



Constitutional Limits to Congress’s Statutory Damages Authority: Takeaways from the Ninth Circuit in *Wakefield v. ViSalus*

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A central question any time Congress exercises its legislative power is what consequences may follow from violating the law. For laws that create private rights of action—in other words, a law that permits an individual to bring a lawsuit—violators may be subject to monetary liability in the form of damages. Laws that permit recovery of damages may distinguish between *actual damages*, an amount meant to approximate the monetary harm caused by the unlawful conduct that will vary case by case, and *statutory damages*, a fixed amount or range of amounts set by the law. Statutory damages may provide plaintiffs an alternative means of monetary recovery when proving actual damages is difficult. Although Congress has broad leeway to set statutory damages, the Constitution sets limits.

In *Wakefield v. ViSalus, Inc.*, the U.S. Court of Appeals for the Ninth Circuit vacated a statutory damages award of more than \$900 million under the Telephone Consumer Protection Act (TCPA), holding that the district court had not properly considered the award under the Due Process Clause of the Fifth Amendment to the U.S. Constitution. The Ninth Circuit’s decision does not invalidate any portion of the TCPA, but it reflects a potential limit to statutory damages awarded under the statute. The decision may impact other statutory schemes as well, due to a dearth of case law on the constitutionality of statutory damages.

Damages Under the TCPA

The [TCPA](#) is the primary federal statute addressing robocalls made to residential and wireless phones. The TCPA makes it illegal to call any wireless phone number without the recipient’s consent using an automatic telephone dialing system or an artificial or prerecorded voice. The Federal Communications Commission (FCC) [enforces](#) the TCPA, but the statute also allows for a private right of action. A person who receives an unsolicited robocall may sue the caller and recover either “actual monetary loss” or \$500 per violation, whichever is greater. Each call made in violation of the TCPA is a separate violation of the law.

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Constitutional Limits on Damages

The Due Process Clauses of the U.S. Constitution—one in the [Fifth Amendment](#) that applies to the federal government and one in the [Fourteenth Amendment](#) that applies to states—prohibit governments from depriving individuals of life, liberty or property without due process of the law. The Supreme Court has interpreted these clauses to prohibit excessively high damages awards. While [several](#) of the Court’s decisions [focus](#) on punitive damages awarded by a jury, the Court held in a [1919 decision](#) that a statutorily defined award violates the Constitution when it is “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”

The Supreme Court has not addressed how this test applies to statutory damages awards comprised of multiple violations. Several federal courts of appeals have [held](#) or [suggested](#) without deciding that while an individual statutory damage award—such as the TCPA’s \$500 per violation—may survive constitutional scrutiny, an aggregate award may still exceed the limits set by the Constitution. Other appeals courts have [suggested](#) that the constitutionality of an aggregated damages award depends only on the constitutionality of the per-violation penalty.

The Ninth Circuit’s Decision

The *Wakefield* decision involved a class action brought against ViSalus, a multi-level marketing company, based on [targeted telemarketing calls](#) to individuals. A jury [found](#) that ViSalus had placed roughly 1.85 million calls in violation of the TCPA. Based on the TCPA’s statutory damages of \$500 per violation, the district court [ordered](#) ViSalus to pay approximately \$925 million to the class. ViSalus [filed](#) a post-trial motion challenging this award, arguing that even if the TCPA’s \$500 per violation is constitutional, the total award violated due process. The district court [declined](#) to reduce the award.

On appeal, the Ninth Circuit reversed and remanded, holding that “[in certain extreme circumstances](#)” an aggregate statutory award may violate the Constitution even if the per-violation award would not. The court [noted](#) that Supreme Court precedent on statutory damages awards does not turn on whether statutory damages are calculated for a single violation. Instead, the constitutional analysis [depends](#) on whether the damages awarded are “wholly disproportioned” to the illegal conduct and “obviously unreasonable.” The court [reasoned](#) that an award may be “wholly disproportioned” when aggregation results in “extraordinarily large awards.” The Ninth Circuit held that [seven factors](#) set out in an [earlier Ninth Circuit decision](#)—including the amount awarded to each plaintiff and the total award—should inform a trial court’s analysis of an aggregated statutory damage award. Even so, the court [cautioned](#) that statutory damages awards should be reduced only if an aggregate award is “gravely disproportionate to and unreasonably related to the legal violation committed.”

The *Wakefield* decision does not invalidate any portion of the TCPA, nor does the decision mean that the \$925 million award must be reduced. The district court may apply the Ninth Circuit’s due process analysis and determine that the \$925 million damages award accords with the factors identified by the *Wakefield* court. The decision does, however, make the Ninth Circuit the second U.S. court of appeals to conclude that large aggregated statutory damages awards under the TCPA may be unconstitutional, following a decision by the [Eighth Circuit](#) in 2019.

Considerations for Congress

The *Wakefield* court [acknowledged](#) that Congress generally has broad latitude to design remedial schemes. Among the questions for Congress to consider when it creates a statutory damages remedy are whether the statute sets a minimum (floor) or maximum (ceiling) on damages that may be awarded. Several statutes provide for one or both of these outer limits on damages awards. The

[Fair and Accurate Credit Transactions Act](#), for example, permits individuals to recover “damages of not less than \$100 and not more than \$1,000” for violating the law.

Congress may limit the recovery of statutory damages in other ways. Some statutes direct courts to consider particular factors in determining the amount of a damages award. These directions can range from specific (such as the [Fair Debt Collection Practices Act’s](#) instruction to consider the frequency, persistence, and intentionality of noncompliance in determining damages awards) to general (such as the [Copyright Act’s](#) range of statutory damages between \$750 and \$30,000 “as the court considers just”). Rather than limit the amount of damages available for each discrete violation, a law may limit the total number of violations that may be alleged in a single enforcement action or restrict the availability of class action litigation. [Section 130](#) of the Truth in Lending Act, for example, caps total liability in a class action at the lesser of \$1 million or 1% of the defendant’s net worth.

As the Ninth Circuit [confirmed](#) in the *Wakefield* decision, the TCPA does not place any ceiling on the award of statutory damages or otherwise limit liability in class actions or actions for aggregated damages. An earlier Ninth Circuit case [refused](#) to read such limitations on liability into a statute that did not expressly contain them, holding that doing so “would subvert congressional intent.” Despite the statutory language, the *Wakefield* court [held](#) that the Constitution may prevent large awards in egregious circumstances even if Congress did not intend to limit recovery of statutory damages at all. Permitting defendants to challenge large awards on due process grounds may create a de facto ceiling on statutory damages despite the lack of such a ceiling expressly in the law.

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