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## To “Opt Out” Go to Court: How the Public Nuisance Doctrine Can Solve the Robotext Circuit Split and Support Plaintiffs

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# To “Opt Out” Go to Court

## HOW THE PUBLIC NUISANCE DOCTRINE CAN SOLVE THE ROBOTEXT CIRCUIT SPLIT AND SUPPORT PLAINTIFFS

### INTRODUCTION

The cellphone is quickly turning from America’s sweetheart into its worst nightmare. Like spotted lanternflies, spam text messages—often called “robotexts,” autodialed text messages, or “smishing” messages<sup>1</sup>—are everywhere, increasingly invasive, and sometimes even dangerous.<sup>2</sup> Spam calls, or “robocalls,” in comparison, seem now only like a minor inconvenience. In March 2021, for example, 7.4 billion robotexts were sent to American cellphone users, compared to 6.3 billion spam calls in the same month.<sup>3</sup> In October 2022, 18.2 billion robotexts were sent domestically, which is “nearly 261 spam texts for every person in the U.S.”<sup>4</sup> According to Robokiller, one

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<sup>1</sup> Robotexts are, like robocalls, those “made with an autodialer.” *Stop Unwanted Robocalls and Texts*, FCC, <https://www.fcc.gov/consumers/guides/stop-unwanted-robocalls-and-texts> [<https://perma.cc/LZ23-LQB7>]. “Autodialing” occurs when equipment is used that “has the capacity—(a) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.” *U.S. Supreme Court Holds “Autodialer” Definition Under the TCPA Is Limited to Equipment Using a Random or Sequential Number Generator*, BLANK ROME (Apr. 5, 2021) (quoting 47 U.S.C. § 227(a) (1991)), <https://www.blankrome.com/publications/us-supreme-court-holds-autodialer-definition-under-tcpa-limited-equipment-using-random> [<https://perma.cc/K4ES-YGCT>]. According to experts, “smishing is the act of using text messages to trick people into compromising sensitive data using different types of malware, as well as fake websites and phone numbers.” Clare Stouffer, *What Is Smishing + Smishing Attack Protection Tips for 2022*, NORTON (May 4, 2022), <https://us.norton.com/internetsecurity-emerging-threats-what-is-smishing.html> [<https://perma.cc/3LJ7-5F5S>].

<sup>2</sup> Rimma Kats, *Are SMS Campaigns Too Intrusive, or Not Invasive Enough?*, MARKETINGDIVE (2017), <https://www.marketingdive.com/ex/mobilemarketer/cms/news/messaging/14560.html> [<https://perma.cc/X4GD-NRAW>]; Margo Saunders, *How Congress and the FCC Can Protect Americans from Invasive and Dangerous Robocalls and Robotexts*, NAT. CONSUMER L. CTR. (Nov. 2020), <https://www.nclc.org/images/TCPA-Priorities-RevFinal-111620.pdf> [<https://perma.cc/39AM-FVPC>].

<sup>3</sup> *Robocall Record: 7.4 Billion Spam Texts Surpass Total Robocalls by More Than 1 Billion Messages in March 2021*, ROBOKILLER (Apr. 6, 2021), <https://www.robokiller.com/blog/march-2021-robocall-robotext-trends>.

<sup>4</sup> 2022 *United States Robotext Trends*, ROBOKILLER, <https://www.robokiller.com/spam-text-insights> [<https://perma.cc/5GVR-3MDJ>].

of the many phone applications now developed to combat these messages, robotexts are proliferating rapidly with no clear end in sight.<sup>5</sup>

While cellphone users can easily choose not to answer a phone call and end the nuisance quickly, text messages are much more invasive. Texts can be answered at any time and can easily lead victims astray using faulty website links.<sup>6</sup> According to a 2018 study, the majority of American households do not have landlines,<sup>7</sup> consequently driving Americans to spend more time on their cellphones and increasing the likelihood they will interact with robotexts. As a result, the Federal Trade Commission (FTC) receives thousands of text-related fraud claims per year.<sup>8</sup> In February 2021, the FTC released a report noting that in 2020, 27 percent of fraud claims filed that year originated from text messages, leading to an \$86 million loss among victims.<sup>9</sup>

The broader issue of spam is not new. Indeed, Congress has grappled with spam for over three decades. In 1991, Congress passed the Telephone Consumer Protection Act (TCPA) to restrict telemarketing.<sup>10</sup> However, there was no clear penalty for sending robotexts until 2003 when the Federal Communications Commission (FCC) confirmed that the TCPA includes protections against robotexts.<sup>11</sup> Under the TCPA, robotexts are prohibited unless those texts are “made with the prior express consent of the called party,”<sup>12</sup> or “unless [they] are (1) made for emergency purposes; (2) free to the end user and

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<sup>5</sup> *Robocall Record: 7.4 Billion Spam Texts Surpass Total Robocalls by More Than 1 Billion Messages in March 2021*, *supra* note 3.

<sup>6</sup> *What Is Smishing + Smishing Attack Protection Tips for 2022*, *supra* note 1.

<sup>7</sup> Gary Price, *New Data: 57.1% of American Homes Had Only Wireless/Mobile/Cell Telephones During the Second Half of 2018—an Increase of 3.2 Percentage*, INFODOCKET (June 27, 2019), <https://www.infodocket.com/2019/06/27/new-data-57-1-of-american-homes-had-only-wireless-mobile-cell-telephones-during-the-second-half-of-2018-an-increase-of-3-2-percentage/> [<https://perma.cc/F7DD-QQXD>].

<sup>8</sup> See CONSUMER SENTINEL NETWORK, FED. TRADE COMM’N, *DATA BOOK 2020* (2021), [https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn\\_annual\\_data\\_book\\_2020.pdf](https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2020/csn_annual_data_book_2020.pdf) [<https://perma.cc/QK6B-LYDH>].

<sup>9</sup> See *id.* at 18. This number, however, is unlikely to be fully accurate, as it only accounts for those fraud claims “with a contact method identified,” meaning that the victim specified in their report to the FTC where the fraud originated. *Id.* at 4.

<sup>10</sup> 47 U.S.C. § 227.

<sup>11</sup> In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 at 101, CG Docket No. 02-278, <https://docs.fcc.gov/public/attachments/FCC-03-153A1.pdf> [<https://perma.cc/G6PK-U8VS>].

<sup>12</sup> Enf. Bureau Chief, Public Notice, *Enf’t Advisory DA 16-1299*, Fed. Comm’n’s Comm’n, *Robotext Consumer Protection: Text Message Senders Must Comply with the Telephone Consumer Protection Act 1–2* (Nov. 18, 2016), <https://docs.fcc.gov/public/attachments/DA-16-1299A1.pdf> [<https://perma.cc/94UA-HS3Y>]; 47 C.F.R. § 64.1200(a) (2022).

have been exempted by [the FTC] . . . or (3) made solely to collect debts ‘owed to or guaranteed by the United States.’”<sup>13</sup>

Private parties may seek enforcement of the TCPA through the federal court system.<sup>14</sup> To bring a federal claim, a plaintiff must prove that they have Article III standing.<sup>15</sup> A plaintiff has Article III standing if they “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”<sup>16</sup> In *Spokeo v. Robins*, the Supreme Court clarified that an “injury-in-fact” is one that is both “concrete and particularized.”<sup>17</sup>

This “standing to sue” doctrine is, at its core, a jurisdictional requirement established to guarantee that federal courts only hear the cases under their jurisdiction as designated by the Constitution.<sup>18</sup> Standing requirements have the effect of decreasing the pool of litigants who can bring their case in federal court, ensuring that those whose injuries are recognized can recover.<sup>19</sup> But even with this smaller pool, there still must be parameters for plaintiffs to enter federal court, leading courts across the country to question what harm is “concrete” and “particularized” enough to be considered an “injury in fact.”<sup>20</sup> This was further compounded by the holding in *Spokeo*, where the Court noted that suffering either a tangible or an intangible injury may be a route to recovery—a departure from prior precedent which only allowed tangible injuries.<sup>21</sup> Tangible injuries are those that are easier to see, like “loss of money or” physical injury.<sup>22</sup> Intangible injuries, on the other hand, require consideration of a connection to a harm that American courts remedied in the past.<sup>23</sup> Consequently, intangible harms are

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<sup>13</sup> *Id.* at 2 (quoting 47 U.S.C. § 227(b)(1)(A)(iii)).

<sup>14</sup> Spencer Webber Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343 (2014). While the TCPA allows for private actions to be brought in state court, “[t]he [Supreme] Court held that the TCPA’s grant of jurisdiction to state courts does not deprive the federal district courts of federal question jurisdiction over private lawsuits alleging TCPA violations.” *Id.* at 405 (citing *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012)).

<sup>15</sup> U.S. CONST. art. 3, § 2, cl. 1.2.1; 28 U.S.C. § 1331.

<sup>16</sup> *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

<sup>17</sup> *Id.* at 330 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)).

<sup>18</sup> *Spokeo*, 578 U.S. at 338; Standing Requirement: Overview, LEGAL INFO. INST., <https://www.law.cornell.edu/constitution-conan/article-3/section-2/clause-1/standing-requirement-overview> [<https://perma.cc/M5QC-F4DZ>].

<sup>19</sup> See *Spokeo*, 578 U.S. at 338.

<sup>20</sup> *Salcedo v. Hanna*, 936 F.3d 1162, 1166–67 (11th Cir. 2019); *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 689–92 (5th Cir. 2021).

<sup>21</sup> *Spokeo*, 578 U.S. at 340–41.

<sup>22</sup> Vanessa K. Ing, *Spokeo, Inc. v. Robins: Determining What Makes an Intangible Harm Concrete*, 32 BERKELEY TECH. L.J. 503, 507 (2017).

