



No. 07-38

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IN THE  
**Supreme Court of the United States**

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DOUGLAS M. MCKENNA, ET AL.,  
*Petitioners,*

v.

STEPHEN C. OLIVER, ET AL.,  
*Respondents.*

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**On Petition for a Writ of Certiorari  
from the Colorado Court of Appeals**

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**RESPONDENT MYRON CORPORATION'S  
BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The three Colorado intermediate appellate courts below all determined that Telephone Consumer Protection Act (“TCPA”) facsimile claims constitute personal injury/privacy claims rather than property damage claims for purposes of determining assignability, and that under the TCPA’s language state law controls the assignability determination. Accordingly, because Colorado law, like federal common law, does not allow assignment of personal injury claims, the courts held the assignments invalid, and thus determined that the assignee lacked standing to assert the claims. The questions presented are:

1. Whether the Court should decline review on choice of law issues (i.e., federal versus state law) when the courts below, consistent with both the language of the TCPA and the uniform weight of authority from other courts that have considered the issue, determined that the TCPA incorporates state law assignability standards.

2. Whether the Court should decline to review Petitioner’s argument that the assignability analysis actually involves two separate choice of law questions, one at the characterization stage (i.e., whether federal or state law controls in determining whether the claim is privacy or property damage), and another at the assignment stage (i.e., whether federal or state law controls in determining whether the claim, once characterized as privacy or property damage is assignable), when they did not make that argument below, and there is no split in authority on the issue.

3. Whether the Court should decline to use this case as a vehicle for reviewing Article III representational standing, when Article III does not control justiciability in state courts.

4. Whether the Court should decline review at this time when the Colorado Supreme Court has accepted review in a related case involving some of the same parties and raising virtually identical issues.

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**BRIEF IN OPPOSITION  
TO PETITION FOR WRIT OF CERTIORARI**

**STATEMENT**

The petition suffers from three independently fatal flaws. First, Petitioners have failed to identify any real conflict, let alone a conflict warranting review in this Court. The courts below decided that the Telephone Consumer Protection Act (“TCPA”) claims at issue here were not assignable. The Colorado state courts based this decision regarding assignability on Colorado law. Other courts to have considered the issue have agreed that, based on the TCPA’s express language, questions of assignability are ultimately governed by state law standards. Thus, differences in outcome on the ultimate question of assignability, to the extent they even exist, do not reflect a conflict on the choice of law questions (i.e., federal versus state law) that Petitioners seek to present here. In all cases, the courts have determined that the TCPA directs them to apply state law standards. Second, even if there were a conflict on any of the issues presented, this case would be a poor vehicle to address them. Petitioners’ Article III standing issue, for example, is not presented here. Article III standing rules do not govern in state court. Third, any review would be premature. Petitioners are seeking review of Colorado intermediate appellate court decisions. The Colorado Supreme Court, however, has granted review in a closely related case raising virtually identical issues. There is no reason to review this case when a definitive statement of the Colorado courts’ treatment of the assignability and standing issues relating to TCPA claims is forthcoming.

The TCPA was enacted in 1991 to govern telephone and facsimile advertising. An important focus of the TCPA is the privacy of recipients. The TCPA prohibits using a fax machine to send an “unsolicited advertisement,” 47 U.S.C. § 227(b)(1)(C), that is, an advertisement “transmitted to any

person without that person's prior express invitation or permission." The TCPA's concern for privacy interests is reflected in its legislative history. See, e.g., S. Rep. No. 102-178, at 1, 1991 U.S.C.C.A.N. 1968, 1968 (1991) ("The purposes of the [TCPA] are to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls to the home and to facilitate interstate commerce by restricting certain uses of facsimile . . . machines and automatic dialers."); *U.S. Fax Law Center, Inc. v. IHire, Inc.*, 362 F. Supp. 2d 1248, 1252 (D. Colo. 2005), *aff'd*, 476 F.3d 1112 (10th Cir. 2007) ("Artificial or prerecorded messages, like a faxed advertisement, were believed to have heightened intrusiveness because they are unable to 'interact with the customer except in preprogrammed ways.' (citations and punctuation omitted)).

Petitioner US Fax Law Center, Inc., is an entity that solicits claims from others for purposes of pursuing litigation to recover statutory damages under the TCPA, 47 U.S.C. § 227. As far as Myron knows, Petitioner has never received a fax transmission itself from any of those whom it seeks to sue in these actions.

Respondent Myron Corporation is a family owned company based in New Jersey that for more than 50 years has provided personalized business products and office supplies to its customers throughout the United States. Myron makes limited use of facsimile transmissions to market its products and services. In doing so, however, Myron sends faxes only to its existing customers, with whom it has an established business relationship, or to those who have expressly inquired about Myron products. Even as to those groups, Myron does not send faxes without the recipients' express invitation or permission.

