.C. § 1367(a).

The district court granted summary judgment to Appellees on Ms. Romero's state law claims on February 4, 2016. ER 18. It denied Ms. Romero's motion for reconsideration of that order on February 18, 2016. ER 25. And it dismissed Ms. Romero's TCPA claim—the final remaining claim in the lawsuit—on August 5, 2016. ER 6. The district court issued final judgment on August 8, 2016. ER 5. Ms. Romero filed a notice of appeal on August 31, 2016. ER 1. The appeal is therefore timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Does a consumer who was unlawfully robocalled hundreds of times—leading to injuries such as stress, headaches, lost sleep, lost time, intrusion upon seclusion, and the occupation of her cell phone without consent—have Article III standing to bring a claim in federal court for violation of the Telephone Consumer Protection Act, which Congress passed to remedy the invasion of privacy and the seizure of consumers' phone lines caused by unwanted robocalls?
2. May a debt collector that called a consumer hundreds of times against her will escape all liability for violating California's Rosenthal Fair Debt Collection

Practices Act simply by refraining from making further calls once it has been sued?

3. May a judge decide as a matter of law that receiving hundreds of unwanted robocalls could not possibly be highly offensive to a reasonable person—and therefore is not a violation of the common law right to be free from intrusions upon seclusion—or is that a question for a jury to decide?

RELEVANT STATUTES

The relevant statutory provisions are provided in an addendum, submitted with this brief.

STATEMENT OF THE CASE

1. It is undisputed that between July and December of 2014, Appellees—the banks that issue Macy's-branded credit cards—called Appellant Elisa Romero's cell phone nearly three hundred times about a balance she owed on a Macy's card. ER 19. It's also undisputed that, with the possible exception of two calls, all of these calls were placed by the banks' autodialer—a computer that makes hundreds of thousands of calls per day on the banks' behalf. ER 80. Often, Ms. Romero would receive two, three, or even eight robocalls a day. ER 71.

The banks contend that once Ms. Romero told them to stop calling, they did so, but the record contains substantial evidence to the contrary: Ms. Romero submitted a declaration stating that she asked the banks to stop calling multiple times before they actually did so—and provided contemporaneous notes

documenting these conversations. ER 75, 135-40. Indeed, she stated that she first asked the banks to stop calling on July 2, 2014—months before the calls actually ceased. ER 75. Two other Macy's customers gave depositions, testifying that they too received numerous unwanted calls, long after they'd asked the banks to stop calling. ER 93, 96. And the banks' own employees testified that it is bank policy to keep calling even when a customer tells them to stop. ER 81-82, 116.

Ms. Romero testified that the banks' incessant robocalling made her anxious and nervous, gave her headaches, and caused her to lose sleep. ER 118-27.

It took five months for Ms. Romero to finally get the banks to stop calling her, and they only stopped then because they believed they had the wrong number. ER 90.

2. On January 29, 2015, Ms. Romero sued the banks, claiming that the hundreds of unwanted robocalls she received violated state and federal law. ER 30-41. The banks' calls, Ms. Romero alleged, violated the federal Telephone Consumer Protection Act, which prohibits robocalling a cell phone without consent, 47 U.S.C § 227(b); California's Rosenthal Fair Debt Collection Practices Act, which prohibits harassing or annoying a debtor through repeated phone calls,

Cal. Civ. Code §§ 1788.11(d), (e), 1788.17; and the common law right to be free from intrusions upon seclusion. ER 34-40.[1]

3. After discovery, the banks moved for summary judgment on Ms. Romero's state-law claims. ER 18. The district court granted their motion. ER 18.

First, the court held that because the banks did not call Ms. Romero after she had served them with notice of her lawsuit, they could not be held liable for violating the Rosenthal Act. ER 20-22. When the Act was initially passed, it contained a safe harbor for debt collectors who cure "a violation which is able to be cured . . . within 15 days" of receiving written notice of the violation. Cal. Civ. Code. § 1788.30(d). The lower court held that this safe harbor applied here. ER 22. In the court's view, the banks' hundreds of robocalls constituted a violation that is "able to be cured," and the banks cured this violation simply by sending Ms. Romero a notice after she had sued them, saying they would not call her any more. ER 20-21.

Second, the district court held that a reasonable person could not possibly find it "highly offensive" to receive hundreds of unwanted robocalls in a short period of time. ER 22-24. Therefore, the court held that Ms. Romero's intrusion upon seclusion claim failed as a matter of law. ER 24.

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[1] Ms. Romero also brought a claim for negligent infliction of emotional distress. She does not appeal the district court's dismissal of that claim, and therefore, it is not at issue here.

Ms. Romero filed a motion requesting the district court reconsider its decision. ER 25. Among other things, she argued that the decision contradicted Section 1788.17 of the Rosenthal Act—an amendment to the statute that explicitly adopted the remedies provision of the federal Fair Debt Collection Practices Act, which does not have a cure provision. *See* ER 27. This amendment, Ms. Romero argued, rendered the cure provision originally contained within the Rosenthal Act—the provision the district court relied upon—inoperable. The district court denied reconsideration. ER 25.

The parties proceeded to prepare for trial on Ms. Romero's remaining claim—that the banks' calls violated the Telephone Consumer Protection Act. Just weeks before the trial was scheduled to begin, the banks filed a motion to dismiss, arguing that Ms. Romero lacked standing to bring this claim. ER 144.

The district court granted the motion. ER 6. The court recognized that virtually every court to decide the issue has held that receiving robocalls constitutes a concrete injury, sufficient to support standing. ER 15. But the district court held that all of these other courts were wrong. ER 15. The court did not dispute that receiving unwanted robocalls is a concrete injury. ER 16. But, the court held, to have standing to bring a TCPA claim based on these robocalls, a plaintiff must—for each and every robocall she received—provide evidence of a tangible injury caused not just by the call itself, but specifically by the use of an

autodialer to make that call—a requirement, the court made clear, no plaintiff could ever meet. ER 9-12.

This appeal followed. ER 1.

SUMMARY OF THE ARGUMENT

The decision below is an extreme outlier that has already been sharply criticized by other courts. First, the vast majority of courts have held that receiving unwanted robocalls is a concrete injury sufficient to support standing to bring a TCPA claim. As Congress recognized when it enacted the TCPA, robocalls are intrusive, annoying, and, in some cases, even dangerous. They waste consumers' time, violate their right to be let alone, and occupy their phones without consent. These injuries have long been considered sufficient for standing. Moreover, Ms. Romero suffered additional harm: The banks' robocalls gave her headaches; caused her stress, anxiety, and aggravation; and disturbed her sleep. These, too, are concrete injuries, sufficient to support standing.

The lower court's requirement that Ms. Romero demonstrate that her injuries were caused not just by the banks' calls but specifically and uniquely by their use of an autodialer to make those calls conflicts with longstanding Supreme Court precedent. The Supreme Court has repeatedly held that to demonstrate standing, plaintiffs need only show that their injury is traceable to the defendant's conduct. It has expressly *rejected* the notion that the injury must be tied to the specific aspect

of that conduct that renders it illegal. Ms. Romero has demonstrated that her injuries are traceable to the banks' calls. Under Supreme Court precedent—and that of this Court—that is enough.

Second, the district court in this case is the only court ever to have held that a debt collector may escape liability under the Rosenthal Act for harassing a consumer through repeated unwanted phone calls, simply because the collector did not continue calling after it had been sued. Indeed, the cure provision the district court relied on has long been superseded. And even were it still in force, it only applies to violations that are "*able* to be cured." Cal. Civ. Code § 1788.30 (emphasis added).

A statutory violation is only curable if the harm it caused can be undone. The banks did not—and, indeed, could not possibly—undo the harm they caused by calling Ms. Romero hundreds of times against her will. Their Rosenthal Act violations, therefore, cannot be cured.

Finally, the district court's conclusion that a reasonable person could not possibly find it "highly offensive" to receive hundreds of unwanted robocalls—and therefore Ms. Romero's intrusion upon seclusion claim must fail as a matter of law—directly contradicts the view expressed in the Restatement (Second) of Torts, which California has adopted. It conflicts with the views of Congress and the California state legislature, both of which found unwanted calls, like those Ms.

Romero received, so offensive that they made them illegal. And it conflicts with numerous courts, which have held that a reasonable person could, in fact, find repeated unwanted calls "highly offensive." The lower court was not entitled to impose its own view of whether a reasonable person would find it "highly offensive" to suffer through months of relentless robocalls—that's for a jury to decide.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). "Summary judgment is appropriate only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Id.*[2]

The lower court treated the banks' motion to dismiss Ms. Romero's TCPA claim as a motion for summary judgment. ER 9. Therefore, this standard of review applies to both the district court's order granting summary judgment on the merits of Ms. Romero's state-law claims, as well as its order dismissing her TCPA claim for lack of standing.

[2] Internal citations, quotation marks, and alterations are omitted throughout this brief.

II. Ms. Romero Has Standing To Bring Her TCPA Claim.

To bring a claim in federal court, a plaintiff must have suffered an injury that is "both concrete"—that is, "actually exist[s]"—and "particularized"—that is, "affect[s]" the plaintiff "personal[ly]." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545, 1548 (2016). This injury must be "fairly traceable" to the defendant's "conduct" and "likely to be redressed by a favorable judicial decision." *Id.* at 1547. Ms. Romero easily satisfies these requirements.