<sup>23</sup> *Spokeo*, 578 U.S. at 340–41.



sometimes difficult to prove with the same level of specificity as tangible harms.<sup>24</sup>

The difficulty surrounding how to best define an injury in fact led to a recent circuit split between the Eleventh and Fifth Circuits, both of which had to decide if the plaintiffs had standing to bring a TCPA claim for unwanted robotexts. The Eleventh Circuit concluded in *Salcedo v. Hanna* that a single unwanted text message is not injurious enough to invoke Article III standing because the plaintiff did not adequately prove concreteness and particularization, ultimately removing the case from federal court.<sup>25</sup> Differently, in *Cranor v. 5 Star Nutrition*, the Fifth Circuit held that the plaintiff complied with the injury in fact requirements established in *Spokeo*.<sup>26</sup> The court reached this conclusion by connecting the plaintiff's harm to the doctrine of public nuisance, showing that there was "a close relationship" between the alleged injury and the doctrine of public nuisance because the defendant utilized public telecommunications infrastructure, thus making him "similar to someone who wants to use another piece of infrastructure like a road or bridge without confronting a malarial pond, obnoxious noises, or disgusting odors."<sup>27</sup>

While any plaintiff bringing a case in federal court will need to comply with standing requirements, establishing standing can be especially complex for plaintiffs bringing robotext claims. This is so because robotexts are plentiful and vary in type from actual fraud to marketing messages.<sup>28</sup> Thus, a plaintiff must be able to show individualized harm in these cases to separate themselves from the thousands of other Americans receiving similar spam messages.<sup>29</sup>

This note argues that standing can be shown, and the circuit split can be resolved, by using the "special injury rule" of the public nuisance doctrine.<sup>30</sup> To recover under the public nuisance doctrine, a plaintiff is generally required to show "an unreasonable interference with a right common to

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<sup>24</sup> See Ing, *supra* note 22, at 507.

<sup>25</sup> See *Salcedo*, 936 F.3d at 1172–73.

<sup>26</sup> *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 692–93 (5th Cir. 2021).

<sup>27</sup> *Id.* at 692.

<sup>28</sup> See Jessie Chantel, *8 Spam Text Message Examples (& How to Identify Them Quickly)*, TEXTEDLY (June 28, 2022), <https://blog.textedly.com/spam-text-message-examples> [<https://perma.cc/B9KF-AMZM>].

<sup>29</sup> *Cranor*, 998 F.3d at 692.

<sup>30</sup> See generally Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOLOGICAL LAW Q.* 755 (2001) (discussing the origins of the special injury rule).

the . . . public.”<sup>31</sup> However, under the special injury caveat, an individual plaintiff may establish standing using the public nuisance doctrine if the plaintiff shows they suffered an injury distinct from similar harm felt by the public.<sup>32</sup> Stated differently, the plaintiff must prove that their harm was particularized, thus overcoming the obstacles of Article III standing and *Spokeo*.

Furthermore, by applying the public nuisance doctrine’s special injury rule to robotext claims, courts can cut down on their caseloads while ensuring those who are significantly injured get their day in court. As demonstrated by the *Spokeo* court, the public nuisance test essentially requires a private plaintiff to move through the Article III standing steps noted above while also proving in detail why their experience with a robotext differs from the experience of others who receive similar texts.<sup>33</sup> The special injury rule thus provides a clear route for the most aggrieved plaintiffs to assert standing.

This note makes the argument for the special injury rule and proceeds in three parts. Part I provides both a comprehensive look at the growing issue of robotexts and insight into the types of robotexts that are most popular, revealing that robotexts not only vary in type but are becoming increasingly pervasive. Part I also offers a brief overview of both the history of the TCPA and the steps necessary to bring a case in federal court. Part II discusses relevant case law, focusing first on the current circuit split before discussing how other courts resolved the issue. Part III discusses the aforementioned solution as well as possible limitations to the approach.

## I. THE RISE AND HARM OF ROBOTEXTS

Robotexts are, at least for now, part of the technological landscape. However, not all robotexts are sent for fraudulent purposes. Rather, robotexts can be divided into two categories: spam text messages and marketing text messages.<sup>34</sup> Each category generally leads to different harms. Spam text messages largely cause monetary loss, and marketing messages lead to

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<sup>31</sup> *Cranor*, 998 F.3d at 691 (quoting RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979)).

<sup>32</sup> *Id.* at 692.

<sup>33</sup> *See Cranor*, 998 F.3d at 691–92 (explaining the public nuisance doctrine’s special injury rule).

<sup>34</sup> *See* Julie Thompson, *How to Avoid Sending Spam Text Messages to Customers*, BUS. NEWS DAILY (June 29, 2022), <https://www.businessnewsdaily.com/16010-avoid-text-message-spam.html> [<https://perma.cc/N8DZ-ZFME>].

more intangible injuries like stress or disruption.<sup>35</sup> Intangible injuries—or those that cannot be quantified—range from emotional distress to identity theft or privacy violations.<sup>36</sup>

Following a broad overview of the robotext problem will be (1) a lesson on how robotexts work; (2) a discussion of the two above categories of text messages, as well as the specific harms caused by each category; and (3) an overview of actions taken by the government and the private sector thus far to combat robotexts, contrasting these actions with those taken to combat robocalls.

### A. *The Growing Problem of Robotexts*

Receiving a robotext is no longer a surprise. Indeed, consumers simply expect them.<sup>37</sup> Still, in 2020, the FTC received over 334,000 complaints about robotexts, averaging approximately 916 reports per day.<sup>38</sup> Robotext schemes are growing tremendously each year, helped by the COVID-19 pandemic,<sup>39</sup> innovations in technology, and a stronger overall understanding of how to best navigate new technology-based terrains.<sup>40</sup> Indeed, while there has been a sharp decrease in robocalls, “[r]obotexts have increased twelvefold in [2022], from about 1 billion to 12 billion per month.”<sup>41</sup> Over 660,000 of the text

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<sup>35</sup> CONSUMER SENTINEL NETWORK, *supra* note 8, at 4; see Rustam Singh, *Here's Why SMS Marketing Is Literally the Worst Idea Ever*, ENTREPRENEUR (Aug. 5, 2016), <https://www.entrepreneur.com/article/280342> [<https://perma.cc/H574-QNMY>].

<sup>36</sup> Jackson Erpenbach, *A Post-Spokeo Taxonomy of Intangible Harms*, 118 MICH. L. REV. 471, 483 (2019).

<sup>37</sup> Lance Whitney, *How to Block Robotexts and Spam Messages*, PCMag (Aug. 7, 2020), <https://www.pcmag.com/how-to/how-to-block-robotexts-and-spam-messages> [<https://perma.cc/W5G2-NGKU>].

<sup>38</sup> *Smishing & Spam Text Messages*, VERIZON, <https://www.verizon.com/about/account-security/smishing-and-spam-text-messages> [<https://perma.cc/WE84-H3TJ>].

<sup>39</sup> When the COVID-19 pandemic first began, disinformation was rampant, allowing scammers to exploit this confusion and trick consumers into providing information via text message for vaccine sign-ups, pandemic-related financial relief, and the like. Similarly, because many Americans stayed home at the beginning of the pandemic, online shopping subsequently increased, allowing scammers to more easily trick consumers into clicking convincing, yet fraudulent text messages about their purchases. *COVID-19 Text Scams*, FCC, <https://www.fcc.gov/covid-19-text-scams> [<https://perma.cc/3XTH-JXXW>]; *IRS Warns People About a COVID-Related Text Message Scam*, IRS (Dec. 8, 2020), <https://www.irs.gov/newsroom/irs-warns-people-about-a-covid-related-text-message-scam> [<https://perma.cc/5KZ8-HAJR>].

<sup>40</sup> Nicole Perlroth, *Spam Invades a Last Refuge, the Cell Phone*, N.Y. TIMES (Apr. 7, 2012), <https://www.nytimes.com/2012/04/08/technology/text-message-spam-difficult-to-stop-is-a-growing-menace.html> [<https://perma.cc/R2Z6-7RDW>]; see Katherine Cook, *'Avoid Clicking on the Link': Texting Scams Increase by 300% During Pandemic*, KGW8 (Mar. 12, 2021, 11:23 PM), <https://www.kgw.com/article/news/local/texting-scams-increase-300-percent-since-pandemic/283-b874b3eb-7aa5-4159-9b4d-d6c8feffd30b> [<https://perma.cc/FB7K-ULAA>].

<sup>41</sup> TERESA MURRAY, U.S. PIRG EDUC. FUND, *RINGING IN OUR FEARS 2* (2022), <https://uspirgedfund.org/sites/pirg/files/reports/ROBOCALLS%20REPORT%20USP%20-%20MON722PM.pdf> [<https://perma.cc/U8E5-8XTG>].

messages sent in one week “come on to users’ phones from numbers that were not in their address book,” and nearly 10 percent of these text messages are “flagged as malicious,” meaning they could be spam.<sup>42</sup>

The issue is particularly worrisome in America because of the country’s unparalleled investment into technology-based infrastructure, which allows more citizens to own a cellphone and, consequently, allows scammers to enjoy a broader reach to potential victims.<sup>43</sup> In 2020 alone, the United States invested \$601 billion to support wireless-based infrastructure, accounting for “18 [percent] of the world’s total mobile [capital expenditure].”<sup>44</sup> This is not solely a COVID-19 phenomenon. Since 2016, Americans have increased the country’s “wireless data traffic” by 207 percent.<sup>45</sup> This number continues to rise.<sup>46</sup>

Similarly, many American consumers are already very comfortable with receiving text messages that either claim to be, or truly are, their favorite store or brand, and statistically engage with those kinds of promotional text messages at a much higher rate than their email counterparts.<sup>47</sup> In the case of fraudulent messages, this provides particularly fertile ground for scammers to easily convince victims that the text message is legitimate and provoke the victims to click on the link that accompanies the fraudulent message.<sup>48</sup>

Scammers also target organizations.<sup>49</sup> In the 2021 “State of the Phish” report, it was found that 81 percent of organizations in the United States were targeted by text phishing scams in 2020.<sup>50</sup> Large organizations in nearly every industry—from engineering to insurance—failed to correctly

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<sup>42</sup> Walt Hickey, *How to Keep Scammers from Infiltrating Your Text Messages and Making a Fortune*, INSIDER (Sept. 4, 2021, 10:10 AM), <https://www.businessinsider.com/scam-text-messages-how-to-stop-them-why-increasing-2021-9> [https://perma.cc/WCF4-EVHP].

<sup>43</sup> See CTIA, 2021 ANNUAL SURVEY HIGHLIGHTS 3–4, 10, <https://api.ctia.org/wp-content/uploads/2021/07/2021-Annual-Survey-Highlights.pdf> [https://perma.cc/X4QR-D39L].

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> For example, in 2010, only 0.4 trillion megabytes of data were used by Americans. A decade later, this number stands at 42.2 trillion megabytes. It grew steadily over the decade, with significant increases each year. *Id.*

<sup>47</sup> Vince Magaline, *60 SMS Marketing Statistics That Will Change Your Mind About Text Message Marketing*, MOBILEMONKEY, <https://mobilemonkey.com/blog/sms-marketing-statistics> [https://perma.cc/9AUX-2ERW].