### REASONS FOR DENYING THE WRIT

The courts below uniformly held that the TCPA claims at issue here were not assignable. The courts thus concluded that Petitioners could not pursue their actions as assignees of these claims.

In attempting to manufacture some basis for review in this Court, Petitioners seek to tease three separate questions from the assignability analysis. First, Petitioners contend that the courts are conflicted as to whether state or federal law determines the issue of whether a TCPA claim is properly characterized as a property claim (and thus typically assignable) or a privacy claim (and thus typically not assignable). Second, Petitioners contend that the courts below violated the Supremacy Clause, U.S. Const. art. VI, cl. 2, by applying state rather than federal law to determine the assignability of the claims once characterized. Finally, Petitioners contend that the decision below conflicts with Supreme Court authority regarding the scope of representational standing under Article III.

None of these questions warrants review. The choice of law question on the characterization issue (i.e., Petitioners' first question presented) was not raised below. Petitioners' briefing below did not suggest, as Petitioners argue now, that determining assignability actually involves two separate choice of law questions, one at the characterization stage and one at the assignability stage. Rather, the courts below simply considered the question of whether state or federal law standards governed assignability generally, and concluded that the TCPA's language and purpose reflected a congressional choice that state law should control. Moreover, even if the Petitioners had presented the issue, courts are not conflicted with regard to choice of law on the characterization issue. Rather, courts all agree that in determining characterization, the proper focus is the text and purpose of the TCPA. And, in any event, Petitioners have suggested no reason to believe that the federal common law

category “privacy claim” would be different from (let alone meaningfully different from) the Colorado common law category “privacy claim,” meaning that it is irrelevant which source of law applies in making the distinction.

On the assignability question, Petitioners have similarly failed to demonstrate any conflict with the Court’s decisions. Lower courts, including the decisions below here, have uniformly agreed that given the TCPA’s language, and in particular the provision that conditions a private action on whether it is “otherwise permitted by the laws or rules of court of a State,” 47 U.S.C. § 227(b)(3), the TCPA incorporates state law rules regarding assignability. To be sure, some courts in cases involving *other* federal statutes—statutes that lack similar language—have concluded that the assignability question under those federal statutes must be decided without reference to state law. But that is not a conflict. In both cases the courts are applying a federal law of assignability. It is just that in some cases, such as the one here, the relevant federal statute, here the TCPA, tells the courts to adopt state law standards for private rights of action.

Petitioners fare no better in relying on an alleged conflict as to Article III representational standing as a basis for review. Article III applies solely to federal courts; it does not limit or control justiciability in state courts. Thus, the state court decisions here are a poor vehicle for addressing the scope of representational standing under Article III.

Finally, even if there were any questions here meriting review, and there are not, granting review in these cases would be premature. The decisions here are from the intermediate court of appeals in Colorado. The Colorado Supreme Court, however, has recently accepted review in related litigation raising nearly identical questions involving the same plaintiff and plaintiff’s attorneys as one of the cases here. There is no reason to review intermediate Colorado

state court decisions when a dispositive statement of Colorado's approach to TCPA claims will soon be available.

**A. Petitioners Failed To Argue Below One Of The Choice Of Law Questions They Seek To Present Here, And, In Any Event, There Is No Conflict On That Issue.**

1. The first question that Petitioners offer in their Petition was neither pressed nor passed on below. According to the Petition, the question of assignability actually involves two stages—first, determining how to characterize the claim (e.g. personal injury or property damage), and second, deciding whether claims thus characterized are assignable. Petitioners contend here that each stage involves its own choice-of-law inquiry such that, for example, the characterization stage could be governed by federal law, while the assignability stage is governed by state law. Finally, they suggest both that the courts below violated the Supremacy Clause in applying state rather than federal law at the first stage, see Pet. at ii, and that the decisions create a conflict with other decisions holding that federal law should govern in “determin[ing] the substance of the cause of action,” see Pet. at 15.

In the courts below, however, Petitioners never suggested this double-barreled choice of law inquiry. For example, in the *Myron* case, the trial court originally dismissed for lack of subject matter jurisdiction, saying nothing about assignability. On appeal, the court ordered supplemental briefing on standing. As part of the standing analysis, Petitioner averred that the TCPA claims were assignable both under federal and state law, but presented no argument that one or the other should control. See Plaintiff/Appellant Supp. Br., Opp. App. 1a–3a. More importantly, the papers never hinted that the assignability question should be broken down into two stages (characterization and assignment) with a separate choice of law analysis at each stage.