The defendant banks called Ms. Romero nearly three hundred times. These calls undeniably affected her personally. They caused her aggravation and distress, gave her headaches, disrupted her sleep, and wasted her time. They occupied her cell phone without consent and violated her right to be let alone. These are concrete injuries that have long given rise to standing. Moreover, they are precisely the harms Congress sought to prevent in passing the TCPA.

There is no dispute that the calls that injured Ms. Romero were, in fact, made by the banks. Her injuries are thus "fairly traceable" to the banks' conduct. Nor is there any dispute that Ms. Romero's injuries can be redressed by damages. Under well-established law, therefore, Ms. Romero has standing to pursue her claim.

Nevertheless, the district court held otherwise. In the lower court's view, it was not enough that Ms. Romero demonstrated concrete harm traceable to the

banks' calls. Ms. Romero was required to prove that each and every one of the nearly three hundred robocalls caused a discrete tangible injury that would not have been caused had the call been manually dialed by a bank employee. That is not the law.

Indeed, just in the few months since the decision below was issued, several courts have already explicitly rejected it. This Court should do the same.

A. Ms. Romero Suffered Several Concrete Injuries Sufficient to Support Standing.

The Supreme Court's recent decision in *Spokeo* distilled several "general principles" from the Court's prior case law about what constitutes a "concrete" injury. 136 S. Ct. at 1550. First, the court made clear that "'[c]oncrete' is not . . . necessarily synonymous with 'tangible.'" *Id.* at 1549. Although so-called "tangible injuries" (like physical, emotional, or economic harm) are certainly concrete—and "perhaps easier to recognize"—"intangible injuries" can also be concrete. *Id.* at 1549. Plaintiffs do not lack standing, simply because "their harms may be difficult to prove or measure." *Id.*

Second, the Court stated that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. If the "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"—in other words, if "the common law

permitted suit" in analogous circumstances—that harm will be considered a concrete injury, sufficient to support standing. *Id.*

But Congress can also create "new rights of action that do not have clear analogs in our common-law tradition." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring). Congress, *Spokeo* explained, has the power—and, in fact, is "well positioned"—"to identify intangible harms that meet minimum Article III requirements," even if those harms "were previously inadequate in law." 136 S. Ct. at 1549. The Court emphasized that even the violation of *procedural* rights may constitute a concrete injury if they protect against an identified harm. *Id.* "[T]he risk of real harm" is itself a concrete injury, sufficient to give rise to standing. *Id.*

Under the rubric provided in *Spokeo*, Ms. Romero easily satisfies the concrete injury requirement.

1. Ms. Romero Suffered Tangible Harm.

Ms. Romero suffered several "tangible" injuries. The banks' incessant calling made her anxious, gave her headaches, caused her to lose sleep, and wasted her time. ER 118-27. Even the calls she did not answer required her to spend time identifying the caller and deciding how to respond—which, because the banks did not always call from the same number, sometimes required not only looking at the caller id but also returning the call to determine who had made it. ER 122.

The lower court asserted—without citing any evidence or authority—that calls Ms. Romero did not hear ring could not possibly cause "lost time,

aggravation, or distress." ER 12. Not so. Observing that someone has called, determining who it is, and deciding how to respond takes time—regardless of whether this happens immediately when the call is made or later upon noticing a missed call you did not hear ring. And there is no reason Ms. Romero needed to hear a call ring to become aggravated and distressed by seeing it on her caller id.

There is no doubt these are concrete real-world harms.

2. Ms. Romero Suffered Concrete Intangible Harm.

The district court held that only tangible injuries "could possibly be an injury in fact for the purpose of standing." ER 12. This conclusion is in direct violation of *Spokeo*, which as explained above, explicitly held that "intangible injuries can," in fact, "be concrete" harms, sufficient to support standing. 136 S. Ct. at 1549.

The banks' robocalls caused Ms. Romero two intangible injures: (1) They violated her right to be let alone, and (2) they occupied her cell phone without consent. These injuries are not novel. The violation of the right to be let alone and the occupation of one's personal property without consent have long been actionable under the common law. And they are precisely the harms Congress sought to eliminate in passing the TCPA. Thus, "both history and the judgment of Congress" demonstrate that these injuries, while intangible, are nevertheless "concrete." *Spokeo*, 136 S. Ct. at 1549.

a. Congress recognized the violation of the right to be let alone and the occupation of one's phone line as real-word harms caused by robocalls and enacted the TCPA to prevent these harms.

In enacting the TCPA, Congress recognized—on the basis of substantial evidence—that robocalls cause concrete, real-world harm, and passed the TCPA to ensure that such harm would be legally redressable. Before the TCPA was enacted, "[c]onsumers around the country [were] crying out for Congress to put a stop to" robocalls. 137 Cong. Rec. 30,821 (1991). The findings that accompany the statute state that Congress had "compiled" evidence that consumers "consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy." Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243 § 2, 105 Stat. 2394 (Dec. 20, 1991).

As Senator Hollings, the Act's sponsor, put it, "[c]omputerized calls are the scourge of modern civilization." 137 Cong. Rec. 30,821. Robocalls, Congress found, "seize" the recipient's phone line without consent—and, unlike human-initiated calls, they don't just hang up when asked. *See, e.g.*, H.R. Rep. 102-317, at 10 (1991); 137 Cong. Rec. 35,305 (1991). They "invad[e] our homes and destroy[ ] our privacy." 137 Cong. Rec. 30,821. "They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall." *Id.*

The district court asserted—without citing any evidence—that Congress did not believe that robocalls themselves cause harm, but instead was concerned solely with the quantity of calls the advent of autodialers allowed companies to make. But the legislative history is clear that while it was certainly concerned with the proliferation of unwanted calls in general, Congress—and consumers—believed that robocalls, in and of themselves, were uniquely harmful.

As Senator Hollings explained, "[f]rom the record of the hearings [Congress] held and the consumer complaints [Congress] received, it is clear that it is the computerized call that generates the most significant consumer outrage and that is most clearly an invasion of our privacy, a nuisance, and a threat to our health and safety." 137 Cong. Rec. 30,822 (1991); *see also* 137 Cong. Rec. 35,304 (1991) ("I regard and I hope the FCC will regard, robotic calls by machines such as autodialers and computer-generated voices to be a much greater threat to the privacy of our homes than calls by live operators."); H.R. Rep. 102-317, at 25 (1991) ("The technical flaws of automatic dialing systems have engendered numerous consumer complaints about their use."); S. Rep. 102-178, at 1 (1991) (describing consumer complaints about "[t]he use of automated equipment to engage in telemarketing"); 137 Cong. Rec. 36,297 (1991) (explaining that people find robocalls "objectionable regardless of the content of the message or the initiator of the call").

Congress, therefore, passed the TCPA specifically to "deal directly with computerized calls." 137 Cong. Rec. 30,822 (1991). Congress concluded that, though intangible, the harms caused by robocalls—the seizure of consumers' phone lines and the violation of their right to be let alone——are very real.

Under *Spokeo*—and indeed, under decades of Supreme Court precedent—this conclusion is "instructive and important." 136 S. Ct. at 1549. The district court, however, held that it was irrelevant. *See* ER 10 (stating that Ms. Romero's argument that she "suffered the exact harm that Congress wanted to eliminate with the TCPA" does not "relate[ ]" to the "concrete component" of the standing analysis). "[A] statutory violation alone," the court asserted, "does not eliminate the requirement that a plaintiff establish a concrete injury caused by that statutory violation." *Id.* This analysis misses the point. The point is not that Ms. Romero has standing simply because Congress passed the TCPA, and the banks violated it. The point is that Congress passed the TCPA because it recognized that robocalls cause concrete harm—recognition that, under *Spokeo*, is entitled to deference. It is this harm—not merely the violation of the TCPA itself—that gives Ms. Romero standing.

b. The harms caused by robocalls are merely a modern-day version of harms that have long been recognized as sufficient to support a cause of action under the common law.

The Supreme Court has repeatedly recognized that "history and tradition offer a meaningful guide to the types of cases that Article III empowers federal courts to consider." *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008). Indeed, where an "intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit," *Spokeo*, 136 S. Ct. at 1549, the Court has found this relationship "well nigh conclusive" of the standing inquiry, *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 777 (2000). The intangible harms caused by robocalls—the violation of the recipients' right to be let alone and the occupation of their phone line without consent—are merely modern iterations of injuries that have long been "viewed as capable of resolution through the judicial process," *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013). This close relationship between Ms. Romero's modern-day injuries and the injuries for which the common law has traditionally provided a remedy is "well nigh conclusive" of the standing inquiry here.

i. The invasion of privacy is a quintessential "harm that has traditionally been regarded as providing a basis for a lawsuit," *Spokeo*, 136 S. Ct. at 1549. American courts have long recognized the right to be let alone—and provided a cause of action for its violation. *See* Eli A. Meltz, *No Harm, No Foul?*

"Attempted" Invasion of Privacy and the Tort of Intrusion Upon Seclusion, 83 Fordham L. Rev. 3431, 3438-3443 (2015) (tracing history of right to privacy). It is well-established that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another . . . is subject to liability to the other for invasion of his privacy." *See* Restatement (Second) of Torts § 652B. This intrusion is actionable, regardless of whether it causes any additional harm—the invasion of privacy is *itself* a concrete harm. *See, e.g.*, *O'Phelan v. Loy*, 497 F. App'x 720, 721 (9th Cir. 2012).