<sup>48</sup> See *How to Recognize and Report Spam Text Messages*, FED. TRADE COMM’N (Feb. 2020), <https://www.consumer.ftc.gov/articles/how-recognize-and-report-spam-text-messages> [https://perma.cc/DN96-YHEV].

<sup>49</sup> See PROOFPOINT, 2021 STATE OF THE PHISH 2 (2021), <https://www.intelligentcio.com/wp-content/uploads/sites/20/2021/03/2021-State-of-the-Phish-WP.pdf> [https://perma.cc/QML5-5B4L].

<sup>50</sup> *Id.* at 6.

identify phishing schemes 11 percent of the time.<sup>51</sup> While this specific increase was attributed to COVID-19, even despite the pandemic, exposure to text-based scams increase overall by 125 percent every three months.<sup>52</sup> The issue is expected to grow now that many businesses allow their employees to work from home, some of whom use their own devices that do not have the same protections as company-issued devices.<sup>53</sup>

### B. *How Robotexts Work*

To truly understand the gravity of the issue, one must understand how robotexts are sent. In the case of Apple products, robotexts are sent by exploiting Apple software to create scripts that send messages in succession via iMessage, similar to standard autodialing practices used for sending robocalls.<sup>54</sup> This is particularly problematic when fraud is involved because iMessage syncs with all of Apple's products, including iPads, Apple Watches, and MacBooks, creating a higher likelihood the victim will click or otherwise respond, even if done accidentally.<sup>55</sup> If a link is provided and clicked on, the scammer knows the recipient is a viable target and may receive information such as estimated location.<sup>56</sup> The link could also automatically download malware.<sup>57</sup> This is a significant issue, considering that 99 percent of text messages are read within twenty-four hours of receipt.<sup>58</sup> But this is not a problem limited

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<sup>51</sup> *Id.* at 8, 12. While this number may seem small, the *types* of text-based phishing scams that have tricked companies are important to consider. For example, scams purporting to advertise either payment plans available for struggling businesses or mask availability succeeded nearly 100 percent of the time. *Id.* at 10.

<sup>52</sup> David Robson, *How Fraudsters Exploited Our Fears During the 'Scamdemic,'* BBC (June 13, 2021), <https://www.bbc.com/future/article/20210611-how-fraudsters-exploited-our-fears-during-the-pandemic> [<https://perma.cc/54UY-YWUK>]; Hank Schless, *Device Management Blind to 125 Percent Increase in Financial Sector Phishing Attacks*, LOOKOUT (May 6, 2021), <https://blog.lookout.com/device-management-blind-to-125-percent-increase-in-financial-sector-phishing-attacks> [<https://perma.cc/764Q-PP9S>].

<sup>53</sup> Gene Marks, 'Smishing': The Rising Threat for Business Owners That Brings Scams to Smartphones, GUARDIAN (Sept. 19, 2021, 7:00 PM), <https://www.theguardian.com/business/2021/sep/19/smishing-the-rising-threat-for-business-owners-that-brings-scams-to-smartphones> [<https://perma.cc/NK8H-WVQ9>].

<sup>54</sup> *Robotexts Are Replacing Robocalls as SMS Spam Increases*, CALLERID REPUTATION (May 26, 2021), <https://calleridreputation.com/blog/robotexts-are-replacing-robocalls-as-sms-spam-increases/> [<https://perma.cc/4CT4-9N9L>].

<sup>55</sup> See Jason Cipriani, *How to Sync iMessages Across Multiple Apple Devices*, CNET (Aug. 9, 2021, 3:00 AM), <https://www.cnet.com/tech/services-and-software/how-to-sync-imessages-on-your-iphone-and-ipad/> [<https://perma.cc/ZG8K-VB29>]; *Robotexts Are Replacing Robocalls as SMS Spam Increases*, *supra* note 54.

<sup>56</sup> *Robotexts Are Replacing Robocalls as SMS Spam Increases*, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> James Mishan, *Salcedo v. Hanna*, 65 N.Y.L. SCH. L. REV. 277, 278 (2020–2021).

to Apple hardware. Indeed, any device that can receive text messages is vulnerable to these attacks.<sup>59</sup>

### C. *Types of Robotexts & Associated Harms*

Robotexts can be divided into two broad categories: spam text messages and marketing text messages. Spam text messages are sent with the intent of tricking a person into providing personal information that will then be used fraudulently.<sup>60</sup> As mentioned above, spam text messages are designed to look very similar to marketing text messages to increase the likelihood that they are clicked on.<sup>61</sup> Differently, marketing text messages are those sent by marketing professionals or major companies in the hope that recipients will then purchase products.<sup>62</sup> Unsurprisingly, "[a]utomated text messaging has become an enormous business, as marketers, brands, politicians, and more strive to get in the one place they know consumers are going to check."<sup>63</sup>

The harm caused to consumers by marketing text messages usually differs quite drastically from that of spam text messages. In most cases, the harm experienced by marketing messages is intangible, and monetary harm is less likely because marketing text messages are generally meant to encourage consumers to shop.<sup>64</sup>

Differently, monetary loss can occur when a consumer falls victim to a fraudulent text message.<sup>65</sup> There are also reports of robotexts that can install spyware on a victim's phone.<sup>66</sup> One

<sup>59</sup> See *Robotexts Are Replacing Robocalls as SMS Spam Increases*, *supra* note 54.

<sup>60</sup> Bridget Carey & Jason Cipriani, *Getting More Spam Text Messages? How to Avoid and Report the Latest Schemes*, CNET (Oct. 17, 2021, 2:00 PM), <https://www.cnet.com/tech/mobile/getting-more-spam-text-messages-how-to-avoid-and-report-the-latest-schemes/> [<https://perma.cc/5JS5-6VXL>].

<sup>61</sup> *Id.* According to Walter Hickey, who spoke with experts on robotexting, "[o]ver half of [marketing] messages contain links, and bad actors are leaping at the chance that the onslaught provides." Walt Hickey, *Experts Say the 'Tsunami' of Robotexts Is Only Just Beginning, but You Can Stop Companies from Spamming Your Text Messages*, INSIDER (Sept. 1, 2021, 8:08 AM), <https://www.businessinsider.com/text-spam-how-to-stop-automatic-messages-why-it-happens-2021-9> [<https://perma.cc/UX5Z-7JVG>].

<sup>62</sup> Emily Riedy, *What Is SMS Marketing: Your Guide to the Ecommerce Industry's Fastest Growing Marketing Channel*, KLAIVIYO (Oct. 28, 2022), <https://www.klaviyo.com/blog/what-is-sms-marketing> [<https://perma.cc/Z2AE-BM9U>].

<sup>63</sup> Hickey, *supra* note 61.

<sup>64</sup> See *How to Use Text Message Marketing to Build Your Retail Business*, POCKETSTOP (Aug. 3, 2018), <https://pocketstop.com/blog/how-to-use-text-message-marketing-to-build-your-retail-business/> [<https://perma.cc/NWR9-TXA4>].

<sup>65</sup> CONSUMER SENTINEL NETWORK, *supra* note 8, at 12.

<sup>66</sup> See, e.g., *Flubot: Warning over Major Android 'Package Delivery' Scam*, BBC NEWS (Apr. 23, 2021), <https://www.bbc.com/news/technology-56859091> [<https://perma.cc/79HF-UUMJ>] (discussing one kind of spyware).

type of spyware called Pegasus triggers “a zero-click attack”<sup>67</sup> that does not require victims to act at all for the scammer to gain access to the phone.<sup>68</sup> In fact, victims are entirely unaware of Pegasus’s presence, in essence causing the victim’s phone to “become[] a spy in their pocket.”<sup>69</sup>

Zero-click attacks occur when the scammer exploits a vulnerability in the phone’s software and sends the victim any sort of payload, like a text message, through which it installs spyware.<sup>70</sup> The text message could, for example, just contain what looks like a GIF.<sup>71</sup> These GIF-like messages are actually files that directly attack vulnerable areas of the phone, such as “Apple’s image rendering library.”<sup>72</sup> These threats are very much alive. In October 2021, the New York Times reported that Ben Hubbard, a New York Times journalist who reports on Saudi Arabia, was hacked multiple times by this method, allegedly by Saudi Arabian officials.<sup>73</sup>

But spyware can also target ordinary citizens. One recent example occurred in 2020 when reports spread across social media claiming that a specific robotext was sent to consumers that would be used to track the person’s location, kidnap them, and force that person into a sex trafficking ring.<sup>74</sup> Although this specific claim was determined to be false, the reports gained such considerable traction that Facebook, police departments across the country, and the Polaris Project, which manages the US human trafficking hotline, became involved in the investigation.<sup>75</sup>

<sup>67</sup> Shira Feder, *You Need to Protect Yourself from Zero-Click Attacks*, POPULAR SCI. (Sept. 18, 2021, 7:00 AM), <https://www.popsci.com/technology/zero-click-hacks-explained/> [<https://perma.cc/AQ89-X3TD>].

<sup>68</sup> *Id.*

<sup>69</sup> Aaron D’Andrea, *A ‘Digital Spy in Your Pocket’: Zero-click Hack Blocked by Apple, But What Is It?*, GLOBAL NEWS (Sep. 14, 2021, 1:45 PM), <https://globalnews.ca/news/8189561/digital-spy-zero-click-hack-apple-explained/> [<https://perma.cc/8KHK-RPTU>].

<sup>70</sup> Feder, *supra* note 67, at 2.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 1; BILL MARCZAK ET AL., UNIV. TORONTO, FORCEDENTRY: NSO GROUP IMESSAGE ZERO-CLICK EXPLOIT CAPTURED IN THE WILD 2–3 (2021), <https://tspc.library.utoronto.ca/bitstream/1807/123970/1/Report%23143—forcedentry.pdf> [<https://perma.cc/8ML8-FHBL>].

<sup>73</sup> Ben Hubbard, *I Was Hacked. The Spyware Used Against Me Makes Us All Vulnerable*, N.Y. TIMES (Oct. 24, 2021), <https://www.nytimes.com/2021/10/24/insider/hacking-nso-surveillance.html> [<https://perma.cc/TZN6-AA6G>].

<sup>74</sup> Sid Kranig, FACEBOOK (Aug. 26, 2020, 10:16 AM), <https://www.facebook.com/photo.php?fbid=1162008840850463&set=a.109083979476293&type=3&theater> [<https://perma.cc/4FVJ-AAC4>].