Similarly, in seeking certiorari review in the Colorado Supreme Court, the *Myron* Petitioner expressly relied on both federal and state cases in discussing assignability. See Colo. Pet., Opp. App. 13a–14a. To be sure, Petitioner later argued that federal law should control on assignability, see Colo. Pet., Opp. App. 19a–22a, but again Petitioner never argued that the choice of law should be broken down and considered separately at the characterization stage as apart from the assignability stage.

In short, the issue of choice of law on characterization was never pressed nor passed upon below, and there is no reason to consider it here.

2. In any event, while Petitioners contend that there are some six different conflicts as to the source of law (i.e., federal vs. state) that should govern characterization, see Pet. at 15–19, in fact, Petitioners have failed to demonstrate any actual conflict at all.

First, Petitioners have failed to cite *any* case in which a court has held that the characterization of a TCPA claim for assignability purposes is a matter of federal rather than state law. To the extent Petitioners suggest the *Eclipse Manufacturing Co. v. M and M Rental Center*, No. 06 C 1156, 2007 U.S. Dist. Lexis 36505 (N.D. Ill. May 18, 2007), does so, they are mistaken. See Pet. at 12. In that case, the court expressly relied on state law in making its characterization determination, and ended up relying on federal law only because Illinois state law told it to do so. The underlying rule of decision came from state law. See *id.* at \*9 n.2 (applying federal law standards because “[u]nder Illinois Law, when a federal statute is silent on a particular issue, Illinois courts interpret the statute using federal common law”). Moreover, the distinction between relying on federal versus state law is largely if not entirely irrelevant in any event, as Petitioners have failed to cite any case that suggests that the categories “privacy claim” and “property damage claim” would somehow shift their boundaries

depending on whether state or federal law applies in defining them. Maybe for that reason, virtually no case, other than perhaps *Eclipse Manufacturing*, has even suggested that choice of law matters on the characterization issue, or that choice of law need be discussed in connection with characterization at all.

Instead, in answering the characterization question for TCPA claims, courts have followed essentially identical paths. They look to the language and congressional purpose underlying the TCPA, and then simply apply commonsense understandings of “privacy” and “property damage.” So, for example, in the *MBA Financial* decision below, in deciding that TCPA claims should be characterized as privacy claims, the court cited a Senate Report that stated that “[t]he purposes of the [TCPA] are to protect the privacy interests of residential telephone subscribers.” Pet. App. 34a. The Tenth Circuit in *IHire* cited the same Senate Report, and reached the same conclusion. See *U.S. Fax Law Ctr., Inc. v. IHire, Inc.*, 476 F.3d 1112, 1119 (10th Cir. 2007). In fact, as the district court noted in *IHire*, “eight federal district courts in nine decisions have found that the TCPA exists to protect privacy interests,” 362 F. Supp. 2d at 1253, most citing the same Senate report, see, e.g., *Park Univ. Enters., Inc. v. Am. Cas. Co.*, 314 F. Supp. 2d 1094, 1108–09 (D. Kan. 2004). And in not one of those decisions did the courts suggest that it somehow mattered whether federal common law or state common law defined the category “privacy claim.”

Nor do the decisions here conflict with the cases Petitioners cite involving other federal statutes. See Pet. at 13, 18. Contrary to Petitioners’ claims, for example, the Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), used the same approach on characterization as the courts below here. In the Court’s words, “[t]he characterization of a § 1983 claim for statute of limitations purposes is derived from the elements of the cause of action, and Congress’ purpose in providing it.” *Id.* at 268. That is the precise analytical

approach that the courts below followed with regard to the TCPA. And the decision below is perfectly consistent with the “numerous decisions of this Court” that “federal common law generally provides the rule of decision when federal law is the source of the rights, interests and liabilities at issue.” See Pet. at 17. The courts below *expressly looked* to federal law—namely the text and purpose of the TCPA—in deciding the characterization question.

3. Petitioners’ arguments that *Missouri ex rel. Nixon v. Am. Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003), and *Destination Ventures, Ltd. v. F.C.C.*, 46 F.3d 54 (9th Cir. 1995), create a conflict on the characterization issue do not support their request for certiorari. See Pet at 25–28. In fact, both of those cases are irrelevant to the characterization question that Petitioners seek to present here. According to the petition, the issue in this case is whether federal law—as opposed to state law—should govern the characterization question (i.e., in determining whether TCPA claims are privacy claims or property damage claims, does state law or federal common law control in deciding what it means to be a “privacy claim” or a “property damage claim”?). See Pet. at ii (Question Presented 1). But Petitioners’ arguments based on *Nixon* and *Destination Ventures* do not address that issue. Rather, the section of their petition addressing those cases alleges a conflict not with regard to the *source* of the law (i.e., federal versus state) used in making the characterization determination, but rather with regard to the *outcome* of the characterization decision itself (i.e., privacy versus property damage). Thus, these cases provide no evidence of a conflict on the choice of law aspect of the characterization question—the sole characterization issue on which Petitioners have sought review. See S. Ct. Rule 14 (“Only the questions set out in the petition, or fairly included therein, will be considered by the Court.”).

