No. 18-12077-J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SEBASTIAN CORDOBA,
individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

v.

DIRECTV, LLC,
individually and as successor through merger to DIRECTV, Inc.,
Defendant-Appellant.

Appeal from an Order of the United States District Court
for the Northern District of Georgia,
No. 1:15-CV-3755-MHC (Mark H. Cohen, J.)

MOTION FOR LEAVE TO FILE
***AMICUS CURIAE* BRIEF IN SUPPORT OF**
DEFENDANT APPELLANT

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Dated: July 9, 2018

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 to 26.1-3, proposed *amicus curiae* the Chamber of Commerce of the United States submits this Corporate Disclosure Statement and Certificate of Interested Persons, identifying the following individuals and entities with an interest in this case:

AT&T, Inc., a publicly traded company (NYSE:T), of which no entity or person owns more than 10% of its shares;

AT&T Services, Inc., counsel for Defendant/Appellant;

Boyle, Michael J., Jr., counsel for Plaintiff/Appellee;

Chamber of Commerce of the United States, a non-profit membership organization with no parent company and no publicly-traded stock, proposed *amicus curiae*;

Conger, Ava, counsel for Defendant/Appellant;

Cordoba, Sebastian, Plaintiff/Appellee;

Cuthbertson, Douglas I., counsel for Plaintiff/Appellee;

DIRECTV Group Holdings, LLC, a subsidiary of AT&T, Inc., a publicly traded company (NYSE:T);

DIRECTV Group, Inc., wholly owned by Greenlady Corp. and DIRECTV Group Holdings, LLC;

DIRECTV Holdings LLC, wholly owned by The DIRECTV Group, Inc.;

DIRECTV, LLC, wholly owned by DIRECTV Holdings LLC, Defendant/Appellant;

DTV Entertainment, Inc., wholly owned by DIRECTV Group Holdings, LLC;

Germann, Hans J., counsel for Defendant/Appellant;

Greenlady Corp., wholly owned by DTV Entertainment, Inc.;

Grunberg, Jonathan D., counsel for Plaintiff/Appellee;

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Jett, John P., counsel for Defendant/Appellant;

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Wade, Nicole Jennings, counsel for Plaintiff/Appellee;

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Yowell, Amelia G., counsel for proposed *amicus curiae*.

/s/ *Ashley C. Parrish*

Counsel for Chamber of Commerce of the United States of America

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANT-APPELLANT

According to Federal Rules of Appellate Procedure 27 and 29, the Chamber of Commerce of the United States of America respectfully moves for leave to file the attached *amicus curiae* brief in support of defendant-appellant DIRECTV, LLC.

The Chamber states the following in support of this motion:

1. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations of every size, in every industry, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing *amicus curiae* briefs in cases implicating issues of concern to the nation's business community.

2. This is precisely such a case. This Court already granted (over plaintiff-appellee's objections) the Chamber's motion for leave to file an *amicus curiae* brief supporting defendant-appellant's Rule 23(f) petition for permission to appeal, which this Court also granted. Order, *DIRECTV, LLC v. Cordoba*, No. 17-90020-J (11th Cir. May 21, 2018). The Court should grant the Chamber leave to file an *amicus* brief at the

merits stage for the same reasons and because it is likely to be helpful to the Court.

3. Many of the Chamber's members and affiliates are defendants in class actions. Accordingly, they have a keen interest in ensuring that courts rigorously analyze whether a plaintiff has satisfied the requirements for class certification. The Chamber is especially concerned with protecting a class defendant's due process rights in the administration of Rule 23. Aggregate treatment is not permitted to deprive a class-action defendant of its fundamental due-process right "to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (internal quotation marks and citation omitted).

4. This case implicates one of the most frequently litigated issues to arise in the class-action context: standing. Specifically, this case concerns whether recipients of telemarketing calls who did not request to be placed on the caller's internal do-not-call list have standing under Article III, as articulated in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), to maintain their claims as a class that the caller failed to institute appropriate internal do-not-call list procedures.