As Congress recognized in passing the TCPA, robocalls are merely a contemporary method of intruding upon the recipient's seclusion. *See Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 954 (9th Cir. 2009) ("Congress was trying to prohibit the use of [autodialers] to communicate with others by telephone in a manner that would be an invasion of privacy."); *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at *3 (N.D. W. Va. June 30, 2016) (collecting cases).[3]

ii. The unconsented occupation of Ms. Romero's phone line is also analogous to a traditional common law tort: trespass to chattels—"dispossessing," "using," or "intermeddling" with another's personal property. Restatement § 217.

[3] Indeed, Ms. Romero has brought an intrusion upon seclusion claim based on the banks' robocalls *in this case*. And neither the banks nor the lower court have ever disputed that Ms. Romero has standing to bring that claim.

Indeed, several courts have held that the "temporary electronic intrusion upon another person's computerized electronic equipment"—including the intrusion upon a phone line caused by robocalls—*is* a trespass to chattels. *Mey*, 2016 WL 3645195, at *5 (collecting cases).

As with the right to privacy, the violation of the right to be free from interference with or occupation of one's personal property is actionable regardless of whether it causes any consequential harm. *See* Restatement § 218 cmt. d (recognizing a cause of action for the temporary dispossession of personal objects even where there "has been no impairment of the condition, quality, or value of the chattel, and no other harm to any interest of the possessor," and even when the possessor was "not deprived of the use of the chattel for any substantial length of time"). Occupation of one's personal property without consent is *itself* a concrete harm sufficient to support standing.

Thus, contrary to the district court's conclusion, in determining whether Ms. Romero suffered concrete harm, it is irrelevant that she might not have heard some of the calls ring. The banks' robocalls occupied Ms. Romero's phone, whether she heard them or not. Just as the mere "plac[ement]" of a "foot on another's property" is a concrete harm, sufficient to support standing for trespass, so too is the unwanted occupation of Ms. Romero's cell phone. *See Spokeo*, 136 S. Ct. at 1551 (Thomas, J., concurring); *Wilkes v. CareSource Mgmt. Grp. Co.*, No.

4:16-CV-038, 2016 WL 7179298, at *5 (N.D. Ind. Dec. 9, 2016) ("[T]he existence of a concrete injury does not depend on whether the plaintiff actually received and was annoyed or distracted by the call. Intrusion upon and occupation of the capacity of a plaintiff's phone can give rise to a concrete injury."); *Mey*, 2016 WL 3645195, at *5 (same).

iii. The district court misunderstood the relevance of these common law analogues. It held that "[i]nvasion of privacy and trespass to chattels are torts, not injuries in and of themselves," and therefore they cannot constitute injuries in fact for purposes of standing. ER 11. This conclusion again misses the point. The point is not that the torts themselves are Ms. Romero's injuries. The point is that the *harms* recognized by these traditional common law torts as providing a sufficient basis for a cause of action are analogous—if not identical—to the harms recognized by the TCPA and suffered by Ms. Romero.

Robocalls are merely a modern means of intruding upon a person's seclusion. Occupying a person's cell phone is merely a modern means of temporarily dispossessing them of control over their personal property. Because these harms have traditionally provided a basis for standing, they continue to do so—even if the cause of action is provided by the TCPA rather than the common law. *See Spokeo*, 136 S. Ct. at 1549; *Hunsinger v. Gordmans, Inc.*, No.

4:16-CV-162, 2016 WL 7048895, at *3 (E.D. Mo. Dec. 5, 2016); *Mey*, 2016 WL 3645195, at *3.

B. Ms. Romero Was Not Required To Separately Demonstrate An Injury-In-Fact for Each of the Nearly Three Hundred Robocalls She Received.

As the Supreme Court held in *DaimlerChrysler*, a "plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 335 (2006). Thus, in *DaimlerChrysler*, the Court held that the plaintiffs' standing to challenge a tax exemption granted by the city of Toledo did not automatically enable them to also challenge a different tax exemption granted by the state of Ohio. *Id.* The plaintiffs, the Court explained, were required to demonstrate standing for each claim. *Id.*

Here, the lower court asserted, without citing any authority, that because the TCPA provides statutory damages for every unlawful call a plaintiff receives, TCPA plaintiffs must bring a separate claim for each call. Therefore, in the lower court's view, because the banks made hundreds of calls, Ms. Romero was required to bring hundreds of TCPA claims—and, under *DaimlerChrysler*, to separately demonstrate standing (and, thus, injury-in-fact) for each call.

But the TCPA does not require consumers to bring a separate claim for every call. To the contrary, the statute provides that consumers can bring "*an* action"—i.e. a single cause of action—through which they may recover "$500 in

damages for each . . . violation" of the Act. 47 U.S.C. § 227(b); *see also Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745, 748, 753 (2012) (repeatedly referring to plaintiff's TCPA claim in the singular, even though it was "based on multiple violations" of the statute). Pursuant to this provision, Ms. Romero did not bring hundreds of separate TCPA claims, but rather a single claim, seeking damages for the banks' hundreds of robocalls. *See* ER 38-40.

Neither *DaimlerChrysler* nor anything else in the Supreme Court's jurisprudence requires that plaintiffs who bring a *single* claim based on repeated violations of the same statutory provision demonstrate standing separately for each violation. To the contrary, both this Court and the Supreme Court have repeatedly granted plaintiffs standing based on the cumulative harm caused by repeated statutory violations. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000); *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110 (1979) (municipality and its residents had standing to challenge real estate brokerage firms' repeated violations of the Fair Housing Act because the cumulative effect of those violations had "begun to rob [the municipality] of its racial balance and stability"); *Covington v. Jefferson Cty.*, 358 F.3d 626, 638-41 (9th Cir. 2004) (neighbors of landfill had standing to bring Clean Air Act claim based on cumulative impact of repeated unlawful release of ozone-depleting substances and standing to bring Resource Conservation and Recovery Act claim

based on cumulative impact of repeated unlawful dumping of liquid hazardous waste).

In *Laidlaw*, for example—a case cited favorably in *Spokeo*, 136 S.Ct. at 1545—three environmental groups sued the owner of a wastewater treatment plant for repeatedly discharging greater levels of mercury into a river than its permit allowed, each discharge a violation of the Clean Water Act. *Laidlaw*, 528 U.S. at 167. The Court held that the environmental groups had standing to sue based on the interests of their members, several of whom stated that they would like to use the river for recreational activities but did not do so because of concerns about pollution. *Id.* at 181–82. Although the Clean Water Act provides a civil penalty of up to $25,000 "for each violation," 33 U.S.C. § 1319(d), and the plaintiffs' claim was based on multiple unlawful mercury discharges, the Court did not require the plaintiffs to show that each (or any) particular discharge, viewed in isolation, deterred the members from using the river. *Laidlaw*, 528 U.S. at 176, 181-83. Instead, it relied solely on the cumulative impact of the discharges, holding that this cumulative impact was sufficient to support standing. *Id.*

So too here. Ms. Romero need not provide evidence demonstrating the specific quantum of harm caused by each of the banks' nearly three hundred robocalls. It is sufficient that she has demonstrated that the banks' calls, when considered all together, caused her concrete injury.

Moreover, even if each call were evaluated in isolation, Ms. Romero would still have standing. The law is clear that even a minimal injury is sufficient to support standing—"an identifiable trifle is enough." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973); *accord Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008). The Supreme Court has upheld the standing of "plaintiffs with no more at stake in the outcome of an action than a fraction of a vote; a $5 fine and costs; and a $1.50 poll tax." *SCRAP*, 412 U.S. at 690 n.14.

The harm caused by an unwanted phone call is at least "an identifiable trifle." Every robocall contributed to Ms. Romero's stress and aggravation. Every call wasted some amount of Ms. Romero's time. Even just looking at the caller id (either as the phone rings or after the fact) and deciding to ignore a call takes time. Every call intruded upon Ms. Romero's seclusion—either by ringing or by showing up as a missed call. And every call occupied her cell phone without consent—regardless of whether she answered it or even heard it ring.

Moreover, even if, as the district court asserted, calls that Ms. Romero did not hear ring did not cause these harms, they certainly entailed a substantial risk of doing so. And under *Spokeo*, this risk is itself a concrete injury. 136 S. Ct. at 1549 ("[T]he risk of real harm" is a concrete injury.); *see Mey*, 2016 WL 3645195, at *7 ("risk of harm" caused by robocalls is a concrete injury).

For these reasons, courts have repeatedly held that even a single unwanted call causes concrete harm sufficient for standing. *See, e.g.*, *Cabiness v. Educ. Fin. Sols., LLC*, No. 16-CV-01109-JST, 2016 WL 5791411, at *5 (N.D. Cal. Sept. 1, 2016); *Krakauer v. Dish Network L.L.C.*, 168 F. Supp. 3d 843, 845 (M.D.N.C. 2016); *Ung v. Universal Acceptance Corp.*, No. 15-127, 2016 WL 4132244, at *2 (D. Minn. Aug. 3, 2016); *see also Patriotic Veterans, Inc., v. Zoeller*, -- F.3d --, 2017 WL 25482, at *2 (7th Cir. Jan. 3, 2017) ("Every call uses some of the phone owner's time and mental energy, both of which are precious.").