But even overlooking Petitioners’ failure to link these cases to the actual characterization question presented, *Nixon*

and *Destination Ventures* also fail to help Petitioners for another reason. Neither case creates a conflict as to *any* aspect of the characterization issue, *because neither case involves a characterization question*. *Nixon* and *Destination Ventures* addressed constitutional challenges to the TCPA under the First Amendment. Under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980), the question the court faced in those cases, then, was whether a “substantial government interest” supported the TCPA. Both courts pointed to the congressional desire to avoid cost shifting as a legitimate and substantial government interest. See *Nixon*, 323 F.3d at 654–55; *Destination Ventures*, 46 F.3d at 56–57. But that does nothing to advance Petitioners’ claims here. First, that the courts identified one legitimate interest (avoiding cost shifting) does not mean that there were not also additional interests that the TCPA served (e.g., protecting privacy). The government need only identify one legitimate substantial interest to overcome a First Amendment challenge. It need not exhaustively catalog *all* legitimate governmental interests that a given statute serves. Thus, identifying one interest does not foreclose the existence of others.

Second, and even more fundamentally, it is apples and oranges to assert that merely because Congress had a substantial interest in avoiding cost shifting, this would somehow mean that TCPA claims are “property damage claims” for purposes of assignability. In a constitutional challenge, the question is what *goal* Congress was pursuing. On the characterization issue for assignability purposes, by contrast, the question turns on the nature of the *right* that Congress conferred. Even if the TCPA’s goal was economic, Congress is certainly free to confer privacy rights as a means of serving an economic goal. Thus, identifying the nature of the governmental interest that supports the TCPA against a constitutional challenge does not determine the outcome of the personal injury/property damage divide

for assignability. And with regard to the latter question, courts have overwhelmingly concluded that such claims fall on the personal injury side of that divide.

In short, the approach evidenced below in determining the characterization of TCPA claims is consistent with the language of the statute, consistent with the Supremacy Clause's mandate, and consistent with the path other courts have followed in characterizing TCPA and other types of federal claims. There is no need for the Court to revisit the characterization analysis here.

**B. The TCPA Incorporates State Law Standards On Assignability, And Thus The Decisions Below Did Not Violate The Supremacy Clause In Using Colorado Assignability Standards.**

Petitioners' second question presented starts from a flawed assumption. Contrary to Petitioners' suggestion, the courts below did not "fail[] to apply federal common law to determine the assignability of federal TCPA fax claims." See Pet. at ii (Question Presented 2). It is just that here the relevant federal law (i.e., the TCPA) provides that state law governs on the question of assignability. Thus, state assignability standards do not apply *instead of* federal law, but rather *as a result of* federal law, meaning that the courts below did not violate the Supremacy Clause as Petitioners contend. Nor have Petitioners shown any conflict on this issue. Indeed, lower courts have been remarkably uniform in their approach to TCPA claims. Moreover, given that the substantive content of Colorado state law and federal common law are similar if not identical on the assignability question, the entire choice of law issue with regard to that question is irrelevant to the ultimate outcome on assignability. At the very least, the Court should wait to examine this issue until there is a case where the resolution of the issue will actually matter.

1. Petitioners' primary argument—presented in a host of different ways—is that application of state law standards in determining assignability of TCPA claims somehow works in derogation of federal law. See Pet. at 16–17 (application of state law cannot be reconciled with *Erie* line of cases which establish that federal law provides rules of decision); Pet. at 18 (question of survival of cause of action under federal statute is a matter of federal law), Pet. at 20 (application of state law violates the Supremacy Clause and conflicts with Congress's authority); Pet. at 21 (application of state law standard “undermine[s] uniform administration of the TCPA”). In fact, however, courts are applying state law standards *as a result of* their reading of the TCPA's statutory command. Thus, far from “undermining” federal law, see Pet. at 21, the assignability analysis serves to promote the choices Congress made.

As the very “conflict” cases that Petitioners cite recognize, see Pet. at 15–16, Congress has the right to determine the rule of decision for a federally-created cause of action and, where it desires, it can incorporate state law. As the Court put it in *Burks v. Lasker*, 441 U.S. 471 (1979), see Pet. at 16, “[t]he fact that the scope of [a party's] federal right is, of course, a federal question does not . . . make state law irrelevant.” (quotation omitted). *Id.* at 477. And there, for example, the Court concluded that in the Investment Company Act, Congress had chosen to incorporate state standards for directors' conduct. *Id.* at 479–80. In other cases, of course, courts have found that the particular federal statutes under consideration required a federal rule of decision rather than incorporating state standards, see, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), but again in those cases, this was as a result of *what Congress said in those statutes*, not some general rule that federal standards must always apply. See *id.* at 406 (“Federal courts are bound to apply rules enacted by Congress”).