5. The Chamber participated as *amicus curiae* in *Spokeo*, and emphasized that, if the Ninth Circuit's decision there had been allowed to stand, it would have further eroded the minimum requirements for standing under Article III of the Constitution. That erosion is of grave concern to the nation's businesses because alleged technical violations of regulatory statutes, like the one here, can often relate to large numbers of people without causing anyone to suffer actual injury. When individuals are allowed to seek damages despite having suffered no concrete injury, businesses find themselves trapped in abusive litigation over allegations of harmless technical violations, burdening the courts and diverting resources from more productive uses.

6. Under Federal Rule of Appellate Procedure 29(c)(5), the Chamber certifies that no party's counsel authored the attached brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than the Chamber, its counsel, and its members contributed money intended to fund the brief's preparation or submission.

7. The Chamber's brief is timely because it is filed within seven days of the July 2, 2018 filing of defendant-appellant's opening brief.

Fed. R. App. P. 29(e). The brief complies with Fed. R. App. P. 29(d), because it is no more than half the maximum length of 13,000 words authorized for defendant-appellant's opening brief.

8. Counsel for defendant-appellant DIRECTV has consented to the filing of this *amicus* brief; counsel for plaintiff-appellee Sebastian Cordoba has not.

* * *

Given its substantial interest in this case, the Chamber respectfully moves for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

/s/ *Ashley C. Parrish*

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Counsel for the
Chamber of Commerce
of the United States of America

Dated: July 9, 2018

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume of Fed. R. App. P. 32(g)(1), because it contains 645 words, as determined by Microsoft Word. The motion also 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). The text appears in 14-point Century Schoolbook, a proportionally spaced serif typeface.

/s/ *Ashley C. Parrish*

Counsel for Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

I certify that on July 9, 2018, I served the above Motion for Leave upon all counsel of record by and through the Court's CM/ECF system.

/s/ *Ashley C. Parrish*

Counsel for Chamber of Commerce of the United States of America

ATTACHMENT:

PROPOSED *AMICUS* BRIEF

No. 18-12077-J

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANT-APPELLANT

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Yaklin, Stephen A., counsel for Plaintiff/Appellee; and

Yowell, Amelia G., counsel for proposed *amicus curiae*.

/s/ *Ashley C. Parrish*

Counsel for Chamber of Commerce of the United States of America

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Chamber regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community, including cases like this one that address the requirements for Article III standing and class certification. Because businesses are frequent targets of class-action lawsuits, including meritless suits based on allegations of bare statutory violations with no actual harm, the Chamber has a significant interest in ensuring that courts rigorously analyze whether class-action plaintiffs satisfy the requirements for Article III standing and class certification.

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[1] The Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber, its members, or counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

STATEMENT OF ISSUES

Whether a recipient of a telemarketing call who did not request to be placed on the caller's internal "do not call" list has standing under Article III of the Constitution of the United States to maintain a class-action lawsuit claiming that the caller failed to institute appropriate internal "do not call" list procedures.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

"[N]o principle is more fundamental to the judiciary's proper role in our system of government" than the requirement that a plaintiff demonstrate standing under Article III of the Constitution to sue in federal court. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (internal quotation marks and citation omitted). The Supreme Court has thus held that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. A plaintiff may not allege a "bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.*

The plaintiff in this case, Sebastian Cordoba, has brought a nationwide class action based on nothing more than an alleged technical violation of a procedural statutory requirement. He alleges that class members' rights under the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, were violated because a retailer for defendant DIRECTV, LLC allegedly called them without having first established procedures for an internal do-not-call list. But Cordoba does not allege that absent class members requested to be placed on a do-not-call list. Nor does he allege that they received calls despite such

a request. Instead, Cordoba's proposed internal do-not-call class definition consisted of *all* persons who received two or more calls from the retailer, without regard to whether the call recipient ever asked to be placed on an internal do-not-call list. By that definition, the only "injury" Cordoba has identified is the kind of bare statutory violation that the Supreme Court has rejected.

A putative class may not be certified when, as here, it contains large numbers of individuals who lack Article III standing. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action adds nothing to the question of standing." (alterations and quotation marks omitted)). Due process and Rule 23 require that a defendant be afforded the opportunity "to litigate its . . . defenses to individual claims," including the defense that a plaintiff has no claim at all because she was never injured. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011); *see also Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense."). The certification of no-injury class actions like this one deny defendants that opportunity and make a mockery of the class-action device, which is meant to "leave[] the parties' legal rights and

duties intact," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion).