Indeed, the very same term that *Spokeo* was decided, Chief Justice Roberts wrote that the entire Court agreed that a plaintiff who had received a single unwanted text message had suffered an injury-in-fact. *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 679 (2016) (Roberts, C.J., dissenting).

The injury caused by any single call may be small, but it *is* an injury. That is all that is required. The lower court erred in holding otherwise.

C. Ms. Romero's Injuries Are Fairly Traceable to the Banks' Conduct.

The district court acknowledged that Ms. Romero's injuries were traceable to the banks' calls. *See* ER 16 (recognizing that the "calls . . . may have been stressful, aggravating, and occupied Plaintiff's time"). But, the court held, traceability to the banks' calls was not enough. Because the calls would not have violated the TCPA if they had been made by an actual person, rather than a

computer, the court held that Ms. Romero was required to demonstrate that her injuries were traceable not just to the calls but specifically to the use of an autodialer to make those calls—a requirement, the court concluded, Ms. Romero could not possibly meet. Indeed, in the lower court's view, no TCPA plaintiff could *ever* meet this requirement, for, "regardless of *Congress's* reasons for enacting the TCPA," the *lower court* believed that the harm from a robocall is no different than the harm from any other call. ER 15 (emphasis added).[4]

But, as explained below, this Court and the Supreme Court have both consistently held that a plaintiff's injury need only be traceable to the defendant's *conduct*. It need not be traceable—or even connected— to the statute that renders that conduct unlawful, let alone any particular element of that statute. The district court's decision conflicts with this binding precedent, and therefore, should be reversed.

1. The district court grafted onto the standing analysis a requirement that isn't there: In the lower court's view, standing requires not only an injury that is traceable to the defendant's conduct, but an injury that is specifically—and uniquely—traceable to the *particular elements* of that conduct that render it illegal. But that can't be right.

[4] As explained above, this assertion contradicts the considered view of Congress as expressed in the TCPA and its legislative history—as well as the views of actual consumers. The court did not explain its decision to substitute its own view of the harm caused by robocalls for that of Congress.

On this view, plaintiffs would not only be unable to bring TCPA claims, they would be unable to bring almost *any* claim. An antitrust plaintiff alleging price-fixing would lack standing unless she could demonstrate that high prices are more harmful to her when they stem from an agreement between competitors than when they happen to be independently adopted. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("Sherman Act does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy."). A Title VII plaintiff couldn't bring a discrimination claim unless she could show that she was somehow uniquely harmed because her employer had more than fifteen workers. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006) (cause of action under Title VII is limited to employers having "fifteen or more employees"). Numerous statutory claims would get thrown out of court because plaintiffs couldn't demonstrate that their injury was somehow caused or made worse by the fact that the defendant's conduct affected interstate commerce.

This, of course, is not the law. Standing requires only an injury-in-fact "fairly traceable to the challenged conduct of the defendant." *Spokeo,* 136 S.Ct. at 1547. The Supreme Court has repeatedly held that what makes that conduct illegal—or even *if* the conduct is illegal—is irrelevant. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("[T]he absence of a valid . . .

cause of action does not implicate . . . the courts' statutory or constitutional *power* to adjudicate the case.").[5]

Indeed, both the Supreme Court and this Court have consistently rejected the contention that standing requires *any* nexus whatsoever between the injury a plaintiff alleges was caused by the defendant's conduct and the reason that conduct is illegal—let alone the onerous requirement the district court imposed, that every element of the plaintiff's legal cause of action must have a causal relationship to the plaintiff's injury. In *Duke Power*, for example, the plaintiffs challenged a federal statute that limited the liability of privately-owned nuclear power plants in the event of an accident to $560 million. *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 69 (1978). The plaintiffs' legal claim was, essentially, that $560 million was an arbitrary amount—and therefore the statute violated the Due Process Clause. *Id.* at 82. But the plaintiffs' injuries did not stem from this alleged arbitrariness. The plaintiffs were (allegedly) injured because the statute would enable two nuclear power plants to be built near them, and those plants would adversely affect the plaintiffs' health and the lakes they used for recreation. *Id.* at 73. Much like the lower court here, the defendants in *Duke Power* argued that the plaintiffs lacked standing because they had not "demonstrate[d] a connection

[5] Of course, if the alleged conduct is not illegal, the plaintiff will not have a *cause of action*. But she still has standing.

between the injuries they claim[ed] and the constitutional rights being asserted." *Id.* at 78.

The Supreme Court forcefully rejected this argument. Outside the context of taxpayer lawsuits, the Court explained, no case has ever "demanded this type of subject-matter nexus between the right asserted and the injury alleged." *Duke Power*, 438 U.S. at 79. The Court refused to "accept the contention" that a plaintiff must show anything "more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Id.* The Court held that because the plaintiffs had shown a concrete injury—the adverse effects caused by the power plants—that would be redressed by a favorable decision—there was a "substantial likelihood" that striking down the statute would prevent the plants from being built—the plaintiffs had standing. *Id.* at 76, 79. It didn't matter that what allegedly rendered the statute unconstitutional was not what caused the plaintiffs' injuries. *See id.* at 79. Their injuries were fairly traceable to the defendants' conduct, and that was enough. *See id.*

Similarly, in *Brown*, this Court held that certain counties in Washington, which stood to lose money because of a federal statute banning timber exportation, had standing to bring a claim that the statute violated the Tenth Amendment. *Bd. of Nat. Res. of State of Wash. v. Brown*, 992 F.2d 937, 945 (9th Cir. 1993). There was "no connection or nexus between the" counties' injury—"the loss of money"

caused by their inability to export timber—and the reason the statute was unconstitutional—it required the states to pass certain regulations. *Id.* But, relying on *Duke Power*, this Court held that no such nexus was necessary. *Id.* All that mattered was that the government's conduct (passing the statute) injured the counties (by causing them to lose money), and there was a "substantial likelihood that the judicial relief requested" (a declaration of the statute's unconstitutionality) would "prevent or redress the claimed injury." *Id.*; *see also Montana Envtl. Info. Ctr. v. U.S. Bureau of Land Mgmt.*, 615 F. App'x 431, 432-33 (9th Cir. 2015) ("Although Appellants' claims of procedural error relate to the government's alleged failure to consider climate-change effects, Appellants' injuries which resulted from that error need not."); *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1180 (9th Cir. 2000) (rejecting contention that plaintiffs alleging "environmental" injuries must bring suit under an "environmental" statute).

Here, the district court demanded not only a subject-matter nexus between Ms. Romero's injuries and her legal cause of action, but a nexus between her injuries and a specific element of her cause of action—the use of an autodialer. This requirement is clearly foreclosed by the Supreme Court's decision in *Duke Power* and this Court's decision in *Brown*. Ms. Romero has demonstrated several

concrete injuries traceable to the banks' robocalls, injuries that would be redressed by an award of damages. That is all that is required for standing.[6]

2. *Spokeo* does not hold otherwise. The lower court relied on the statement in *Spokeo* that "a bare procedural violation, divorced from any concrete harm" does not "satisfy the injury-in-fact requirement." *Spokeo*, 136 S. Ct. at 1549. The district court took this statement to mean that even if a plaintiff alleges concrete

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[6] Similar to the district court here, the *Duke Power* defendants also argued that the plaintiffs' injuries were not traceable to the statute limiting liability for private nuclear power plants, because if the statute "had not been passed, the Government would have undertaken development of nuclear power on its own and the same injuries would likely have accrued to [the plaintiffs] from such Government-operated plants as from privately operated ones." 438 U.S. at 77.

The Supreme Court rejected this argument out of hand. "Whatever the ultimate accuracy of this speculation," the Court explained, "it is not responsive to the simple proposition that private power companies now do in fact operate the nuclear-powered generating plants injuring [the plaintiffs], and that their participation would not have occurred but for the enactment and implementation of the" statute. *Duke Power*, 438 U.S. at 77–78. "Nothing in [the Court's] prior cases," the Court held, "requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief." *See id.* at 78; *see also Bisson*, 231 F.3d at 1178 (rejecting contention that plaintiffs—injured by the inability to continue using federal land the Bureau of Land Management had traded away—lacked standing to bring a claim that the land was unlawfully traded for land of less than equivalent value simply because, hypothetically, the Bureau could have traded the land away for the lawful amount and that, too, would have injured the plaintiffs).

So too here. "[W]hatever the ultimate accuracy" of the district court's "speculation" that the banks *could* have hired someone to manually call Ms. Romero hundreds of times—speculation that is dubious at best—"it is not responsive to the simple proposition" that "in fact" the banks robocalled Ms. Romero nearly three hundred times, and that those robocalls injured her. That is sufficient for standing.

harm traceable to the defendant's conduct, that harm still cannot give rise to standing unless it is connected to the statute—and, apparently, each particular element of the statute—the plaintiff alleges was violated. ER 16 (holding that Ms. Romero lacked standing because her "alleged concrete harm was divorced from the alleged violation of the TCPA"). But that is not what that statement means.

Spokeo did not silently impose a requirement that there must always be a nexus between a plaintiff's injury and her cause of action—a nexus the Supreme Court has consistently rejected. *Cf. Hohn v. United States*, 524 U.S. 236, 252 (1998) (explaining that the Court does not silently overrule its prior precedent). Rather, it merely reaffirmed the longstanding principle that where a plaintiff's alleged injury *is* that the defendant violated a right granted to the plaintiff by statute, "a bare procedural violation," standing alone, is insufficient. *See Spokeo*, 136 S. Ct. at 1549; *Lujan*, 504 U.S. at 572 n.7.