Consistent with the very cases that Petitioners cite, the decisions below ultimately chose to apply state standards on assignability, but did so only based on their reading of Congress's command in the language of the TCPA. In *MBA Financial*, for example, the court pointed to the language that “[a] person or entity may, if otherwise permitted by the laws or roles of court of a State, bring [an action] in an appropriate court of that State.” Pet. App. 31a (quoting 47 U.S.C. § 227(b)(3)). Based on that language along with specific non-preemption language in the statute—“nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirement or regulations . . .,” 47 U.S.C. § 227(e)(1)(A)—the Court concluded that Congress had not chosen to preempt state law, and that the state law of assignability thus governed. Pet. App. 31a. Similarly, *Oliver* expressly adopted the Tenth Circuit’s reasoning from *IHire* (the decision raising similar issues on which a petition is pending, see No. 06-1634), see Pet. App. 5a–6a, in which the Tenth Circuit applied Colorado law to assignability based on its reading of the federal statute: “[T]he TCPA itself directs that Colorado law govern the matter of assignability.” 476 F.3d at 1118. And the final case below, *Myron*, similarly adopted *Oliver*’s reasoning. See Pet. App. 21a.

Nor, contrary to Petitioners’ assertions, did the courts give short shrift to the possibility that the need for a uniform federal policy could trump the statutory reference to state law. See, e.g., Pet. at 13. Rather, the courts simply concluded, based on the statute’s non-preemption language, as well as the courts’ understanding of the relevant policy underlying the TCPA, that Congress had not seen a need for such uniformity here. In *MBA Financial*, for example, the court stated: “The language of the statute makes it clear that Congress did not intend to ‘occupy the field’ or to promote national uniformity as to the transmission of telephone

facsimiles.” See Pet. App. 31a. Similarly, in *IHire*, the court stated that it was “unaware of any federal program that could be frustrated” by relying on state law standards for assignability. 476 F.3d at 1118.

In short, the decisions below here do not conflict either with the Supremacy Clause, or any of the decisions Petitioners cite involving other federal statutes. The courts below applied the standard choice of law analysis with regard to federal statutory claims. In particular, they used standard tools of statutory interpretation and determined that Congress intended courts to use state standards to govern assignability, and that the use of such standards would not frustrate any important federal purpose. Even if the courts below were incorrect in the outcome of that analysis (and they were not), that is at most a garden variety claim of error and does not warrant certiorari review.

2. Nor, contrary to Petitioners’ suggestion, is there any conflict among the TCPA-specific cases themselves. The cases that Petitioners rely upon to show this “conflict” are two of the three cases below (*Oliver* and *MBA Financial*), along with *Martinez v. Green*, 131 P.3d 492 (Ariz. App. 2006), *IHire*, *Eclipse Manufacturing Co.*, and *J2 Global Communications, Inc. v. Vision Lab Telecommunications, Inc.*, No. CV 05-6348, 2006 U.S. Dist. Lexis 66865 (C.D. Cal. May 9, 2006). See Pet. at 12, 20. Far from showing “considerable conflict, confusion, lack of uniformity, and uncertainty,” *id.*, however, those six cases are remarkably similar in their approach on assignability. Petitioners claim, for example, that *Oliver* applies federal common law. See Pet. at 20. But, in fact, *Oliver* expressly relies on *IHire* in making its assignability determination, see Pet. App. 5a–6a, a case that Petitioners contend “conclud[es] that state law governs,” Pet. at 20, and a case that is in perfect accord with *MBA Financial* where the court again applied Colorado standards to the assignability issue. Pet. App. 31a. Similarly, the *Martinez* court expressly states that it is

looking to “state law and federal common law” in deciding the assignability question, before concluding, like *IHire*, *Oliver* and *MBA Financial*, that TCPA claims are not assignable. 131 P.3d at 494. The remaining two cases, *Eclipse Manufacturing* and *J2 Global Communications*, see Pet. at 12, similarly applied state law to the assignability question. To be sure, these courts both found assignments of TCPA claims valid. But that was not because these courts disagreed on the appropriate choice of law (both applied state law), but rather because these courts characterized the specific TCPA claims at issue in those cases as involving property rather than privacy claims. See *Eclipse Mfg.*, 2007 U.S. Dist. Lexis 36505, at \*6–9; *J2 Global Commc’ns*, 2006 U.S. Dist. Lexis 66865, at \*5–7. In sum, on the choice of law questions Petitioners present here, there is no meaningful conflict as to TCPA assignability, either in analysis or result, that warrants the Court’s attention.<sup>1</sup>

3. Further confirming that review is unwarranted, the substantive content of Colorado state law and federal common law makes choosing between the two a fruitless exercise here, as both are identical regarding the assignability of TCPA claims. Under federal common law, personal injury claims (including privacy claims) are not assignable. See *Evans v. Boyd Rest. Group, LLC*, 240 Fed. Appx. 393, 2007 U.S. App. Lexis 21995, at \*12 (11th Cir.