Affirming the district court's decision would invite abusive, no-injury class-action litigation, with potentially devastating effects on businesses and consumers. Class-action lawyers would have even more incentive to bring actions based on mere statutory violations and forgo claims for actual damages, which would complicate class certification and require proof of causation. These types of abusive class actions, where no class member has suffered any concrete injury, force corporate defendants to settle and benefit no one but the lawyers.

The district court's certification decision should be reversed.

ARGUMENT

I. The Class Certified By The District Court Lacks Standing.

"Article III does not give federal courts the power to order relief to *any* uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (emphasis added); *see also Spokeo*, 136 S. Ct. at 1547 n.6 ("That a suit may be a class action . . . adds nothing to the question of standing . . . ." (internal citation and quotation marks omitted)). Instead, the court's role is limited "to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis*, 518 U.S. at 349.

The district court in this case stepped outside the bounds of its authority and certified a nationwide class action based only on a technical statutory violation, with no proof that all class members suffered a concrete injury from that violation. The court's holding cannot be reconciled with the constitutional principles recognized in *Spokeo* and should be reversed.

A. *Spokeo* Clarified That Bare Statutory Violations Are Not Enough To Establish Article III Standing.

Spokeo reaffirmed the fundamental principle that a suit by an uninjured plaintiff does not present a justiciable "case or controversy" under Article III. 136 S. Ct. at 1547. To satisfy that basic standing requirement—the "irreducible constitutional minimum"—a plaintiff must have suffered an injury in fact that is concrete and particularized, fairly traceable to the challenged action of the defendant, and likely to be redressed by a favorable decision. *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The requirement that a plaintiff show injury is "[f]oremost" among the elements of standing, *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018), because it ensures that "the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action," *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

Spokeo also made clear that Congress "cannot erase" the constitutional requirement that a plaintiff show an actual injury. 136 S. Ct. at 1547–48. Accordingly, even plaintiffs who allege a statutory

violation must still show an actual injury that is concrete and particularized in order to satisfy constitutional standing requirements. *Id.* at 1549. A plaintiff does not "automatically" establish an injury merely because a statute grants the plaintiff a right and also purports to authorize a lawsuit to vindicate that right. *Id.* In other words, "bare procedural violation[s], divorced from any concrete harm, [cannot] satisfy the injury-in-fact requirement of Article III." *Id.*

Applying *Spokeo*, this Court has recognized that when a plaintiff alleges a statutory violation, the relevant question is not whether the statute "creates a right," but whether the plaintiff "was harmed when this statutory right was violated." *Nicklaw v. Citimortgage, Inc.*, 839 F.3d 998, 1002–03 (11th Cir. 2016). In *Nicklaw*, for example, the Court found that the plaintiff did not have standing to sue because he alleged only that the defendant failed to record a satisfaction of the plaintiff's mortgage within the statutory time period. *Id.* He did not allege a harm arising from that violation, such as loss of money or decreased credit score. *Id.*

Other circuits have taken a similar approach, applying *Spokeo* to bar claims on standing grounds where the alleged harm fails to rise

above a bare statutory violation. For instance, the Sixth Circuit held that a plaintiff did not have standing to assert a claim under the Fair Debt Collection Practices Act because he had not alleged "the type of harm [that statute] was designed to prevent." *Lyshe v. Levy*, 854 F.3d 855, 859 (6th Cir. 2017); *see also Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017) (finding a lack of standing because the alleged harm was "not the type of harm Congress sought to prevent when it enacted the [Fair Credit Reporting Act]"). Similarly, the Eighth Circuit found that a plaintiff did not have Article III standing where he alleged that defendant retained personally identifiable information in violation of the Cable Communications Policy Act, without also alleging that his personal information was disclosed to a third party. *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930–31 (8th Cir. 2016). The Seventh Circuit also held that a plaintiff lacked standing to recover for a business's violation of the Fair and Accurate Credit Transactions Act because "nobody else ever saw the non-compliant receipt" and merely including an expiration date on the receipt did not increase the risk of identity theft. *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016).