<sup>75</sup> McKenzie Sadeghi, *Fact Check: No Evidence Text Scam About a Package Is Linked to Sex Trafficking*, USA TODAY (Sept. 13, 2020), <https://www.usatoday.com/story/news/factcheck/2020/09/13/fact-check-text-scam-package-not-linked-sex-trafficking/5644365002/> [<https://perma.cc/8R7B-449W>]. This is not the only case of rumored human trafficking originating from robotexts. *See, e.g.*, Debra Dolan, *Law Enforcement Warns of Suspicious Texts Asking to Meet in Person*, KWQC (Aug. 19, 2021),

While fabricated in this specific instance, new innovations in technology already allow users to track others through a website link and can be harnessed to make these plots a reality in the future.<sup>76</sup> This possibility raises significant security concerns, especially given the US government's generally unimpressive performance in combating robotexts.<sup>77</sup>

#### D. *Government Inaction in the Face of Robotext Harms*

The early 1990s, when the TCPA was enacted, was a time of vast technological advancement. In the span of a few years, the world saw the introduction of mobile phones, the beginning of the World Wide Web and Google, and the rise of text messaging.<sup>78</sup> The telemarketing industry also grew exponentially between 1989 and 1990.<sup>79</sup> By the mid-1990s, there were more than 550,000 telemarketing businesses operating in the United States.<sup>80</sup> Telemarketing fraud through autodialing<sup>81</sup> was extremely widespread, so much so that an Alliance Against Fraud in Telemarketing and Electronic Commerce was formed.<sup>82</sup> The Alliance Against Fraud in Telemarketing and Electronic Commerce, known now as the Fraud.org Forum,<sup>83</sup> is "a coalition of government agencies, consumer organizations, trade groups, labor organizations, and multinational companies that work[] to educate the public about preventing fraud and how to shop safely by telephone and online."<sup>84</sup> In response to this widespread

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<https://www.kwqc.com/2021/08/19/law-enforcement-warns-suspicious-texts-asking-meet-person/> [<https://perma.cc/JK3D-GBJS>] (providing one example of texts thought to be connected to sex trafficking).

<sup>76</sup> See, e.g., GRABIFY IP LOGGER, <https://grabify.link> [<https://perma.cc/UA77-JPGQ>]. Grabify is one website that provides links which can be used to determine the IP address of the recipient.

<sup>77</sup> *Id.*

<sup>78</sup> Rose Leadem, *10 Inventions that Prove the Best Things Were Born in the 90s*, CHRON (May 10, 2021), <https://www.chron.com/business/article/10-inventions-that-prove-the-best-things-were-16163596.php> [<https://perma.cc/28Q5-R4WH>].

<sup>79</sup> Nick Jiwa, *A Brief History of Outbound Telesales*, HELLER GRP. (Apr. 11, 2018), <http://www.thehellergruppinc.com/brief-history-outbound-telesales> [<https://perma.cc/PFZ4-9VAC>].

<sup>80</sup> *Id.*

<sup>81</sup> Autodialing uses software that "automatically dial[s] telephone numbers from a list. Once the call is answered, the auto dialer will either connect the caller to a person or a prerecorded message." Mary Clare Novak, *What Is an Auto Dialer? A Time Saver, That's What.*, G2 (Oct. 13, 2020), <https://www.g2.com/articles/what-is-an-auto-dialer> [<https://perma.cc/RE4R-U576>].

<sup>82</sup> John M. Doyle, *Telemarketing Scams: Forecasting Phone Fraud for the '90s*, AP NEWS (Jan. 26, 1990), <https://apnews.com/article/e80ce291ce583914131c095b36c39342> [<https://perma.cc/X3UU-NBC4>].

<sup>83</sup> *Fraud.org Forum*, NAT'L CONSUMER LEAGUE, <https://nclnet.org/fraud-dot-org-forum/> [<https://perma.cc/U486-T3XE>].

<sup>84</sup> *Consumers on the Web*, CTR. FOR AM. PROGRESS (Jul. 24, 2006), <https://www.americanprogress.org/article/consumers-on-the-web/> [<https://perma.cc/SDV5-GKDD>].



fraud, President George H.W. Bush signed the TCPA into law on December 20, 1991,<sup>85</sup> which “amended the Communications Act of 1934.”<sup>86</sup> In doing so, the TCPA prohibited autodialing to any number without the owner’s consent.<sup>87</sup> In 2015, the FCC expanded the definition of “automatic dialer” to include all devices that have the potential to autodial numbers.<sup>88</sup> This includes “virtually every digital communications device on the market today.”<sup>89</sup> This means that equipment that has the *capacity* to autodial is included under this definition, even if it is not *currently* used for such a purpose.<sup>90</sup> This broader definition led to “a 46 percent increase in case filings in the 17-month period after the . . . decision” because the FCC now considered auto-dialing in the context of text messages because text messaging technology can be used to reach thousands of people in quick succession.<sup>91</sup>

The TCPA includes a private right of action for those harmed by robotexts.<sup>92</sup> If the violator holds an FCC license, the violator could be responsible for up to \$18,936 in forfeiture penalties.<sup>93</sup> If a violator does not hold a license, before the FCC can impose financial penalties, “the FCC must first issue a warning citation” to that party.<sup>94</sup> However, “[i]f [that] party continues to violate the Communications Act or the Commission’s rules after receiving a citation, the FCC may impose a monetary forfeiture penalty covering both violations that occur after the citation and those violations that were addressed in the citation.”<sup>95</sup> Private parties may also recover up to \$500 per violation—meaning for each robotext sent—or may recover the total monetary amount lost as a result of their

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<sup>85</sup> Statement on Signing the Telephone Consumer Protection Act of 1991, 2 PUB. PAPERS 1651–52 (Dec. 20, 1991), <https://www.govinfo.gov/content/pkg/PPP-1991-book2/pdf/PPP-1991-book2.pdf> [<https://perma.cc/L6KY-RELE>].

<sup>86</sup> *Telephone Consumer Protection Act*, in FDIC CONSUMER COMPLIANCE EXAMINATION MANUAL—AUGUST 2022 5.1 (2022), <https://www.fdic.gov/resources/supervision-and-examinations/consumer-compliance-examination-manual/documents/8/viii-5-1.pdf> [<https://perma.cc/TYW2-66E5>].

<sup>87</sup> 47 C.F.R. § 64.1200(a)(1) (2022).

<sup>88</sup> *In the News Today—December 13, 2017*, U.S. CHAMBER COM. INST. FOR LEGAL REFORM (Dec. 13, 2017), <https://instituteforlegalreform.com/in-the-news-today-december-13-2017/> [<https://perma.cc/5EEC-E7FB>].

<sup>89</sup> *Id.*

<sup>90</sup> Elizabeth Bohn, *Keeping Current: Courts Consider Definition of Autodialer and Standing Under the Telephone Consumer Protection Act After FCC Ruling*, A.B.A. (Nov. 15, 2015), [https://www.americanbar.org/groups/business\\_law/publications/blt/2015/11/keeping\\_current/](https://www.americanbar.org/groups/business_law/publications/blt/2015/11/keeping_current/) [<https://perma.cc/3REW-6ZLQ>].

<sup>91</sup> See *In the News Today—December 13, 2017*, *supra* note 88.

<sup>92</sup> 47 U.S.C. § 227(b)(3).

<sup>93</sup> Enf. Bureau Chief, *supra* note 12, at 3.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 3 n.18.

interaction with the robotext.<sup>96</sup> The statute further notes that the court, by its own discretion, may increase the damage award up to three times the established amount if it finds the defendant acted willingly.<sup>97</sup>

Still, the actions taken by the government to combat robotexts have been particularly lackluster in comparison to its approach to robocalls. To curb robocalls, the government rolled out “a framework of interconnected standards” called STIR/SHAKEN.<sup>98</sup> Under STIR/SHAKEN, the government requires phone carriers to verify that the phone calls consumers receive are legitimate and not coming from spoofed numbers.<sup>99</sup> Though it was issued several years earlier, STIR/SHAKEN officially went into effect on June 30, 2021.<sup>100</sup> According to the FCC,

Calls traveling through interconnected phone networks would have their caller ID “signed” as legitimate by originating carriers and validated by other carriers before reaching consumers. STIR/SHAKEN digitally validates the handoff of phone calls passing through the complex web of networks, allowing the phone company of the consumer receiving the call to verify that a call is in fact from the number displayed on Caller ID.<sup>101</sup>

Early data shows scammers are finding ways to circumvent the protocols put in place by STIR/SHAKEN.<sup>102</sup> Scammers side step STIR/SHAKEN by routing the call first through a non-IP intermediary that conceals the true identity of a scammer before transferring the call to the service provider, thus tricking the system into believing the call originated from someone else.<sup>103</sup> However, consumers are further protected by the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED).<sup>104</sup> TRACED was

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<sup>96</sup> 47 U.S.C. § 227(b)(3)(B).

<sup>97</sup> *Id.* § (b)(3)(C).

<sup>98</sup> *Combating Spoofed Robocalls with Caller ID Authentication*, FCC, <https://www.fcc.gov/call-authentication> [<https://perma.cc/ZRP5-SL8Y>].

<sup>99</sup> *Id.*

<sup>100</sup> *Understanding STIR/SHAKEN*, TCN, <https://www.tcn.com/understanding-stir-shaken/> [<https://perma.cc/3ETR-2M55>].

<sup>101</sup> *Combating Spoofed Robocalls with Caller ID Authentication*, *supra* note 98.

<sup>102</sup> Clayton W. LeaBratton, *The Future Of Robocalls in a Stirred, Shaken World*, INT'L BUS. TIMES (Sept. 22, 2021, 5:30 AM), <https://www.ibtimes.com/future-robocalls-stirred-shaken-world-3301280> [<https://perma.cc/66FK-RSCU>].

<sup>103</sup> Yasamin Kubba, *FCC Seeks Public Comments on Unresolved STIR/SHAKEN Implementation Issues—Comments Due May 15, 2020*, MARASHLIAN & DONAHUE (Apr. 7, 2020, 10:12 AM), <https://commlawgroup.com/2020/fcc-seeks-public-comments-on-unresolved-stir-shaken-implementation-issues-comments-due-may-15-2020/> [<https://perma.cc/F8H9-97QP>].