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<sup>1</sup> Nor do *Eclipse Manufacturing* and *J2 Global Communications* create a conflict warranting review on the underlying question of whether a TCPA claim is properly characterized as a privacy claim or a property damage claim for assignability purposes. First, Petitioners did not raise that question in their petition, see S. Ct. Rule 14, instead limiting themselves to choice of law issues, see Pet. at ii. Second, Petitioners were right not to raise this question—the only two cases to have found that a TCPA claim is a property damage claim and thus assignable are district court cases, one of which is not even reported. Thus, even if those cases portend a developing conflict (rather than merely reflecting aberrant decisions), the Court should await further development in the lower courts before undertaking review.

2007) (“[U]nder federal common law, personal injury claims are not assignable absent a statute to the contrary.”); *Casino Cruises Inv. Co. v. Ravens Mfg. Co.*, 60 F. Supp. 2d 1285, 1287 (M.D. Fla. 1999) (“Under the [federal] common law and the law of most states, personal injury claims are not assignable absent a statute to the contrary.”).

The same rule applies under Colorado law. See *Espinosa v. Perez*, 165 P.3d 770, 773 (Colo. Ct. App. 2006) (“At [Colorado] common law, only property claims were assignable because they survived death. Personal injury claims were not assignable.” (citations omitted)); *Stanley v. Petherbridge*, 42 P.2d 609 (Colo. 1935) (same), *overruled in unrelated part by Publix Cab Co. v. Colorado Nat’l Bank*, 338 P.2d 702 (Colo. 1959); *Brown v. Stookey*, 298 P.2d 955 (Colo. 1956) (same); cf. *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d 1292, 1302 (D. Colo. 1998) (under Colorado law, “invasion of privacy involves injury to the person, primarily through mental and emotional distress,” and an association of individuals may not collectively claim an invasion of privacy).

Thus, even if Petitioners were correct that a court should ignore the TCPA’s command and apply the federal standards for assignability, the end result in this case would be exactly the same. Whether judged under Colorado state law standards or federal common law standards, privacy claims are not assignable, while property damage claims are. Before granting review on Petitioners’ proposed question, the Court should await a case, if one ever arises, where the difference between applying state and federal assignability standards actually matters. Cf. *Evans*, 2007 U.S. App. Lexis 21995, at \*11 (“Because a cause of action for discrimination in violation of Title VII is not assignable under either Georgia or federal law, we need not decide which law applies.”).

**C. These Cases Do Not Present Any Questions Regarding Representational Standing Under Article III As Article III Does Not Apply To Colorado State Courts, And, In Any Event, There Is No Conflict On That Issue.**

Petitioners' suggestion that the Court should grant certiorari to address an alleged conflict as to the scope of representational standing under Article III fails for at least two reasons. See Pet. at 28–30. First, these cases arise out of Colorado state courts and, as the Court has observed more than once, state courts are not governed by Article III. Second, even putting that flaw aside, review is not warranted as there is no conflict. The courts below merely held that an invalid assignment does not confer standing on the assignee. So far as Respondent can tell, no court—and certainly none of the decisions Petitioners cite—has ever held otherwise.

1. The Court has “recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.” *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989). So, for example, in *Virginia v. Hicks*, 539 U.S. 113 (2003), when the Court reviewed a Virginia state supreme court decision on a First Amendment issue, the Court declined to reach the petitioners' argument that the Court should “impose restrictions on the use of overbreadth standing.” *Id.* at 120 (punctuation omitted). According to the Court, “[t]he problem with [petitioner's] proposals is that we are reviewing here the decision of a *State* Supreme Court; our standing rules limit only the *federal* courts' jurisdiction over certain claims.” *Id.* (emphasis in original) (citing *ASARCO*, 490 U.S. at 617). In short, Petitioners' proposed question regarding representational standing under Article III does not even arise here, as standing doctrine in Colorado state courts

is a creature of state, not federal, law. Accordingly, the Court lacks jurisdiction to even reach the question of standing at all. See, e.g., *Sochor v. Florida*, 504 U.S. 527 (1992) (Court generally lacks jurisdiction to review questions of state law).