These decisions respect the proper judicial role under our Constitution. When an alleged regulatory violation has occurred but no one has suffered an actual concrete injury as a result, the case should be left to the regulators to address if and as they see fit. There is no role for the judiciary to play consistent with bedrock constitutional principles and the requirements of Article III standing. Those principles should have even greater force in the context of class actions, which are supposed to be an "exception" to the usual rule that litigation is conducted by and on behalf of individual parties only. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700–01 (1979)).

B. Cordoba Has Failed To Allege That All Class Members Suffered An Injury In Fact Traceable To The Alleged Statutory Violation.

Unlike many TCPA cases, which involve alleged violations of TCPA provisions prohibiting unsolicited calls or telephone faxes, this case concerns an alleged violation of regulations requiring telemarketers to maintain an internal do-not-call list that records a person's "request not to receive telemarketing calls." 47 C.F.R. § 64.1200(d). The purpose of these regulations is to protect residential

subscribers from solicitation calls "to which they object." 47 U.S.C. § 227(c)(1) (authorizing the Federal Communications Commission ("FCC") to "initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object"). Accordingly, a recipient is harmed by a violation of these regulations only if he or she receives calls after objecting—that is, by requesting to be placed on a do-not-call list. *See Dreher*, 856 F.3d at 346; *Lyshe*, 854 F.3d at 859.

Cordoba does not allege that every member of the 16,870 class requested to be placed on a do-not-call list. Nor does he allege that all class members received calls despite making such a request. Instead, Cordoba's proposed class definition merely alleges that DIRECTV's retailer made calls without maintaining procedures for an internal do-not-call list. Cordoba does not assert that every member of the class actually objected to such calls—the whole point of the regulation.

Without these basic allegations, Cordoba cannot show that all, or even most, class members suffered concrete harm from the alleged statutory violation. If they did not ask to be placed on a do-not-call list, they cannot claim that the calls they received resulted from the failure

to maintain such a list. With no way to tie the calls to the violation, Cordoba is left with a bare regulatory violation—a simple failure to maintain a list—and no concrete harm traceable to that violation.

Cordoba suggests, and the district court agreed, that harm should be assumed to occur any time "a call [is] placed in violation of the TCPA," regardless of the specific violation or facts at issue. ECF No. 96 (Certification Order) at 28. But this is exactly the kind of loose standing analysis that the Supreme Court rejected in *Spokeo*. The Supreme Court made clear that "Congress's role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." 136 S. Ct. at 1549.

Instead of looking to the many decisions that have applied *Spokeo* in analogous circumstances, the district court wrongly relied on a pre-*Spokeo* decision that involved a different TCPA violation with different facts. ECF No. 96 at 25–26 (citing *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 781 F.3d 1245 (11th Cir. 2015)). At issue in that case was the TCPA's prohibition on making certain kinds of contact with customers

without first obtaining their consent. *Palm Beach*, 781 F.3d at 1252. This provision was intended to protect people from disruptions caused by unsolicited advertisements. *Id.* at 1251. The Court found that the plaintiff had standing to sue for faxes allegedly sent in violation of this provision because he suffered real harm—the temporary unavailability of his fax machine caused by unsolicited advertisements—and this injury was of the type "intended to be prevented by the statute." *Id.* at 1252.

Whatever the force of that decision after *Spokeo*, it does not apply here. The purpose of the internal do-not-call regulation is to protect residential telephone subscribers from receiving calls "to which they object." 47 U.S.C. § 227(c)(1). An unsolicited call on its own cannot cause an injury resulting from the failure to maintain an internal do-not-call list. To show injury, a putative class member would also need to establish that the call they received was a call "to which they object[ed]." *Id.*

The post-*Spokeo* decisions cited by the district court and Cordoba are inapposite for the same reason: they are all based on contact for which the statute requires advance consent. ECF No. 96 at 26–27;