<sup>104</sup> Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act, Pub. L. No. 116–105, 133 Stat. 3274 (2019) (codified as amended in scattered sections of 47 U.S.C.).

enacted in 2019, following a year where Americans received forty-eight billion robocalls.<sup>105</sup> Notably, TRACED extends the statute of limitations to four years, provides the Department of Justice with the power to prosecute, prohibits phone carriers from charging customers for blocking robocalls, and provides guidelines for implementing STIR/SHAKEN.<sup>106</sup> The FCC also began gathering data through “the Robocall Mitigation Database to enforce TRACED Act requirements mandating the implementation of a caller ID authentication framework at the network-level.”<sup>107</sup> Finally, the FTC created the Do Not Call Registry, an opt-in program which ensures that callers on this list are not contacted by telemarketers.<sup>108</sup> States also have access to this list to ensure full implementation.<sup>109</sup>

Robotext protection, on the other hand, is less robust. Following the implementation of STIR/SHAKEN, the FCC commented that it was now beginning to focus on curbing robotexts.<sup>110</sup> The FCC often publishes Consumer Alerts to raise awareness about the high rise in robotexts and advises consumers on potential steps they may take to protect themselves, though it uses its Robocall Response Team to disseminate this information.<sup>111</sup> Thus, aside from the recent inclusion in the TCPA and city or state initiatives, consumers are largely reliant on phone carriers and phone applications to combat robotexts, and many of these phone applications are not free to use.<sup>112</sup>

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<sup>105</sup> Devin Coldewey, *TRACED Act Signed Into Law, Putting Robocallers on Notice*, TECHCRUNCH (Dec. 31, 2019, 1:22 PM), <https://techcrunch.com/2019/12/31/traced-act-signed-into-law-putting-robocallers-on-notice/> [https://perma.cc/8MPH-VENL].

<sup>106</sup> U.S. HOUSE OF REPS. COMM. ON ENERGY & COM., SECTION-BY-SECTION SUMMARY PALLONE-THUNE TRACED ACT (2019), <https://energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/documents/Pallone-Thune%20TRACED%20Act%20Section%20by%20Section.pdf> [https://perma.cc/2Q5K-KW3Q].

<sup>107</sup> *STIR/SHAKEN: The Call Authentication Framework*, NUMERACLE, <https://www.numeracle.com/resources/stir-shaken-center> [https://perma.cc/WL43-LCBP].

<sup>108</sup> FED. COMM'NS COMM'N, REPORT ON ROBOCALLS CG DOCKET NO. 17-59 4878 (2019). Those interested in joining the Do Not Call Registry can sign up on the Federal Trade Commission's website specifically created to intake these requests. *National Do Not Call Registry*, FED. TRADE COMM'N, <https://www.donotcall.gov> [https://perma.cc/4JC5-NZKL].

<sup>109</sup> See, e.g., *Sign Up for the Wisconsin Do Not Call Registry*, STATE OF WI DEPT. OF AGRIC., TRADE & CONSUMER PROT., [https://datcp.wi.gov/Pages/Online\\_Services/DoNotCall.aspx](https://datcp.wi.gov/Pages/Online_Services/DoNotCall.aspx) [https://perma.cc/FD2B-NFHB].

<sup>110</sup> Marguerite Reardon, *FCC to Get Tough on Robotexts*, CNET (Oct. 18, 2021, 2:31 PM), <https://www.cnet.com/tech/mobile/fcc-to-get-tough-on-robotexts/> [https://perma.cc/ZT85-DWHQ].

<sup>111</sup> *Robotext Scams on the Rise*, FCC (July 28, 2022), <https://www.fcc.gov/robotext-scams-rise> [https://perma.cc/JG62-N2PT].

<sup>112</sup> *How to Block Numbers, Calls, Ads, Text Messages & Emails*, VERIZON, <https://www.verizon.com/support/block-numbers/> [https://perma.cc/A9HE-6EVN]; *What*

While the problem is still extremely prevalent, cellphone carriers are improving at filtering out spam text messages following a 2018 directive from the FCC that allows them to block robotexts.<sup>113</sup> In 2019, for example, T-Mobile blocked one million spam texts each day, and Verizon reported it blocked five hundred million spam text messages each month.<sup>114</sup> Cellphone carriers have largely done this by creating downloadable phone applications that filter the messages as they are received.<sup>115</sup> Still, these applications have limited effect because scams often come from new phone numbers each time.<sup>116</sup> Because the efforts of phone carriers are not particularly effective and regulatory agencies are slow to respond to the issue at hand, an injured consumer's best remedy is through the TCPA.

## II. A WIDESPREAD PROBLEM: AN OVERVIEW OF *SALCEDO* AND *CRANOR* AND A SURVEY OF SIMILAR CASES

Determining how to evaluate standing under the TCPA is a difficult task for judges at all levels of the court system. While the Eleventh Circuit and Fifth Circuit decisions received the most attention, lower-level courts across the country are grappling with very similar and complex issues.<sup>117</sup>

The TCPA and its previous failure to include text messages caught court attention dating back more than a decade.<sup>118</sup> Indeed, the Ninth Circuit held in *Satterfield v. Simon & Schuster, Inc.* that a text message constitutes a "call" for the purposes of the TCPA, essentially creating a right of action for

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to Do About Robotexts, AT&T, <https://about.att.com/pages/cyberaware/ni/blog/robotext>; Nomorobo, <https://nomorobo.com> [<https://perma.cc/NMC2-LQKB>]; Homepage, ROBOKILLER, <https://www.robokiller.com> [<https://perma.cc/29YE-KP2K>]; see, e.g., Raven Brown, *Cuomo Signs Legislation to Curb Telemarketing Robo-Texts*, WHEC (July 13, 2021, 10:53 AM), <https://www.whec.com/news/cuomo-signs-legislation-to-curb-telemarketing-robo-texts-6169790/> [<https://perma.cc/9UK7-HJBU>].

<sup>113</sup> David Shepardson, *FCC Affirms that Wireless Carriers Can Block Unwanted Text Messages*, REUTERS (Dec. 12, 2018, 1:08 PM), <https://www.reuters.com/article/us-usa-fcc-texts/fcc-affirms-that-wireless-carriers-can-block-unwanted-text-messages-idUSKBN1OB2FP> [<https://perma.cc/439X-NA5Z>]; *Verizon Continues Its Crack Down on Spam Calls and Texts*, VERIZON (last updated July 27, 2022), <https://www.verizon.com/about/news/verizon-continues-its-crack-down-spam-calls-and-texts> [<https://perma.cc/4X83-ZJ7U>].

<sup>114</sup> Katherine Bindley, *Getting Attacked by Robotexts? Here's What to Do*, WALL ST. J. (Aug. 21, 2019, 7:00 AM), <https://www.wsj.com/articles/getting-attacked-by-robotexts-heres-what-to-do-11566385200> [<https://perma.cc/G86W-8445>].

<sup>115</sup> Whitney, *supra* note 37.

<sup>116</sup> Dave Johnson, *5 Ways to Stop Spam Texts from Reaching Your Smartphone*, INSIDER (Oct. 8, 2021, 1:15 PM), <https://www.businessinsider.com/how-to-stop-spam-texts> [<https://perma.cc/PK5B-37BV>].

<sup>117</sup> For an example of one similar case heard in the lower courts, see *Camunas v. Nat'l Republican Senatorial Comm.*, 541 F. Supp. 3d 595, 599 (E.D. Pa. 2021).

<sup>118</sup> *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009).

those who otherwise faced limited routes to court.<sup>119</sup> This decision proves that courts started to realize the invasive nature of text messages early into their existence.<sup>120</sup>

The TCPA took center stage again in 2019 when the Eleventh Circuit heard *Salcedo v. Hanna*.<sup>121</sup> In *Salcedo*, John Salcedo sued Alex Hanna after receiving an unwanted text message from Hanna promoting his law firm and offering a discount.<sup>122</sup> After review, the court dismissed the case, ruling that Salcedo failed to assert a justiciable claim.<sup>123</sup> In the Eleventh Circuit's view, receiving one unwanted text message did not rise to the level of injury necessary to bring a federal claim, meaning that the plaintiff did not establish standing.<sup>124</sup> In fact, the court held that the injury was not a "real injury" at all:<sup>125</sup>

[t]he chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts.<sup>126</sup>

Two years later in 2021, the Fifth Circuit split from the Eleventh Circuit in *Cranor v. 5 Star Nutrition, L.L.C.* In *Cranor*, Lucas Cranor sued 5 Star Nutrition under the TCPA after he received a group of unwanted text messages.<sup>127</sup> The Fifth Circuit held that Cranor suffered an intangible injury.<sup>128</sup> The court established this injury by applying the public nuisance doctrine's special injury rule, holding that Cranor could sue under the doctrine because "he 'could show that he had suffered damage particular to him[] and not shared in common by the rest of the public.'" <sup>129</sup> Cranor suffered a concrete and particularized injury because not only could he allegedly not afford access to technology that could block these texts, but "the text itself 'deplet[ed] the battery life on [Cranor's] cellular

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<sup>119</sup> *Id.* at 952.

<sup>120</sup> See GONZALO E. MON, KELLEY DRYE & WARREN, THE NINTH CIRCUIT HOLDS THAT TEXT MESSAGES ARE SUBJECT TO A TELEMARKETING LAW 1 (2009), <https://www.kelleydrye.com/getattachment/d7a94627-99f4-453d-8552-729592ccca94/attachment.aspx> [<https://perma.cc/NZ72-JUUK>] (discussing 2006 application of the TCPA to text messages by the Ninth Circuit).

<sup>121</sup> *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019).

<sup>122</sup> *Id.* at 1165.

<sup>123</sup> *Id.* at 1173.

<sup>124</sup> *Id.* at 1171.

<sup>125</sup> *Id.* at 1173.

<sup>126</sup> *Id.* at 1172.

<sup>127</sup> *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 688–89 (5th Cir. 2021).

<sup>128</sup> *Id.* at 690.