Nor are Petitioners correct that Colorado state law has incorporated Article III to the point that the state law standing issue has become “interwoven” with federal law and thus creates a federal question. See Pet. at 28 (citing *Michigan v. Long*, 463 U.S. 1032, 1038–39 (1983)). As the Court noted in *Long*, state law decisions are subject to review in the Supreme Court only where it appears on the face of the opinion that the state court felt *compelled* to resolve the state law issue in a particular way because of the demands of federal constitutional or statutory law. 463 U.S. at 1044. Where state courts look to federal court decisions only for *guidance*, by contrast, Supreme Court review is not available.

Here, it is clear that Colorado law imposes its own standing requirements, separate and apart from federal law, and that it relies on federal law only for guidance. Indeed, the Colorado Supreme Court has expressly said so. In *Grossman v. Dean*, 80 P.3d 952 (2003), the Colorado Supreme Court rejected the defendant’s claim that a plaintiff lacked standing, a claim that the defendant had based on federal standing doctrine. In doing so, the court noted that “[a]lthough federal decisions may be considered *for guidance*, we are ultimately governed here by state principles of standing, rather than the federal principles created by Article III . . . .” *Id.* at 959 (emphasis added). And just this year, a Colorado appeals court similarly rejected the argument that this Court’s opinion in *Lance v. Coffman*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1194 (2007), controlled resolution of a standing question in Colorado state court. See *Barber v. Ritter*, \_\_\_ P.3d \_\_\_, 2007 Colo. App. Lexis 480 (Colo. Ct. App. Mar. 22), *cert. granted*, 2007 Colo. Lexis 1052 (Nov.

13, 2007). According to the court, “nothing in the Court’s decision [in *Lance*] affects the standing of private citizens and taxpayers to bring lawsuits in state court . . . . While federal decisions may be considered for guidance, we are ultimately governed by state principles of standing, rather than the federal principles created by Article III of the United States Constitution and addressed in federal decisions.” *Id.* at \*17.

Nothing about the decision below here suggests anything to the contrary. To be sure, the *MBA Financial* court below cited the federal court decision in *IHire* in concluding that no standing existed. See Pet. App. 32a–34a. But the court never said, or even suggested, that the court believed that federal law somehow *compelled* the court to limit standing in accordance with federal principles. Rather, the Colorado appeals court looked to *IHire* for guidance (as the Colorado Supreme Court has instructed Colorado state courts to do), and finding that guidance persuasive, dismissed plaintiff’s state court claims for lack of standing.

Indeed, Petitioners themselves correctly acknowledged that the question of standing for these cases was one of state law. At Petitioners’ request, the Colorado appeals court ordered supplemental briefing on standing in the *Myron* case. In that briefing, Petitioners focused on what standing required in *Colorado*, an argument it buttressed by citing to Colorado state cases. See, e.g., Supp. Br., Opp. App. 1a (“In Colorado, standing involves the application of a two-pronged analysis.” (citing *Wimberly v. Ettenberg*, 570 P.2d 535 (1977))); Opp. App. 3a (“Unfortunately, some courts have conflated standing with a party’s legal interest in the suit” (citing *Public Service Co. v. Barnhill*, 690 P.2d 1248 (Colo. 1984))). While the Petitioners admittedly pointed to *IHire* and *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), Supp. Br. at 2a, nowhere did they suggest that these federal standing decisions were somehow binding on Colorado state courts.

In short, the state court decisions here provide a poor vehicle to address questions regarding the scope of Article III standing. Even if there were a conflict regarding representational standing under Article III, and as described below there is not, that conflict would be better addressed in a case actually governed by Article III.

2. Petitioners' request for review of the Article III representational standing question also fails because there is no conflict on the issue it seeks to present. The courts below merely held that the TCPA claims at issue here are not assignable, and that Petitioners thus lacked standing because they were not valid assignees of the claims. To show a conflict, then, one would presume that Petitioners would bring forth cases in which a court has held that a party that lacks a valid assignment nonetheless has representational standing under *Vermont Agency* to pursue the invalidly assigned claims. Of course, Petitioners have not been able to identify any cases standing for that proposition, nor so far as Respondent can tell, has any court ever held that.

Instead, Petitioners suggest that the conflict as to standing is between the decisions below and those cases in which the Court has held that assignees of *validly* assigned claims have standing. See Pet. at 29. But there is no reason to believe that the same standing rules that apply to valid assignees would also apply to those who hold invalidly assigned claims. To the contrary, courts have routinely recognized that valid assignments do not create a bar to standing, while invalid assignments do bar standing. Compare, e.g., *Vermont Agency*, 529 U.S. at 765–66 (an “assignee of a claim has standing to assert the injury in fact suffered by the assignor”), with *Carter v. Romines*, 560 F.2d 395, 396 & n.1 (8th Cir. 1977) (civil rights claim not assignable; purported assignee lacked standing). Thus, the decisions Petitioners cite, which involved *valid* assignments, do not conflict with the decisions below, which involved *invalid* assignments.