This holding is irrelevant here. For one thing, Ms. Romero does not contend that her sole injury is the banks' violation of the TCPA. As explained above, her injuries are that the banks' calls gave her headaches, stress, and aggravation; intruded upon her seclusion; wasted her time; and occupied her phone line—all injuries that would be cognizable, concrete injuries, regardless of whether Congress had ever passed the TCPA. There is no requirement that she tie these injuries to the statute.

Moreover, the banks' violation of the TCPA was not a "bare procedural violation." As several courts—including the Supreme Court—have held, the TCPA provides a *substantive* right to be free from robocalls. *See, e.g.*, *Mims*, 132 S. Ct. at 751 (describing TCPA as enacting "substantive prescriptions"); *Mey*, 2016 WL 3645195, at *2. Congress did not merely enact procedures it hoped would curb robocalls. It directly prohibited them. The violation of the TCPA, therefore, cannot possibly be "divorced from" the harm Congress sought to prevent: It *is* the harm Congress sought to prevent. *See, e.g.*, *Cabiness*, 2016 WL 5791411, at *5 (collecting cases); *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-4069, 2016 WL 4439935, at *5-*6 (N.D. Ill. Aug. 23, 2016).

Finally, even if robocalls could be considered merely a procedural violation of the TCPA—and even if Ms. Romero's sole injury was the violation of her statutory right to be free from robocalls—she would still have standing under *Spokeo*. As explained above, *Spokeo* explicitly recognized that the violation of even a procedural right can constitute a concrete injury, if that right protects a concrete interest. *See Spokeo*, 136 S. Ct. at 1549. There is no dispute that the use of an autodialer leads to a substantial risk of unwanted calls—a risk from which Congress sought to protect consumers under the TCPA. Thus, even if the prohibition on robocalls could be considered merely procedural, it is a procedure meant to protect consumers' concrete interest in freedom from unwanted calls—

the precise interest that was violated in this case. Under *Spokeo*, therefore, violation of this prohibition is a concrete harm, sufficient to support standing.

D. The Vast Majority of Courts Have Held that Plaintiffs Like Ms. Romero Have Standing To Bring TCPA Claims.

The decision below is an extreme outlier. The vast majority of courts—both pre- and post-*Spokeo*—have held that a plaintiff who receives unwanted robocalls has standing to bring a TCPA claim.[7]

Moreover, not only is the decision below an outlier, in just the few months since it was issued, several courts have explicitly rejected it. *See, e.g.*, *LaVigne v. First Cmty. Bancshares, Inc.*, No. 1:15-CV-00934-WJ-LF, 2016 WL 6305992, at *6 (D.N.M. Oct. 19, 2016) (characterizing decision as "hardly convincing," "draconian," "an outlier," and "inexplicable"); *Mbazomo v. Etourandtravel, Inc.*, No. 2:16-CV-02229-SB, 2016 WL 7165693, at *2 (E.D. Cal. Dec. 8, 2016);

[7] *See, e.g.*, *Holderread v. Ford Motor Credit Co., LLC*, No. 4:16-CV-00222, 2016 WL 6248707, at *3 (E.D. Tex. Oct. 26, 2016); *Mey*, 2016 WL 3645195, at *8; *Cabiness*, 2016 WL 5791411, at *6; *Krakauer*, 168 F. Supp. 3d at 845; *Aranda*, 2016 WL 4439935, at *6; *Hewlett v. Consol. World Travel, Inc.*, No. 2:16-713, 2016 WL 4466536, at *3 (E.D. Cal. Aug. 23, 2016); *A.D. v. Credit One Bank, N.A.*, No. 14-cv-10106, 2016 WL 4417077, at *8 (N.D. Ill. Aug. 19, 2016); *Ung*, 2016 WL 4132244, at *2-3; *Cour v. Life360, Inc.*, No. 16-CV-00805-TEH, 2016 WL 4039279, at *2 (N.D. Cal. July 28, 2016); *Rogers v. Capital One Bank (USA), N.A.*, No. 1:15-CV-4016-TWT, 2016 WL 3162592, at *2 (N.D. Ga. June 7, 2016); *Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016); *see also Campbell-Ewald*, 136 S. Ct. at 679 (Roberts,C.J., dissenting) (stating that all Justices agreed that plaintiff alleging single unwanted text message had standing); *Mims*, 132 S. Ct. at 744 (holding that federal courts have subject matter jurisdiction over TCPA claims, without questioning the plaintiff's standing).

Wilkes, 2016 WL 7179298, at *5; *see also Hunsinger*, 2016 WL 7048895, at *4 (plaintiff need not demonstrate that harm from text messages that violate TCPA is different from harm caused by other text messages); *Caudill v. Wells Fargo Home Mortg., Inc.*, No. CV 5:16-066-DCR, 2016 WL 3820195, at *2 (E.D. Ky. July 11, 2016) (rejecting contention that plaintiff lacked standing to challenge unwanted robocalls, simply because defendant could have injured the plaintiff through manually-dialed calls).

This Court should do the same.

III. The Banks' Violations of the Rosenthal Act Were Incurable.

California's Rosenthal Act prohibits precisely the conduct Ms. Romero alleges in this case—harassing consumers through incessant phone calls. *See* Cal. Civ. Code §§ 1788.11(d), (e); *id.* § 1788.17 (incorporating 15 U.S.C. § 1692d). In moving for summary judgment, the banks did not contend—and the lower court did not hold—that their relentless calls were lawful. Instead, the court held that the banks had "cured" any statutory violation, simply because they did not call Ms. Romero after receiving notice of her lawsuit.

The lower court relied on a provision contained in the initial version of the Rosenthal Act, passed in 1977, which stated:

> A debt collector shall have no civil liability under this title if, within 15 days either after discovering a violation *which is able to be cured*, or after the receipt of a written notice of such violation, the debt collector notifies the debtor of the violation, and makes whatever

> adjustments or corrections are necessary to cure the violation with respect to the debtor.

Cal. Civ. Code § 1788.30 (emphasis added).

But as explained below, this provision is no longer operative. And even if it were, harassing a consumer with hundreds of unwanted calls is not a violation that is "able to be cured." Indeed, in the forty-year history of the Rosenthal Act, the decision below is the only decision ever to hold that a debt collector "cured" its liability for repeatedly hounding a consumer with unwanted calls, simply because the collector eventually stopped calling.

In the district court's view, a debt collector can violate the Rosenthal Act with impunity, so long as it stops within fifteen days of being sued. That is not the law.

1. As an initial matter, the California legislature rendered the Rosenthal Act's cure provision inoperative in 1999, when it amended the statute to adopt the remedies provision of the federal Fair Debt Collection Practices Act. As relevant here, the provision the California legislature added to the Rosenthal Act states: "Notwithstanding any other provision of this title [i.e. the Rosenthal Act], every debt collector collecting or attempting to collect a consumer debt . . . shall be subject to the remedies in Section 1692k of Title 15 of the United States Code [the remedies provision of the federal debt collection statute]." Cal. Civ. Code § 1788.17. As this Court has previously held, this amendment "unambiguously

supercedes any provision of the Rosenthal Act inconsistent with" the federal Act's remedies provision. *Gonzales v. Arrow Fin. Servs., LLC*, 660 F.3d 1055, 1065 (9th Cir. 2011).

Like the Rosenthal Act, the remedies provision of the federal Fair Debt Collection statute provides a safe harbor. But the federal safe harbor is narrower than that originally provided by the Rosenthal Act. Under the federal statute, debt collectors cannot escape liability for their misconduct simply by "curing" it. *See generally* 15 U.S.C. § 1692k. Rather, a collector is liable for *any* violation—cured or not—unless it can demonstrate that it "resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Id.* at § 1692k(c). Under the federal remedies provision, then, unless a collector can prove its violation was a "bona fide error," consumers are entitled to a remedy of actual or statutory damages. *See id.* at § 1692k(a).

The Rosenthal Act's cure provision—which *prevents* consumers from getting a remedy if a violation has been cured—is "inconsistent" with the federal Act's remedies provision—which *provides* a remedy, regardless of whether a violation has subsequently been cured. The Rosenthal Act's cure provision was therefore rendered inoperable by the legislature's adoption of the federal Act's remedies provision.

Indeed, this was the legislature's intent. The legislative history repeatedly states that "[t]he area of current law, which is of most concern to the proponents of this legislation, is the ability for violators to escape liability if they cure the impact of their illegal practice." *See, e.g.*, Bill Analysis, S. Jud. Comm., AB 969, 1999-2000 Sess., at 4 (Cal. 1999).[8] This ability to cure, the amendment's supporters worried, meant that "debt collectors [could] flaunt the law with no threat of accountability." *Id.* Removing the cure provision, they believed, was necessary to ensure the "deterrent" effect of the Act. *Id.*

The legislature's belief that adopting the federal remedies provision would obviate the state cure provision is evident in the comparisons contained in the legislative history between "existing law"—which was, of course, described as containing the cure provision—and the description of what the law would be after adopting the federal remedies provision—where the cure provision was absent. *See* Bill Analysis, S. Jud. Comm., AB 969, at 3.