<sup>129</sup> *Id.* at 692 (quoting W. PAGE KEETON & WILLIAM LLOYD PROSSER, PROSSER & KEETON ON THE LAW OF TORTS § 90, at 643 (5th ed. 1984)) (alteration in original).

telephone and . . . us[ed] minutes allocated to [him] by his cellular telephone service provider.”<sup>130</sup>

While *Salcedo* and *Cranor* are the two stars of this debate, other courts have dealt with very similar issues, even if not directly related to robotexts. For example, in *Susinno v. Work Out World Inc.*, the Third Circuit was tasked with determining whether receiving a single unsolicited call was an injury that could be remedied.<sup>131</sup> In her complaint, Noreen Susinno claimed the unsolicited call she received from Work Out World, a fitness company, constituted a nuisance and was therefore a concrete injury.<sup>132</sup> The Third Circuit agreed, holding that nuisance was “the very harm that Congress sought to prevent, arising from prototypical conduct proscribed by the TCPA.”<sup>133</sup>

The Second Circuit then applied this reasoning in *Melito v. Experian Marketing Solutions, Inc.*<sup>134</sup> In *Melito*, American Eagle Outfitters sent the plaintiffs several unwanted promotional text messages.<sup>135</sup> Christina Melito and her fellow plaintiffs filed a class action lawsuit, suing American Eagle under the TCPA.<sup>136</sup> The plaintiffs and American Eagle agreed to settle the lawsuit “and moved in district court for approval of the settlement and certification of the settlement class.”<sup>137</sup> Following court approval of the settlement and certification, Experian, a third-party defendant, appealed the decision, arguing that the plaintiffs did not satisfy *Spokeo*’s standing requirements because they did not “allege a ‘concrete’ injury in fact.”<sup>138</sup> The court disagreed, holding that the plaintiffs were in fact concretely injured because robotexts “present the same ‘nuisance and privacy invasion’ envisioned by Congress when it enacted the TCPA” for robocalls.<sup>139</sup>

Considered together, these cases reveal three schools of thought. One school of thought, like in *Salcedo*, notes that nuisance is not enough to establish standing. Another, like in *Melito*, emphasizes that establishing *any* nuisance should be enough to establish standing. The third, as shown in *Cranor*,

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<sup>130</sup> *Id.* (alteration in original).

<sup>131</sup> *Susinno v. Work Out World Inc.*, 862 F.3d 346 (3d Cir. 2017).

<sup>132</sup> *Id.* at 348, 351.

<sup>133</sup> *Id.* at 351 (internal quotation marks and citation omitted).

<sup>134</sup> *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85 (2d Cir. 2019).

<sup>135</sup> Paul Tassin, *American Eagle Outfitters Settles Text Message Class Action for \$14.5M*, TOP CLASS ACTIONS (Dec. 26, 2016), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/american-eagle-outfitters-settles-text-message-class-action-14-5m/#> [https://perma.cc/7M56-A7MD].

<sup>136</sup> *Melito*, 923 F.3d at 88.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 92.

<sup>139</sup> *Id.* at 92–93.

notes that asserting a personal injury resulting from a *public* nuisance is necessary to establish standing.

### III. AN OVERVIEW OF THE PUBLIC NUISANCE DOCTRINE AND ITS ROLE IN SOLVING THE TCPA CIRCUIT SPLIT

As the case discussion above reflects, the nuisance doctrine is at the heart of the TCPA and is something Congress strongly considered when enacting the Act.<sup>140</sup> Indeed, the statute—which, as mentioned, now also applies to text messages—reads, “banning . . . automated or prerecorded telephone calls [except when consented to or for emergency purposes] is the only effective means of protecting telephone consumers from this *nuisance* and privacy invasion.”<sup>141</sup>

As such, plaintiffs should utilize and universally adopt a doctrine that specifically addresses nuisance issues when bringing these robotext cases. Without a more specific approach, courts may be bombarded with lawsuits that argue injuries through a confusing myriad of legal doctrines.<sup>142</sup> The sections below will first discuss the origins of the public nuisance doctrine and analyze why it should be utilized and then address the limitations to this approach.

#### A. *The English and American Origins of the Public Nuisance Doctrine*

The public nuisance doctrine was established in England in the twelfth century because of the Crown’s need to hold those who harmed public land—or infringed on a public right—accountable.<sup>143</sup> An infringement of a public right could be as simple as blocking use of a public road.<sup>144</sup> Through the end of the seventeenth century in England, although courts applied the public nuisance doctrine in the tort law context on occasion, the doctrine was applied primarily in the criminal law context.<sup>145</sup>

As early English law developed, the public nuisance doctrine developed as well. English courts expanded recovery

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<sup>140</sup> See Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394, 2395 (codified as amended at 47 U.S.C. § 227).

<sup>141</sup> *Id.* (emphasis added).

<sup>142</sup> See JOSHUA K. PAYNE & JESS R. NIX, U.S. CHAMBER INST. FOR LEGAL REFORM, WAKING THE LITIGATION MONSTER: THE MISUSE OF PUBLIC NUISANCE 9 (2019), <https://instituteforlegalreform.com/wp-content/uploads/2020/10/The-Misuse-of-Public-Nuisance-Actions-2019-Research.pdf> [<https://perma.cc/7UJQ-XCLY>].

<sup>143</sup> *Id.* at 4.

<sup>144</sup> *Id.* at 3.

<sup>145</sup> *Id.* at 4.

under the doctrine to allow *private* citizens to recover in the civil context, creating the “special injury rule” mentioned above.<sup>146</sup> Under the special injury rule as applied today, a private action can be brought to recover for injuries stemming from a public nuisance so long as the plaintiff can show they “suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”<sup>147</sup>

American courts later adopted the public nuisance doctrine developed under English law, applying it in the tort context.<sup>148</sup> In the following years, the American legal system also recognized in *Cranor* that an individual can recover under the public nuisance doctrine by using the special injury rule.<sup>149</sup> Historically, like in England, the public nuisance doctrine only applied in American courts when there was interference with physical infrastructure like a bridge or a public right like freedom from pollution.<sup>150</sup> However, *Cranor* expanded this definition by applying the public nuisance doctrine to telecommunications infrastructure.<sup>151</sup> In *Cranor*, the court wrote, “*Cranor* wants to use our Nation’s telecommunications infrastructure without harassment. In that sense, he’s similar to someone who wants to use another piece of infrastructure like a road or bridge without confronting a malarial pond, obnoxious noises, or disgusting odors.”<sup>152</sup> Thus, use of this infrastructure is now considered “a right common to the general public.”<sup>153</sup>

Telecommunications infrastructure is considered an important component of public infrastructure because it plays a significant role in the economy, just like roads and air transportation.<sup>154</sup> A study conducted by Boston Consulting Group found that “5G [alone] will contribute anywhere from \$400 billion to \$500 billion in GDP to the U.S. economy.”<sup>155</sup> This is in addition to the nearly \$500 billion that the wireless

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<sup>146</sup> *Id.* at 4–5.

<sup>147</sup> William B. Johnson, Annotation, *What Constitutes Special Injury that Entitles Private Party to Maintain Action Based on Public Nuisance—Modern Cases*, 71 A.L.R. 4th 13 (1989).

<sup>148</sup> PAYNE & NIX, *supra* note 142, at 4.

<sup>149</sup> *Cranor v. 5 Star Nutrition*, L.L.C., 998 F.3d 686, 692 (5th Cir. 2021).

<sup>150</sup> See PAYNE & NIX, *supra* note 142, at 3–4.

<sup>151</sup> See *Cranor*, 998 F.3d at 692.

<sup>152</sup> *Id.*

<sup>153</sup> See *id.* at 691 (citing RESTATEMENT (SECOND) OF TORTS § 821B (AM. L. INST. 1979)).

<sup>154</sup> See James McBride & Anshu Siripurapu, *The State of U.S. Infrastructure*, COUNCIL ON FOREIGN RELS. (Nov. 8, 2021, 3:43 PM), <https://www.cfr.org/background/state-us-infrastructure> [https://perma.cc/K48S-3B56].

<sup>155</sup> Tom Leddo, *How Will 5G Deliver on Its Potential?*, MD7 (June 21, 2021), <https://www.md7.com/perspectives/how-will-5g-deliver-on-its-potential/> [https://perma.cc/2954-NNBG].



industry already adds to the American economy annually.<sup>156</sup> Indeed, nearly every American industry—from healthcare to business to agriculture to education—relies on telecommunications infrastructure.<sup>157</sup> Therefore, its role in the day-to-day lives of Americans cannot be overemphasized.<sup>158</sup>

*B. The Public Nuisance Doctrine and Special Injury Rule as the Path Forward*

As previously discussed, in order to bring a lawsuit in federal court, a plaintiff must establish standing by showing they suffered a “concrete and particularized” injury.<sup>159</sup> As established in *Spokeo*, a plaintiff can prove they were concretely and individually injured by successfully tying the alleged harm to a doctrine that provides recovery for an injury of a similar nature.<sup>160</sup> Therefore, creating that connection provides plaintiffs with a wider range of avenues to enter the federal court system. However, this wide latitude can overwhelm the court.

This eventual deluge can be mitigated through the individual based, special injury approach to the public nuisance doctrine. As discussed, the individual approach requires not only concrete proof that there was an infringement of a right shared by the public (which, in the text messaging realm, is the use of telecommunications infrastructure),<sup>161</sup> but also that that right was infringed in a manner that is separate and unique to the plaintiff.<sup>162</sup> Thus, the harm suffered must be particularized, which parallels the requirements established in *Spokeo*.<sup>163</sup> Given this, as applied to robotexts, the best avenue for robotext plaintiffs to establish standing to enter federal court is through use of the special injury rule embedded in the public nuisance doctrine.

This approach can grow with changes in technology because it is not specifically designed for the exact text messages users receive today. Rather, it can apply to any innovations to text messaging that might arise in the future.<sup>164</sup> It is a versatile

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<sup>156</sup> *Id.*

<sup>157</sup> See *Critical Infrastructure Sectors*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/critical-infrastructure-sectors> [<https://perma.cc/M49U-BLGR>].

<sup>158</sup> See *Why Is Telecoms So Important? How Is It Relevant to Me?*, HILL DICKINSON (Dec. 8, 2020), <https://www.hilldickinson.com/insights/articles/why-telecoms-so-important-how-it-relevant-me> [<https://perma.cc/C2GZ-CN8N>].

<sup>159</sup> *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016).

<sup>160</sup> See *id.* at 341.

<sup>161</sup> *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 692 (5th Cir. 2021).

<sup>162</sup> *Id.*

<sup>163</sup> *Spokeo*, 578 U.S. at 330.