Resp. Br. at 11–12, *DIRECTV, LLC v. Cordoba*, No. 17-90020 (11th Cir.) (citing *Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362 (11th Cir. 2017)). But Cordoba did not bring suit for any injury caused by an alleged violation of the statute's prior consent prohibition and that type of injury does not, as the district court assumed, transfer to Cordoba's claim that DIRECTV violated the do-not-call regulations. ECF No. 96 at 28. Instead, Cordoba was required to show that the class is entitled to have a federal court adjudicate the particular claim that its members assert, including demonstrating that the alleged injury in fact is "fairly traceable" to the alleged wrongful conduct. *See Lewis*, 518 U.S. at 358 n.6; *Lujan*, 504 U.S. at 560–61 ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant . . . ." (internal quotation marks and citation omitted)). He has never made that showing.

II. No-Injury Class Actions Like This One Violate Rule 23, Due Process, and the Rules Enabling Act.

Because the class action is a procedural device "ancillary to the litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980), "it leaves the parties' legal rights and duties intact

and the rules of decision unchanged," *Shady Grove*, 559 U.S. at 408 (plurality opinion). To apply a different rule in a class action would violate the Rules Enabling Act, which provides that procedural rules such as Rule 23 "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

"A defendant in a class action has a due process right to raise individual challenges and defenses to claims." *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013); *see also Lindsey*, 405 U.S. at 66. Accordingly, class actions cannot be certified if they would eviscerate a defendant's due process right to raise any available challenges and defenses. *Carrera*, 727 F.3d at 307. Nor can certification mask individual issues. *Id.* Both claims *and* defenses must be amenable to class-wide adjudication before a class may proceed under Rule 23. *See Dukes*, 564 U.S. at 367.

Certifying a class in which large numbers of class members lack standing impermissibly "enlarge[s]" the class members' rights and correspondingly "abridge[s]" defendants' rights. *See* 28 U.S.C. § 2072(b). This case is a perfect example. The district court ran afoul of Article III's standing requirement, as articulated in *Spokeo*, by

certifying a class in which large numbers of putative class members were likely never injured and, therefore, cannot satisfy the basic requirements of Article III. At the very least, establishing otherwise—that individual class members were in fact meaningfully deprived of time, mental energy, and privacy, *see* ECF No. 96 at 28—would require individualized litigation as to the harm each class member suffered. The court's class certification decision thus denies DIRECTV the opportunity to present a meaningful standing defense and permits unharmed class members to bring statutory damages on claims they could not pursue as individuals.

The jettisoning of a meaningful injury-in-fact requirement—and with it a meaningful causation requirement—also removes critical constraints on class certification. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) ("In an era of frequent litigation [and] class actions . . . courts must be more careful to insist on the formal rules of standing, not less so."). If plaintiffs can litigate their claims in the posture of a class action merely by alleging that a defendant has violated a legal duty, regardless of that violation's widely varying or entirely absent effects on individual class members, then commonality

under Rule 23(a)(2) and predominance under Rule 23(b)(3) collapse into a single inquiry, for which the answer is automatic.

Commonality is not supposed to depend solely on whether the class members "have all suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 349–50. Instead, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id.* (citation omitted). Similarly, predominance asks "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997); *see also Comcast Corp.*, 569 U.S. at 34–35. To determine whether the predominance requirement is satisfied, a court must look for "legal or factual questions that qualify each class member's case as a genuine controversy." *Amchem Prods.*, 521 U.S. at 623. Both requirements are rendered meaningless, however, if injury in fact exists merely by virtue of common exposure to the same technical violation of a statute, without any need to consider individualized harm or causation. Such cursory review cannot safeguard a defendant's due-process right "to present every available defense." *Lindsey*, 405 U.S. at 66.

III. The District Court's Lax Approach To Standing And Class Certification Invites Abusive Class-Action Litigation That Harms Businesses And Consumers.

The failure to properly and uniformly apply the requirements of Article III and Rule 23 carries significant real-world consequences. The availability of statutory damages in lieu of *actual* damages based on *actual* injury creates great incentives for enterprising class-action lawyers to bring aggressive, overreaching lawsuits on behalf of plaintiffs who have suffered no real-world harm. It also encourages class-action lawyers to forgo claims for actual damages, which would complicate class certification and require proof of causation, for the prospect of easy class certification and no need to prove actual harm. In this way, statutory damages and class actions create a "perfect storm" by "combin[ing] to create commercial wreckage far greater than either could alone." *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 276 (4th Cir. 2010) (Wilkinson, J., concurring).