Thus, both the text of the Rosenthal Act and its legislative history make clear that the legislature meant to—and, in fact, did—render the Act's cure provision inoperable.

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[8] This report is available at http://leginfo.ca.gov/pub/99-00/bill/asm/ab_0951-1000/ab_969_cfa_19990708_133036_sen_comm.html.

2. But even if the cure provision had not been superseded, the banks could not rely on it here. Harassing a consumer by calling her hundreds of times is not a "violation which is able to be cured," Cal. Civ. Code § 1788.30(d).

Although the Rosenthal Act does not explicitly identify which violations are "able to be cured," California statutes—like federal laws—are to be interpreted according to their "usual and ordinary meaning." *People v. Arias*, 45 Cal. 4th 169, 177 (2008). And the ordinary—indeed, virtually universal—meaning of the word cure in this context is to "make whole"—that is, to undo any harm that has been caused. *See, e.g.*, *United States v. Hatter*, 532 U.S. 557, 579 (2001) (unconstitutional diminution of federal judges' salaries was not "cure[d]" by subsequent salary increase because subsequent increase did not restore the judges to the position they would have been in had the constitutional violation never occurred); *Nunes v. Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003) (to "cure the constitutional error" caused by a defense attorney's failure to properly communicate a plea deal, the defendant must be restored to "the same position he would have been in had he received effective counsel"—i.e. the same plea deal must be re-offered); *Matter of Clark*, 738 F.2d 869, 872 (7th Cir. 1984) ("The common meaning of 'cure' is to remedy, restore, remove, or rectify.").

The lower court assumed that debt collectors can "cure" any violations of the Rosenthal Act, simply by refraining from violating the Act in the future. But

courts have consistently made clear that to "cure" a violation, it is not enough to simply stop it; any harm caused by the violation must be undone. *See, e.g.*, *Roberts v. Fleet Bank (R.I.)*, 342 F.3d 260, 268 (3d Cir. 2003) (misleading credit card offer was not "cure[d]" by subsequent notice because customers had already accepted credit card based on initial offer and subsequent notice did nothing to change that); *People v. Franco*, 183 Cal. App. 3d 1089, 1094 (1986) ("Here, the officers neither gave notice of their presence nor identified themselves as police officers before entering the hut. Their failure to do so was not cured by their announcement *after* entering.").

Thus, "[t]o cure" an unlawful lockout of its workers, a company must not only end the lockout; it must also ensure that "the affected employees are made whole"—by, for example, providing backpay. *Alden Leeds, Inc. v. N.L.R.B.*, 812 F.3d 159, 166 (D.C. Cir. 2016). And to cure a breach of contract, the breaching party must not only "perform the contract obligation" but also "compensate fully for [any] loss" caused by the breach. Unif. Computer Information Transactions Act § 703; *see* U.C.C. § 2-508 cmt. 5.

Although California courts have never interpreted the Rosenthal Act's cure provision—and, given that it is no longer operable, they likely never will—they have interpreted other statutory cure provisions in accordance with this widely-accepted understanding that to cure is to make whole. California's open meetings

statute, for example, contains a cure provision, allowing a legislative body that has violated the statute to avoid liability by "cur[ing]" its violation. Cal. Gov. Code §§ 54960.1(c)(2), (e). The California Court of Appeal has repeatedly held that a legislative body that impermissibly meets in secret cannot "cure" this violation simply by ceasing to meet privately—or even by holding an open meeting to reconsider any decisions it made. *See, e.g.*, *Page v. MiraCosta Cmty. College Dist.*, 180 Cal. App. 4th 471, 505 (2009); *Blaisdell v. Whittier City Sch. Dist.*, No. B149139, 2002 WL 187076, at *5–6 (Cal. Ct. App. Feb. 6, 2002). Rather, it must fully rescind all previous actions taken while in violation of the statute and begin any decisionmaking process entirely anew. *See, e.g.*, *Page*, 180 Cal. App. 4th at 505. That is, it must restore the public to the position it would have been in had the statute never been violated in the first place.

In *Page*, for example, the California Court of Appeal considered whether a community college board of trustees that had impermissibly negotiated a settlement in secret had "cure[d]" its violation by subsequently reconsidering and approving the settlement at an open meeting. *Page*, 180 Cal. App. 4th at 500, 505. The court held that the violation had not been cured because although the board reconsidered the settlement, it did not redo the "information gathering" that had led to it. *Id.* at 505. The point of the open meetings law, the court explained, is "to mandate open and public actions and deliberations." *Id.* Therefore, the court held,

"the public [was] entitled to monitor and provide input on" not just the board's decision, but its "acquisition and exchange of facts." *Id.* Because the board only reconsidered the settlement in public, but did not undergo the information-gathering and negotiation process anew, it had not undone the harm caused by its violation of the statute. *Id.* Therefore, the court held, it had not cured its violation. *Id.*

Unsurprisingly, because "curing" a statutory violation requires undoing the harm it caused, courts have consistently held that where a violation causes harm that cannot be undone, it is incurable. This concept frequently arises in the criminal context. For example, where inadmissible testimony is presented to a jury, if the jury's view of the case is irreparably prejudiced, the violation cannot be "cure[d]." *See, e.g.*, *United States v. Kragness*, 830 F.2d 842, 867 (8th Cir. 1987). Simply refraining from mentioning the testimony again "may prevent further damage," but it cannot "cure" the initial violation, for "it cannot undo what has already been done." *Id.*; *see also United States v. Poston*, 430 F.2d 706, 708 (6th Cir. 1970) (jury instruction "could not cure" inadmissible testimony concerning prior conviction); *Williams v. State of Ala.*, 341 F.2d 777, 781 (5th Cir. 1965) ("[T]he defect of lack of counsel at arraignment cannot be cured by later appointment of counsel" because "the damage ha[s] already been done; Humpty Dumpty could not be put together again.").

This principle—that a violation cannot be cured unless the harm it caused can be undone—is no different in the civil context. Take, for example, a California statute that provides a cause of action against businesses that fail to warn of carcinogenic chemicals. *See* Cal. Health & Safety Code § 25249.6. A plaintiff is not permitted to sue for violation of the statute unless it gives notice to the government sixty days before filing the complaint. *See id.* § 25249.7(d)(1). The point of the notice provision is to give the government an opportunity to discourage frivolous lawsuits and encourage the resolution of disputes without resort to litigation. *See Physicians Comm. for Responsible Med. v. Applebee's Int'l, Inc.*, 224 Cal. App. 4th 166, 182–83 (2014). Therefore, courts have repeatedly held that the failure to provide proper pre-suit notice "cannot [be] cure[d]." *See, e.g.*, *id.*; *Harris v. R.J. Reynolds Vapor Co.*, No. 15-CV-04075-JD, 2016 WL 6246415, at *2 (N.D. Cal. Sept. 30, 2016). Any notice filed subsequent to litigation cannot possibly remedy the government's inability to intervene in the dispute before litigation began.

Over and over again, in context after context, courts have held that a violation is incurable where the damage caused cannot be undone. *See, e.g.*, *Stollings v. Ryobi Techs., Inc.*, 725 F.3d 753, 762 n.2 (7th Cir. 2013) (plaintiff's failure to object to defense attorney's mischaracterization of evidence was irrelevant because the error "could not have been cured," for the "damage had

already been done"); *In re Claremont Acquisition Corp., Inc.*, 113 F.3d 1029, 1033 (9th Cir. 1997) ("[T]his default is a historical fact and, by definition, cannot be cured."); Unif. Computer Information Transactions Act § 703, cmt. 5 (where "damage done" by a breach of contract "cannot be reversed," "cure is inapplicable").

So too here. Indeed, the Rosenthal Act incorporates this idea into the text of the statute itself—expressly limiting the cure provision to violations "which are able to be cured." Cal. Civ. Code § 1788.30(d). If violations could be cured simply by choosing not to repeat them—without having to undo the harm caused by previous violations—all violations of the Act would be curable, rendering the limitation of the cure provision to violations "which are able to be cured" meaningless. *Cf. People v. Craft*, 41 Cal. 3d 554, 560 (1986) ("[A] statute should not be given a construction that results in rendering one of its provisions nugatory.").

Furthermore, this interpretation would lead to absurd results. A debt collector could call a debtor hundreds of times, or verbally harass them, or, for that matter, punch them in the face, and so long as the collector stopped once the debtor sued—or, in fact, fifteen days *after* the debtor sued—the collector would face no liability under the Act. That can't be what the legislature intended. If it were, the statute would be utterly useless. Debt collectors could violate the law with

impunity and, so long as they stopped doing so within two weeks of being sued, they would suffer no consequences.

Under California law, remedial statutes are to be broadly construed "to effectuate [their] purpose," and any safe harbors they contain, therefore, should be narrowly interpreted. *See Komarova v. Nat'l Credit Acceptance, Inc.*, 175 Cal. App. 4th 324, 340 (2009). The Rosenthal Act is undeniably a remedial statute, the purpose of which is to protect consumers from abusive debt collection. *See id.*; Cal Civ. Code § 1788.1 ("It is the purpose of this title to prohibit debt collectors from engaging in unfair or deceptive acts or practices in the collection of consumer debts.").