<sup>164</sup> Andrea Giacomini, *The Past, Present and Future of Messaging*, FORBES (Jan. 6, 2021, 9:00 AM), <https://www.forbes.com/sites/forbestechcouncil/2021/01/06/the-past->

and flexible doctrine, as proven by the fact that it has survived over eight hundred years from its inception with very little need for true reform.<sup>165</sup>

Moreover, courts should apply this standard because—aside from the special injury rule of the public nuisance doctrine—there are few other viable avenues that allow private citizens to recover following the breach of a right shared with the public while also limiting court crowding.<sup>166</sup> One would be hard pressed to find a person who has not received a spam text message or robotext.<sup>167</sup> In fact, court dockets suggest this. According to the US Chamber Institute for Legal Reform, following the publication of “an Omnibus TCPA Declaratory Ruling [in 2015], which invited additional TCPA litigation,” TCPA claims roared to life throughout the country, with cases heard in nearly every state.<sup>168</sup> Because the special injury rule requires the plaintiff to provide additional layers of evidence as compared to other possible routes to bring their claims, the significant influx of TCPA claims will be tempered if the special injury rule is adopted.

Furthermore, the special injury rule has been specifically associated and intertwined with the TCPA for many years. In *Sharp v. Ally Financial Inc.*, for example, the court noted that,

[D]uring a Senate proceeding held on November 7, 1991, the TCPA sponsor, Senator Hollings, [urged the Senate to pass the TCPA] to “address[] an enormous *public nuisance*.” . . . Th[is] statement[] support[s] the notion that while the desired effect of the TCPA’s enactment was to diminish the occurrence of inimical telephone and facsimile practices in general, the primary purpose of the TCPA’s private right-to-action provision was to remedy the wrongs inflicted upon individual consumers.<sup>169</sup>

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present-and-future-of-messaging/?sh=25d888269f17 [https://perma.cc/G46B-582T]; Michael J. Gray, *Applying Nuisance Law to Internet Obscenity*, 6 ISJLP 317 (2010).

<sup>165</sup> Richard A. Crudo, *A Patently Public Concern: Using Public Nuisance Law to Fix the False Patent Marking Statute After the Leahy-Smith America Invents Act*, 80 GEO. WASH. L. REV. 568, 580 (2012).

<sup>166</sup> Ronald L. Ohren, *The US Plaintiffs’ Class Action Bar Increasingly Looks to and Relies Upon the Public Nuisance Cause of Action to Address Social Ills*, GLOB. LITIG. NEWS (Oct. 1, 2020), <https://globallitigationnews.bakermckenzie.com/2020/10/01/the-us-plaintiffs-class-action-bar-increasingly-looks-to-and-relies-upon-the-public-nuisance-cause-of-action-to-address-social-ills/> [https://perma.cc/J87K-EHVF].

<sup>167</sup> See Becky Sullivan, *Complaints About Spam Texts were up 146% Last Year. Now, the FCC Wants to Take Action*, NPR (Oct. 19, 2021, 12:48 PM), <https://www.npr.org/2021/10/19/1047303425/complaints-about-spam-texts-fcc-robocalls> [https://perma.cc/5TKY-UMXG].

<sup>168</sup> Becca Wahlquist, *TCPA Litigation Sprawl: A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. CHAMBER INST. FOR LEGAL REFORM (Aug. 2017), <https://instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits/> [https://perma.cc/S2S9-89DE].

<sup>169</sup> *Sharp v. Ally Fin., Inc.*, 328 F. Supp. 3d 81, 90 (W.D.N.Y. 2018) (third alteration in original) (emphasis added).

Consequently, like the Fifth Circuit, many courts applied the special injury rule to other TCPA claims, thereby proving its viability. A useful example is *Cross v. State Farm Mutual Auto Insurance Company*.<sup>170</sup> There, the plaintiff, following the death of her mother and acting as the executor of her mother's Estate, sued State Farm Insurance after the plaintiff's mother received a text message from State Farm offering to assist her in an insurance claim following a car accident.<sup>171</sup> The plaintiff's mother contacted State Farm in connection with the claim but later "made clear . . . that she did not want to be contacted by State Farm."<sup>172</sup> The text message at issue came after this assertion.<sup>173</sup> In response to the plaintiff's complaint, State Farm argued the plaintiff failed to show standing.<sup>174</sup>

Citing *Cranor*, and recognizing that TCPA addresses harms similar to those addressed by the public nuisance doctrine, the court held that the plaintiff did, in fact, sufficiently assert standing because the plaintiff proved their injuries were concrete and particularized.<sup>175</sup> In successfully addressing these two elements, the plaintiffs brought the public nuisance doctrine within the realm of the special injury rule, and opened a road to individualized recovery.<sup>176</sup> The court wrote, "[h]owever minimal, unsolicited text messages pose both a nuisance and unwanted intrusion into one's life. This harm is related in-kind to those harms traditionally redressed through the common law tort[] of nuisance."<sup>177</sup> And importantly, like in *Cranor*, the court also clarified it was "immaterial" that the plaintiff only received one text message versus several.<sup>178</sup>

Unlike the approach taken in *Cross*, the *Salcedo* approach will prove ineffective and unhelpful over time because spam text messages will, in all likelihood, continue to plague American phones.<sup>179</sup> The *Salcedo* court's holding will encourage

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<sup>170</sup> *Cross v. State Farm Mut. Auto. Ins. Co.*, No. 20-CV-1047, 2022 WL 193016 (W.D. Ark. Jan. 20, 2022).

<sup>171</sup> *Id.* at \*1.

<sup>172</sup> *Id.* at \*2.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at \*2.

<sup>175</sup> *Id.* at \*2, \*6–7.

<sup>176</sup> *Id.* at \*7.

<sup>177</sup> *Id.* at \*20.

<sup>178</sup> *Id.* at \*7; see *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 693 (5th Cir. 2021).

<sup>179</sup> Elisabeth Buchwald, *Robocalls Are Biting the Dust, but Get Ready for a Lot More Spam Texts*, MKT. WATCH (Sept. 25, 2021, 12:51 PM), <https://www.marketwatch.com/story/robocalls-are-biting-the-dust-thanks-to-new-technology-but-get-ready-for-a-lot-more-spam-texts-11632343541> [<https://perma.cc/53SY-XWSE>].

scammers to continue targeting consumers.<sup>180</sup> This is compounded by the fact that there is currently little other protection or remedies available for victims of texting scams aside from the TCPA.<sup>181</sup> Furthermore, it is difficult to know with absolute certainty what the text messaging landscape will look like in the future.<sup>182</sup> It is quite possible that robotexting will grow to be even more influential than we can currently imagine.<sup>183</sup> Given this, it is exceedingly important for courts to acknowledge that these text messages can and do inflict significant harms, and therefore consumers should be protected by the federal court system to the fullest extent possible.

The public nuisance doctrine's special injury rule is a happy medium between holding all scammers accountable and allowing complete recovery, as not every plaintiff will be able to show that they were harmed in an individual way. Something that is "indirect . . . [or] inherent to [the plaintiff's] business" will not be considered a justiciable harm.<sup>184</sup> However, those who *can* prove concrete and particularized harm can appear in court. Though some scammers may never be caught, the special injury rule does disincentivize them because it increases the possibility that they will be forced to take accountability for their actions.<sup>185</sup>

### C. *Limitations to the Public Nuisance Approach*

While the public nuisance doctrine can outlast changes to the technological landscape, there are limitations to the success of the approach. The limitations can be broken down into three categories: (1) identification, (2) remedies, and (3) assumption of the risk. The identification limitation stems from difficulty in determining how to locate or identify the person or organization behind the text message if it is not inherently clear. Remedial

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<sup>180</sup> See *Spam and Robocalls: Why Have They Gotten Worse?*, KAKE.COM (Apr. 23, 2021, 11:05 AM), <https://www.kake.com/story/43739764/spam-and-robocalls-why-have-they-gotten-worse> [https://perma.cc/V3T8-C56Q].

<sup>181</sup> See *supra* Section I.D.

<sup>182</sup> However, predictions have been made. Ian Pearson, *What Will Mobile Messaging Look Like in 20 Years?*, INFOBIP (Feb. 3, 2020), <https://www.openmarket.com/blog/what-will-mobile-messaging-look-like-in-20-years/> [https://perma.cc/ZRR9-DJYA].

<sup>183</sup> See, e.g., Athima Chansanchai, *Did Spam Text Kill a Russian Suicide Bomber?*, NBC NEWS (Jan. 28, 2011), <https://www.nbcnews.com/tech/tech-news/did-spam-text-kill-russian-suicide-bomber-flna125405>. [https://perma.cc/3QZZ-L2AX].

<sup>184</sup> *Tel. Sci. Corp. v. Asset Recovery Sols., LLC*, No. 15-CV-5182, 2016 WL 4179150, at \*15–16 (N.D. Ill. 2016).

<sup>185</sup> Joshua Briones, *TCPA Litigation Update—Courts See Through Scam Setup TCPA Suits*, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY & POPEO, P.C. (Dec. 12, 2019), <https://www.mintz.com/insights-center/viewpoints/2776/2019-12-tcpa-litigation-update-courts-see-through-scam-setup-tcpa> [https://perma.cc/ELW4-A55F].

limitations include issues with access to damages or injunctions as limited by statute. Finally, affirmative defenses may be available to the defendant, including, most notably, assumption of the risk. These limitations, however, are not particularly significant and can be largely overcome.

### 1. Identifying the Sender

Unless it is blatantly obvious, there is no guarantee the person or company behind the robotexts will be revealed.<sup>186</sup> This is perhaps the biggest limitation to the public nuisance approach because bringing an action in court requires the plaintiff to bring a claim against a legitimate defendant.<sup>187</sup> However, this limitation also extends to any other approach taken under the TCPA.<sup>188</sup> The American Bar Association (ABA) offers tips on how to uncover the sender's identity, though these suggestions are very broad and not entirely applicable because robotexts can also come from email accounts, not just phone numbers.<sup>189</sup>

Specifically, the ABA suggests that recipients of robotexts: (1) call the number the text message came from, (2) use the Internet to find information on the phone number, or (3) investigate any link forwarded by the sender by using the Internet Corporation of Assigned Names and Numbers website.<sup>190</sup> The ABA notes, however, that many of the companies sending these text messages are "fly-by-night" companies or unestablished companies engaged in illegal activities for profit.<sup>191</sup> These companies are particularly hard to track down because they are inherently set up to allow criminals to act quickly and disappear.<sup>192</sup>

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<sup>186</sup> Christopher E. Roberts, *Tips for Tracking Down and Pursuing Robocallers and Spam Texters*, A.B.A. (July 24, 2019), <https://www.americanbar.org/groups/litigation/committees/consumer/practice/2019/tips-for-tracking-down-and-pursuing-robocallers-and-spam-texters/> [https://perma.cc/V98H-KB2J].