Petitioners' real complaint, although denominated in terms of "standing," is that the court below should have (in Petitioners' view) treated the TCPA claims as property claims (which generally are assignable) rather than privacy claims (which generally are not). See Pet. at 29 ("[T]he Court of Appeals' conclusion that TCPA fax claims are not assignable conflicts in principle with decisions of this Court and other federal Courts of Appeals stating that claims *for damage to property* survive and are assignable." (emphasis added)). As described above, however, the questions Petitioners present regarding the appropriate characterization of the claims (i.e., privacy versus property) do not warrant certiorari review. That issue becomes no more certworthy by merely recasting the characterization question as one of Article III "standing."

**D. Review Here Would Be Premature As The Colorado Supreme Court Has Granted Review In A TCPA Case Raising The Issues Presented Here, And Thus The Decisions Below May Not Even Reflect The Colorado Courts' Final View.**

Even if the Court were inclined to grant certiorari on the issues here, to do so now would be premature as the Colorado Supreme Court has granted review in closely-related litigation presenting virtually identical issues. There is no reason to review Colorado intermediate appellate court decisions when the Colorado Supreme Court's resolution of these same issues will likely soon be available.

In *Kruse v. McKenna*, Colorado Supreme Court No. 06 SC 555, a case involving a named Petitioner here and litigated by some of the same counsel, the Colorado Supreme Court has accepted supplemental briefing on issues identical or directly related to the three questions presented in the petition. See, e.g., Respondent's Supplemental Brief on Jurisdiction and Standing, Opp. App. 23a-30a. Directly implicating Petitioners' first question presented, the

Colorado Supreme Court currently is considering (1) whether the substance of a TCPA claim is a matter of federal law, Opp. App. 24a; and (2) whether a TCPA claim is a privacy or economic property claim, Opp. App. 25a–28a. Directly implicating Petitioners’ second question presented, The Colorado Supreme Court currently is considering (1) whether assignability of TCPA claims is a matter of federal common law, *id.* at 28a; and (2) whether a TCPA claim is assignable, *id.* at 28a–30a. Directly implicating Petitioners’ third question presented, the Colorado Supreme Court currently is considering whether the purported assignee of a TCPA claim has standing to pursue the claim, see *id.* at 23a–24a.

Moreover, the Colorado Supreme Court originally accepted discretionary jurisdiction in *Kruse* to determine another issue that, according to Petitioners’ own petition, is directly implicated in this case. Originally, the Colorado Supreme Court accepted *Kruse* to determine whether Colorado state courts have subject matter jurisdiction over private TCPA claims. The trial court ruled that it did not have subject matter jurisdiction because the Colorado General Assembly adopted a different standard of conduct for unsolicited facsimile advertisements under the Colorado Consumer Protection Act. The intermediate appellate court reversed that determination, and the Colorado Supreme Court accepted jurisdiction on that issue. See Respondent’s Motion for Leave to Conduct Supplemental Briefing on the Issues of Jurisdiction and Standing, Opp. App. 32a.

In two of the cases in this consolidated petition, *Oliver* and *Myron*, the trial courts likewise dismissed claims based on lack of subject matter jurisdiction, and the courts of appeals rejected the trial courts’ subject matter jurisdiction reasoning. See Pet. at 11–12. Indeed, the first reason Petitioners list for granting the petition here revolves around their contention that Colorado courts have subject matter

jurisdiction over private TCPA claims. See Pet. at 13–14.<sup>2</sup> Thus, in addition to all three questions presented in the petition, the Colorado Supreme Court is also addressing another fundamental issue relevant to these consolidated cases.

In short, the very issues on which Petitioners seek review here currently are pending before the Colorado Supreme Court in related litigation. Thus, even if the petition raised issues worthy of certiorari (and for the reasons stated above it does not) this Court should decline review of intermediate Colorado appellate court decisions when the Colorado Supreme Court's view soon will be available.

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<sup>2</sup> Interestingly, after briefly referring to this issue in passing as the first ground supporting review early in the petition, see Pet. at 10–11, Petitioners fail to say another word about it anywhere in their petition, and decline to include it within their questions presented. That is perhaps not surprising—these cases would be a poor vehicle to review the subject matter jurisdiction issue as the *Myron* court found in *favor* of Petitioners on this issue, Pet. App. 7a, the *Oliver* court avoided the issue, Pet. App. 20a, and the *MBA Financial* court did not address the issue. Pet. App. 28a–36a.

**CONCLUSION**

For the reasons stated above, the Court should deny the petition for certiorari.

Respectfully submitted,

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