That outcome is not surprising. "What makes these statutory damages class actions so attractive to plaintiffs' lawyers is simple mathematics: these suits multiply a minimum $100 statutory award (and potentially a maximum $1,000 award) by the number of

individuals in a nationwide or statewide class." Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 Mo. L. Rev. 103, 114 (2009).

Class-action lawyers rely on a defendant's potential exposure to a massive damages award to increase settlement pressure, especially once a class is certified. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense."), *superseded by rule on other grounds as stated in Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1715 (2017). When damages allegedly owed to hundreds or even thousands of potential claimants are aggregated, even a small risk of liability is unacceptable and defendants are forced to settle, no matter how questionable the claim. *See AT&T Mobility LCC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also Shady Grove,* 559 U.S. at 445 n.3 (Ginsburg, J., dissenting) ("When representative plaintiffs seek statutory damages, [the] pressure to settle may be heightened because a class action poses the risk of massive liability unmoored to actual injury.").

The threat posed by no-injury lawsuits is particularly acute in the context of TCPA litigation, which has "blossomed into a national cash cow for plaintiff's attorneys specializing in [such] disputes." *Bridgeview Health Care Ctr., Ltd. v. Clark*, 816 F.3d 935, 941 (7th Cir. 2016) (quoting Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 Neb. L. Rev. 70, 97 (2011)). With statutory damages ranging from $500 to $1,500 for each call or text message, 47 U.S.C. § 227(b)(3), companies face substantial exposure in TCPA class actions. As a result, companies have settled for enormous sums. For example, Capital One settled a TCPA case for $75 million, and Bank of America settled one for $32 million. *See* Institute for Legal Reform, *Lawsuit Ecosystem II: New Trends, Targets and Players*, at 87 (Dec. 2014), *available at* https://www.instituteforlegalreform.com/uploads/sites/1/evolving.pdf. This money largely went to class counsel and representatives, not the consumers. *Id.* at 88.

This case is no exception. Cordoba alleges that 52,810 calls were made to 16,870 people in the internal do-not-call class, which would

amount to approximately $26.4 million in damages at the statutory rate of $500 per call, or $79.2 million if trebled as Cordoba requests. ECF No. 61 (Second Am. Compl.) at ¶¶ 92, 104. When pursued as part of a statewide or nationwide class action, these types of statutory damages can yield liability large enough to put the defendant out of business for technical missteps that did not actually harm even a single customer. The resulting economic distortions hurt not only defendants, but also consumers, who often end up bearing the costs of litigation avoidance in the form of higher prices. *See* Joseph Grundfest, *Why Disimply?*, 108 Harv. L. Rev. 727, 732 (1995).

Layering class certification "on top of per-violation damages" thus "distort[s,] rather than facilitiate[s], the [statutory] remedial scheme." Richard N. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1887 (2006). As more than a dozen members of Congress have recognized, "the TCPA has turned into a vehicle to protect consumers from unwanted random solicitations into a booming practice for opportunistic attorneys to take advantage of ambiguous rules and profit personally by receiving millions of dollars by suing businesses and

overburdening courts while providing only nominal relief to their clients." *See Lawsuit Ecosystem II*, *supra*, at 88. Left undisturbed, the decision below will only result in more of this abusive litigation.

CONCLUSION

For these reasons, the Court should reverse the district court's class certification decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Federal Rule of Appellate Procedure Rule 32(g), I certify that this brief complies with the length limits set forth in Fed. R. App. P. 29(a), because it contains 4,014 words, as counted by Microsoft Word, excluding the items that may be exempted under Fed. R. App. P. 32(f).

This brief complies with requirements of Fed. R. App. P. 32(a), as it has been prepared in a proportionally spaced typeface using Microsoft Office Word Version 2013 in 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I certify that on July 9, 2018, I served the above *amicus* brief upon all counsel of record by and through the Court's CM/ECF system.

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