<sup>187</sup> *Lawsuits and the Court Process*, JUSTIA, <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/> [https://perma.cc/K6HM-ZPHW].

<sup>188</sup> *See id.*

<sup>189</sup> Roberts, *supra* note 186; *Stop Spam Texts from Email Addresses*, DONOTPAY, <https://donotpay.com/learn/spam-texts-from-email-addresses/> [https://perma.cc/X9BK-RPEX].

<sup>190</sup> Roberts, *supra* note 186.

<sup>191</sup> *Id.*; *Fly-by-Night*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/fly-by-night> [https://perma.cc/S7V3-DCZ9]; *see How Can a Fly-By-Night Operation be Distinguished From a Legal Company?*, BME, <https://www.bmerv.es/docs/Inversores/Guias/ing/servInv/5.How%20can%20a%20fly.pdf> [https://perma.cc/4BZL-5J76].

<sup>192</sup> *How Can a Fly-By-Night Operation be Distinguished from a Legal Company?*, BME, <https://www.bmerv.es/docs/Inversores/Guias/ing/servInv/5.How%20can%20a%20fly.pdf> [https://perma.cc/4BZL-5J76].

While law enforcement struggles to track down these scammers, amateurs called “scambaiters” have relative success.<sup>193</sup> Scambaiters often dedicate hours to interacting with scammers, either eventually revealing their identity or simply wasting their time.<sup>194</sup> Scambaiting is becoming increasingly popular with many scambaiters who even operate YouTube channels, some of which boast millions of subscribers.<sup>195</sup> Because scambaiting does not generally require any particular set of technological skills, it is an activity in which anyone can engage and a viable option to overcome the identification issue posed by robotexts.<sup>196</sup>

## 2. Remedies Available

Under nuisance law, remedies can include either monetary damages or an injunction, essentially the same remedies provided by the TCPA.<sup>197</sup> Still, issues arise because injunctions are very difficult to enforce.<sup>198</sup> This is because nuisances like text messages are unlike nuisances that, for example, originate when a city population is exposed to pollution after a factory is built nearby. In those instances, it is obvious that the factory created the nuisance. There will be no question of compliance as the factory will either change its practices or continue. The situation is different for text messages. There is no physical interaction between the two parties when a text message is sent. While a court could order an injunction against the defendant to cease sending text messages to the plaintiff, it may be difficult to know if the defendant complied because the text messages could simply be sent under a different email address or phone number.<sup>199</sup>

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<sup>193</sup> Amelia Tait, *Who Scams the Scammers? Meet the Scambaiters*, GUARDIAN (Oct. 3, 2021, 3:00 PM), <https://www.theguardian.com/technology/2021/oct/03/who-scams-the-scammers-meet-the-amateur-scambaiters-taking-on-the-crooks> [https://perma.cc/JP3X-YK4R].

<sup>194</sup> *Id.*

<sup>195</sup> Bob Sullivan, *Inside the World of a Scam-Busting YouTuber*, AARP (June 24, 2022), <https://www.aarp.org/podcasts/the-perfect-scam/info-2022/scammer-payback.html> [https://perma.cc/A9P5-JFLA].

<sup>196</sup> See Tanya Basu, *The People Using Humour to Troll Their Spam Texts*, MIT TECH. REV. (June 20, 2022), <https://www.technologyreview.com/2022/06/20/1054435/people-trolling-spam-texts/> [https://perma.cc/HNW2-TEDY]; Jim Browning, *Scammers Arrested!*, YOUTUBE (Oct. 25, 2022), <https://www.youtube.com/watch?v=P6dhteJIY48> [https://perma.cc/88VZ-YPBQ].

<sup>197</sup> *Nuisance*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/nuisance> [https://perma.cc/56NF-FSNG]; 47 U.S.C. § 227(b)(3).

<sup>198</sup> See generally *Buchanan v. Sullivan*, No. 8:20-CV-301, 2021 WL 149052 (D. Neb. Jan. 15, 2021) (exemplifying imposing injunctions in TCPA lawsuits).

<sup>199</sup> Whitney, *supra* note 37.

In most cases, courts award damages over an injunction and only order an injunction if damages are insufficient.<sup>200</sup> Because the TCPA specifically details the damages available to plaintiffs,<sup>201</sup> courts may leave behind the injunction approach in favor of damages. However, it may be possible to also adopt an injunction approach. There is evidence that some groups of scammers work together at “call centers.”<sup>202</sup> In February 2022, for example, the Department of Justice indicted several call centers based in India, alleging that the call centers placed scam calls intended to defraud Americans.<sup>203</sup> In June 2022, the International Criminal Police Organization, commonly known as INTERPOL, raided nearly eighteen hundred call centers, leading to the arrest of thousands of alleged scammers.<sup>204</sup> If, through these actions, a plaintiff can tie their harm to a specific call center or scammer, they may be able to obtain an injunction in addition to receiving damages under the TCPA.<sup>205</sup> These initiatives may also help decrease the impact of the identification limitation noted above.

### 3. Assumption of the Risk

As applied to text messages, the most obvious available defense to a claim of public nuisance is assumption of the risk.<sup>206</sup> Assumption of the risk occurs when a person “take[s] the risk of injury onto themselves.”<sup>207</sup> In the texting context, defendants could argue that, in buying a cellphone with texting capability, consumers are essentially assuming the risk of being scammed in exchange for using text messaging.<sup>208</sup> On the other hand, given

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<sup>200</sup> *Nuisance*, *supra* note 197.

<sup>201</sup> 47 U.S.C. § 227(b)(3).

<sup>202</sup> Yudhijit Bhattacharjee, *Who’s Making All of Those Spam Calls?*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/01/27/magazine/scam-call-centers.html> [<https://perma.cc/2G4S-375F>].

<sup>203</sup> Press Release, Dep’t of Just., U.S. Att’y’s Off., N.D. of Ga., Multiple India-Based Call Centers and Their Directors Indicted for Perpetuating Phone Scams Affecting Thousands of Americans (Feb. 3, 2022), <https://www.justice.gov/usao-ndga/pr/multiple-india-based-call-centers-and-their-directors-indicted-perpetuating-phone-scams> [<https://perma.cc/DBK4-5P4E>].

<sup>204</sup> Tonya Riley, *INTERPOL Raids Hundreds of Scammy Call Centers in Sweep*, CYBERSCOOP (June 15, 2022), <https://www.cyberscoop.com/interpol-raids-hundreds-of-scammy-call-centers-in-sweep/> [<https://perma.cc/FFU3-XWUH>].

<sup>205</sup> For an example of such an injunction, see Marguerite Reardon, *Verizon Wireless Wins Injunction Against Text Spam*, ZDNET (Feb. 26, 2007), <https://www.zdnet.com/article/verizon-wireless-wins-injunction-against-text-spam/> [<https://perma.cc/CR86-L3CX>].

<sup>206</sup> *Assumption of the Risk*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/assumption\\_of\\_risk](https://www.law.cornell.edu/wex/assumption_of_risk) [<https://perma.cc/V45G-5PVS>].

<sup>207</sup> *Id.*

<sup>208</sup> See Adam Dachis, *How to De-SPAM Your Life*, LIFEHACKER (Jan. 23, 2012, 11:00 AM), <https://lifehacker.com/how-to-de-spam-your-life-5878092> [<https://perma.cc/89XD-XQ7Z>].

that text messaging is both a standard feature of most cellphones and one of the major ways that Americans interact, a court might find this argument unpersuasive as there are few viable workarounds or alternatives to communicate with others when not in person.<sup>209</sup> Courts seem to hint that assumption of the risk is a strong defense in cases brought by plaintiffs who agreed to receive text messages from the defendant.<sup>210</sup> This is because the TCPA does not create a cause of action for these situations.<sup>211</sup>

*D. Despite Limitations, a Workable Solution*

As demonstrated, the limitations associated with this solution can be overcome and should not be a significant factor in determining the viability of this approach. Of course, it is difficult to predict with certainty what the future of technology or enforcement around these technologies will look like. But, given the strengths of the public nuisance doctrine, its special injury rule, and the court system's apparent support of this approach, this solution should be explored with enthusiasm. Dedication to this approach will create a safer environment for Americans while ensuring that the court system continues to function smoothly.

CONCLUSION

While we owe many of our modern-day successes to technology, it also creates many headaches. Because of our reliance on text messaging as one of the predominant methods of communication, the likelihood of falling victim to robotext scams or receiving unauthorized texts is high.<sup>212</sup> As technology continues to advance, the court system has an important responsibility to protect Americans from the harms and damages of text message-based scams. At the same time, robotexts have become a fact of life, with most cellphone users now assuming they will receive robotexts at some point.<sup>213</sup> And, following *Spokeo*, it is also easier for plaintiffs to establish basic

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<sup>209</sup> See Frank Newport, *The New Era of Communication Among Americans*, GALLUP (Nov. 10, 2014), <https://news.gallup.com/poll/179288/new-era-communication-americans.aspx> [<https://perma.cc/5L8C-BJXG>].

<sup>210</sup> *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1044 (9th Cir. 2017).

<sup>211</sup> See, e.g., *Enf. Bureau Chief*, *supra* note 12, at 2–3.

<sup>212</sup> Perlroth, *supra* note 40.

<sup>213</sup> See *id.*



standing.<sup>214</sup> Given these realities, it is important to ensure there is a viable avenue for plaintiffs while also ensuring the court is not overwhelmed with claims.

The solution is the application of the public nuisance doctrine's special injury rule. The special injury rule, which allows plaintiffs to recover for a harm that also affects the public, requires plaintiffs to prove they suffered particularized harm, thus complying with the standing requirements necessary to bring a claim in federal court.<sup>215</sup> The public nuisance doctrine is a highly malleable doctrine that has survived societal changes never fathomable when the doctrine first came into existence centuries ago, with the only question now being how to best define a tangible or intangible injury as society evolves.<sup>216</sup> While it does have its limitations, the doctrine's overall flexibility suggests it is the court's best bet to avoid frivolous lawsuits while providing opportunities for remediation for plaintiffs who suffered unfortunate harms resulting from robotexts. This flexibility will prove critical as robotexting continues to evolve, proliferate, and plague Americans, with still unknown consequences.

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<sup>214</sup> See generally *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016) (explaining that the risk of real harm, such as “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact”).

<sup>215</sup> *Cranor v. 5 Star Nutrition, L.L.C.*, 998 F.3d 686, 692 (5th Cir. 2021).

<sup>216</sup> See *supra* notes 21–24 and accompanying text.

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