Properly interpreted, the Rosenthal Act's cure provision—were it still operative—would allow debt collectors to avoid liability for violations if (and only if) they had undone any harm those violations caused. Thus, perhaps, for example, a debt collector who sent a letter that misrepresented the collector's affiliation with an attorney could send a subsequent letter, notifying the debtor of the misrepresentation and informing the debtor that there is, in fact, no such affiliation. And, so long as the debtor had not acted in reliance on the improper notice or been harmed by it, the misrepresentation violation would be cured. Or a collector who impermissibly collected fees for its services from a debtor could cure its violation by returning the fees. *See* Cal. Prac. Guide Enf. J. & Debt § 2:243 (2016). But a

debt collector that has harassed a consumer by calling her hundreds of times cannot undo that harm—it cannot reverse the stress and annoyance and aggravation caused or give back the time wasted.

The banks' violations here, therefore, are incurable. The district court's decision to the contrary should be reversed.

IV. Ms. Romero Is Entitled To Have a Jury Decide Her Intrusion Upon Seclusion Claim.

Not only did the banks' incessant calling violate state and federal statutes, it also violated Ms. Romero's common law right to privacy. As the California Supreme Court has recognized, the right to be let alone—to maintain "personal control" over who can intrude into your life and how—is "the very essence of personal freedom and dignity." *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231 (1998). This right is recognized by the common law privacy tort, intrusion upon seclusion. *See id.* Here, the banks repeatedly intruded upon Ms. Romero's daily life—calling her cell phone over and over and over again—literally hundreds of times—against her will. Nevertheless, the lower court decided that Ms. Romero's intrusion upon seclusion claim failed as a matter of law, because, in the court's view, no reasonable person could find hundreds of unwanted calls to be "highly offensive." ER 22-24.

But, as explained below, reasonable people *have* found such conduct highly offensive. Congress has passed multiple laws against it. So too has California. And

courts have repeatedly held that similar conduct is sufficient to state a claim for invasion of privacy. Indeed, the Restatement (Second) of Torts—which California has adopted on this issue—explicitly states that "hounding" a consumer with unwanted calls is an intrusion upon seclusion. Restatement § 652B. The district court's decision to ignore all of these authorities and instead decide for itself that a reasonable person could not possibly find the banks' relentless calls highly offensive was error and should be reversed.

1. As noted above, California has adopted the formulation of intrusion upon seclusion provided by the Restatement (Second) of Torts: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person," Restatement § 652B. *See Sanders v. Am. Broad. Companies, Inc.*, 20 Cal. 4th 907, 914 (1999). Thus, there are two elements to an intrusion claim: (1) "[T]he plaintiff must show [that] the defendant penetrated some zone of physical or sensory privacy surrounding . . . the plaintiff"; and (2) the plaintiff must demonstrate that the "manner" of this intrusion would be "highly offensive to a reasonable person." *Id.* at 914-15.

The district court correctly assumed that Ms. Romero had satisfied the first element—that the hundreds of unwanted calls the banks made to her cell phone

constituted an intrusion. ER 22. Indeed, because the banks were calling Ms. Romero's cell phone, she could never escape them. Not only did the banks call her at home; the calls followed her wherever she went.

Counterintuitively, the banks argued below that this made the calls *less* intrusive. Defs.' Reply Mot. Summ. J., Dkt. 53, at 6-7. Unrelenting calls, the banks suggested, are only intrusive when received at home. Indeed, the banks' argument went even further: They argued that because Ms. Romero did not document exactly where she was when each call was received (and therefore could not prove which calls came in while she was at home), the banks should escape liability altogether. *Id.* Apparently, in the banks' view, unless a consumer fastidiously documents her whereabouts each time she is called, a company can call her cell phone as many times as it wants without consequence. But that is not the law.

To the contrary, California law is clear that the right to privacy is *not* limited to the home. *Sanders*, 20 Cal. 4th at 917. Indeed, it is not even limited to non-public places. *See, e.g.*, *Shulman*, 18 Cal. 4th at 233; *Smith v. Hance*, No. D047471, 2007 WL 1301051, at *10 (Cal. Ct. App. May 4, 2007) (photographing a person in a public place can be considered an invasion of privacy if it's "repeated with such persistence and frequency as to amount to a course of hounding").

Rather, the right to privacy protects against intrusion into *any* "sphere[ ] where an ordinary person in plaintiff's position could reasonably expect that *the*

particular defendant should be excluded." *Sanchez-Scott v. Alza Pharm.*, 86 Cal. App. 4th 365, 373 (2001) (emphasis added).

Thus, the California Supreme Court has explained that a camera crew, filming inside a prison, could intrude upon the seclusion of a prisoner—despite the fact that he was working out in full view of the guards and other prisoners—because although the prisoner expected to be seen by guards and other prisoners, that did not "strip him of the right to remain secluded from others." *Sanders*, 20 Cal. 4th at 917 (discussing *Huskey v. National Broadcasting Co., Inc.*, 632 F. Supp. 1282 (N.D.Ill. 1986)).

Similarly, the court held that a car accident victim may have an intrusion claim against a cameraman who secretly recorded the victim's conversations with her rescuers—despite the fact that the conversations took place outside, in public. *Shulman*, 18 Cal. 4th at 233. While the victim, of course, knew that the rescuers—and perhaps others within earshot—could hear her, the Court explained, she may have reasonably expected that the cameraman could not. *See id.*

California law recognizes that privacy "is not a binary, all-or-nothing characteristic." *Sanders*, 20 Cal. 4th at 916. "[T]he fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law." *Id.* Rather, "[p]rivacy for purposes of

the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." *Id.* at 918.

Here, Ms. Romero reasonably expected that she would not be subject to incessant—and illegal—robocalling by banks she had already told not to call her. This expectation is no less reasonable when Ms. Romero was going about her daily life in public than it was when she was at home. "The mere fact" that a person goes out in public cannot "automatically mean that he or she can legally be forced to be subject to" an onslaught of unwanted calls. *See Sanders*, 20 Cal. 4th at 916.

Indeed, courts have repeatedly upheld intrusion upon seclusion claims based on calls to cell phones. *See, e.g.*, *Masuda v. Citibank, N.A.*, 38 F. Supp. 3d 1130, 1134–35 (N.D. Cal. 2014); *Varnado v. Midland Funding LLC*, 43 F. Supp. 3d 985, 992 (N.D. Cal. 2014); *Duncan v. JP Morgan Chase Bank, N.A.*, No. 5:10-CV-01049, 2011 WL 5359698, at *6 (S.D. W. Va. Nov. 4, 2011) (characterizing creditor's argument to the contrary "incredible" and "disingenuous"). As one court explained, the fact that "[t]echnology and advances in science now allow" people to be called "in places in which the conventional land-line telephone would not permit" should not "chip away at [their] long-established right to be let alone." *Duncan*, 2011 WL 5359698, at *6.

Because Ms. Romero had a reasonable expectation that she would not be subject to unwanted—and, indeed, unlawful—calls from banks she had explicitly

told to stop calling her, the first element of the intrusion upon seclusion claim is satisfied.

2. Ms. Romero also presented sufficient evidence to survive summary judgment on the second element of her intrusion claim: that the banks' unremitting calls to her cell phone would be considered "highly offensive to a reasonable person," Restatement § 652B.

The banks called Ms. Romero nearly three hundred times—sometimes two or three or even eight times a day—despite the fact that she repeatedly told them to stop. Whether a reasonable person would find such conduct "highly offensive" is a quintessential jury question. *See Sloman v. Tadlock*, 21 F.3d 1462, 1468 (9th Cir. 1994) ("[E]valuating the reasonableness of human conduct is undeniably within the core area of jury competence.").

Nevertheless, the district court decided the question for itself. In the district court's view, it didn't matter how many calls Ms. Romero received, because no reasonable jury could *ever* find that relentless robocalling, in and of itself, is "highly offensive." ER 23. According to the district court, as a matter of law, a reasonable person would only find a debt collector's robocalling "highly offensive" if the person answered the calls and was harassed by the caller—regardless of how many times the debt collector called. *Id*. But that's simply not true.

To the contrary, it's clear that reasonable people *do* believe that repeatedly receiving unwanted robocalls is highly offensive in and of itself—regardless of the calls' content. As explained above, the legislative history of the Telephone Consumer Protection Act is full of evidence that consumers—and Congress—consider robocalls to be an intrusive invasion of privacy.

And in the Fair Debt Collection Practices Act, Congress explicitly cited repeated phone calls as an example of debt collection conduct, "the natural consequence of which is to harass, oppress, or abuse." 15 U.S.C. § 1692d.

The California legislature believes repeated phone calls are so offensive that it criminalized them. *See* Cal. Penal Code § 653m (b) ("Every person who, with intent to annoy or harass, makes repeated telephone calls . . . to another person is, *whether or not conversation ensues* from making the telephone call . . ., guilty of a misdemeanor." (emphasis added)); *see also* Cal. Civ. Code § 1788.11(d) (prohibiting debt collectors from "[c]ausing a telephone to ring repeatedly or continuously to annoy the person called").

And although California state courts have not yet considered a claim of intrusion upon seclusion based on repeated phone calls, federal courts applying California law have repeatedly held that "repeated and continuous calls made in an attempt to collect a debt may give rise to a claim of intrusion upon seclusion." *Masuda*, 38 F. Supp. 3d at 1134. The California Court of Appeal has cited this

holding with approval. *See Bagheri v. Adeli-Nadjafi*, No. B255407, 2016 WL 298800, at *5 (Cal. Ct. App. Jan. 25, 2016).

Perhaps most importantly, the Restatement (Second) of Torts—which, again, California has adopted on this issue—states that while "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, to demand payment of a debt," a person's privacy *is* invaded "when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence." Restatement § 652B cmt. d.

Here, the banks did not call Ms. Romero two or three or even fifty or one hundred times. They called her nearly three hundred times, often multiple times a day, causing her headaches, tension, and stress. A reasonable jury could certainly conclude that a reasonable person would find such calls a "substantial burden to [their] existence."

And, indeed, courts have repeatedly held that similar—and, in some cases, far less egregious—conduct is sufficient to proceed with an intrusion claim. In *Joseph v. J.J. Mac Intyre Companies, L.L.C.*, for example, the court held the plaintiff stated a claim for intrusion upon seclusion where the defendant made nearly two hundred calls to the plaintiff over nineteen months. 238 F. Supp. 2d 1158, 1168-69 (N.D. Cal. 2002). And in *Duncan*, the court held that whether sixty-

eight calls in eleven months would be "highly offensive to a reasonable person" must be determined by a jury. *Duncan*, 2011 WL 5359698, at *5-6.[9]

While some cases have suggested that an intrusion claim may not be premised solely on the volume of calls, these cases have generally involved far fewer calls than those at issue here. *See, e.g.*, *Inzerillo v. Green Tree Servicing, LLC*, No. 13-CV-06010-MEJ, 2014 WL 6660534, at *5 (N.D. Cal. Nov. 24, 2014) ("Defendant called no more than 10-12 times."); Compl. ¶ 5(e), *McEndree v. Rash Curtis & Assocs.*, No. 2:10-CV-01079-MCE, 2010 WL 2969094 (E.D. Cal. May 2, 2010) (alleging fourteen calls). And to the extent these cases stand for the proposition that repeated robocalls can *never* be considered "highly offensive"—no matter how many times a debt collector calls—this Court should not follow them,

[9] *See also Baldwin v. Monterey Fin. Servs., Inc.*, No. 3:14-CV-2346, 2016 WL 5723734, at *19 (M.D. Pa. Sept. 30, 2016) ("[T]he Court cannot say as a matter of law that no reasonable factfinder could" find that "eighty-six (86) telephone calls" in "over one hundred and sixty-six (166) days" was not a "substantial burden"); *Hilgenberg v. Elggren & Peterson*, No. 2:13-CV-1086, 2015 WL 4077765, at *9 (D. Utah July 6, 2015) ("[T]he question of what constitutes a substantial intrusion that is highly offensive to a reasonable person is fact intensive and therefore" the plaintiffs' intrusion claim—based on twenty calls—is "best resolved at trial."); *Alejandre v. Gen. Elec. Co.*, No. CV 12-1304-CBM-JEM, 2013 WL 12119718, at *1, *3 (C.D. Cal. Feb. 20, 2013) ("[F]ifty-nine calls made . . . in 10 days create[s] a triable issue of fact"—despite the fact that the plaintiff never answered the phone or asked the defendant to stop calling.); *Brandt v. I.C. Sys., Inc.*, No. 8:09-CV-126-T-26MAP, 2010 WL 582051, at *4 (M.D. Fla. Feb. 19, 2010) (101 calls sufficient to create "genuine issue" as to whether defendant invaded plaintiff's privacy); *Pattin v. ARS Nat. Servs., Inc.*, No. 06-3077, 2007 WL 7946043, at *4 (D. Minn. May 7, 2007) ("[T]he twenty-eight (28) telephone calls to the Plaintiffs at their home and workplace . . . pushes this case into the arena of sufficiently culpable behavior as to sustain a punitive damages claim [for intrusion upon seclusion].").

for Congress, the California legislature, and the Restatement of Torts—all "reasonable" sources—demonstrate otherwise.

Indeed, numerous courts have explicitly rejected the contention that a high volume of calls, standing alone, could not be "highly offensive" to a reasonable person. *See, e.g.*, *Messina v. Green Tree Servicing, LLC*, No. 14-cv-7099, 2016 WL 6089821, at *13-14 (N.D. Ill. Sept. 28, 2016) (rejecting debt collector's argument that repeated phone calls cannot be "highly offensive" if their content is not offensive and holding that a reasonable jury could find 167 phone calls over four months to be an intrusion upon seclusion); *Dolenski v. GE Money Bank, F.S.B.*, No. 3:11-CV-1594-JAH, 2012 WL 12054940, at *5 (S.D. Cal. Mar. 28, 2012) (rejecting contention that plaintiff must allege that content of calls is offensive and holding that volume of calls alone is sufficient where plaintiff received hundreds of calls—despite the fact that plaintiff never answered any of the calls); *Desmond v. Phillips & Cohen Assocs., Ltd.*, 724 F. Supp. 2d 562, 569 (W.D. Pa. 2010) (allowing intrusion claim based on repeated phone calls and letters to go to jury despite lack of evidence that the defendant "called [the plaintiff] during the early morning or late night hours, threatened him either with legal action or physical harm, or contacted his family or friends").

As the Eleventh Circuit has explained, repeated, unwanted calls need not be answered to be offensive: "[A] ringing telephone, even if screened and

unanswered, can be harassing." *Meadows v. Franklin Collection Serv., Inc.*, 414 F. App'x 230, 234 (11th Cir. 2011).

Moreover, even if a court could determine that, as a matter of law, a reasonable person could not possibly find it "highly offensive" to receive nearly three hundred phone calls in a short period of time, Ms. Romero's claim is *not* based solely on the volume of calls alone.

First, all but one of these calls were made *after* Ms. Romero told the banks to stop calling her. The banks themselves, in their briefing before the lower court, conceded that repeatedly calling "with knowledge that the call is somehow unauthorized" is sufficient to send an intrusion claim to a jury. *See* Defs.' Mem. Supp. Mot. Summ. J., Dkt. No. 43-1, at 9. Robocalls made after the consumer tells the collector to stop calling are clearly "unauthorized"—and, for that matter, unlawful. *See supra* page 51.

Here, Ms. Romero received nearly three hundred such unauthorized calls. A reasonable jury could certainly find that these relentless calls, long after Ms. Romero asked the banks to stop, would be "highly offensive" to a reasonable person. *Cf. Charvat v. NMP, LLC*, 656 F.3d 440, 454 (6th Cir. 2011) ("Persisting

in calling after this do-not-call request is more offensive to and likely to outrage a reasonable person."); *Messina*, 2016 WL 6089821, at *13 (same).[10]

Making matters worse, the banks frequently called Ms. Romero, only to hang up without identifying themselves. ER 122. *Cf. Langdon v. Credit Mgmt., LP*, No. 09-3286, 2010 WL 3341860, at *2 (N.D. Cal. Feb. 24, 2010) (repeatedly calling and hanging up without disclosing that call is from debt collector violates the Rosenthal Act). And the banks' robocalls came from multiple phone numbers, meaning that Ms. Romero would sometimes have to answer the call (or return it) just to know who was calling. ER 122.

And finally, on numerous occasions, the banks made multiple calls *on the same day*—causing Ms. Romero's phone to ring over and over again throughout the day. This, too, a reasonable jury could find "highly offensive." *See Langdon*, 2010 WL 3341860, at *2 (multiple calls per day "certainly may constitute harassment or annoyance"); *Arteaga v. Asset Acceptance, LLC*, 733 F. Supp. 2d 1218, 1228 (E.D. Cal. 2010) (same).

[10] *See also Hilgenberg*, 2015 WL 4077765, at *9 (allowing intrusion claim based on twenty calls, where the defendant "repeatedly called [the plaintiffs] even after [they sent] cease-and-desist letters"); *Duncan*, 2011 WL 5359698, at *6 (holding that intrusion claim was for jury to decide where "the calls were made after Plaintiffs asked to only be contacted in writing, requested that the auto-dialer not be used to dial their home and eventually advised Defendant that they were represented by counsel with respect to the debt").

Nevertheless, the district court asserted (counterfactually) that Ms. Romero's intrusion upon seclusion claim "is premised solely on the volume of calls" the banks made to her. ER 22. That's simply not the case. Ms. Romero's claim is premised not solely on the volume of calls made to her, but the volume of calls made to her—nearly three hundred—*after* she explicitly told the banks to stop calling; the banks' repeated failure to identify themselves when they called; and the fact that the banks repeatedly called her multiple times in a single day.

As the Restatement, the California legislature, and Congress have all recognized, incessant robocalling, like that suffered by Ms. Romero, is an invasion of privacy. Ms. Romero is entitled to have a jury decide whether the incessant calling she faced would be "highly offensive" to a reasonable person.

CONCLUSION

For the reasons explained above, this Court should reverse the district court's orders dismissing Ms. Romero's TCPA claim and granting summary judgment on her Rosenthal Act and intrusion upon seclusion claims, and remand the case for trial.

Date: January 5, 2017

Respectfully submitted,

s/ *Jennifer D. Bennett*

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STATEMENT OF RELATED CASES

The issue of whether the Rosenthal Act's cure provision has been rendered inoperable by the California legislature's 1999 adoption of the remedies provision in the federal Fair Debt Collection Practices Act is raised in *Afewerki v. Anya Law Group*, No. 15-56510, which is currently pending before this Court. With the exception of *Afewerki*, Appellant knows of no other related cases pending before this Court.

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