

# DOES THE TELEPHONE CONSUMER PROTECTION ACT VIOLATE DUE PROCESS AS APPLIED?

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## Abstract

The Telephone Consumer Protection Act of 1991 (TCPA) subjects a telemarketer’s use of autodialed telephone calls, automated text messages, and faxes to statutory damages of \$500 per violation or up to \$1,500 per willful violation. Depending on the circumstances of the violating communication, the TCPA’s penalties can exceed by orders of magnitude any plausible economic estimate of the recipient’s actual harm, such that the TCPA, as applied, likely violates the Due Process Clause of the Fifth Amendment.

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## INTRODUCTION

The Telephone Consumer Protection Act of 1991 (TCPA)<sup>1</sup> regulates a telemarketer’s use of autodialed telephone calls, automated text messages, and faxes.<sup>2</sup> The recipient of a violating communication may sue the telemarketer “to recover for actual monetary loss from such a violation, or to receive \$500 in damages for each such violation, whichever is greater.”<sup>3</sup> If the telemarketer “willfully or knowingly violated” the TCPA, the court may increase the damage award to as much as \$1,500 per violation.<sup>4</sup> Moreover, a firm can be vicariously liable for the violating communications of a third party to whom the firm has

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1. Pub. L. No. 102-243, 105 Stat. 2393 (codified at 47 U.S.C. § 227 (2012)).  
2. 47 U.S.C. § 227.  
3. *Id.* § 227(b)(3)(B).  
4. *Id.* § 227(b)(3).

contracted out its telemarketing activities.<sup>5</sup> When the recipient of a violating communication files a class action and thereby adds claim aggregation to the TCPA's concatenation of statutory damages and vicarious liability, the telemarketer's potential liability can be staggering. For example, in *Smith v. State Farm Mutual Automobile Insurance Co.*,<sup>6</sup> filed in 2014, the plaintiff class seeks statutory damages for 46 million calls allegedly made on State Farm's behalf, or \$23 billion.<sup>7</sup> Treble damages of \$69 billion would nearly equal State Farm's net worth.<sup>8</sup>

Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has said that the TCPA "imposes potentially very heavy penalties on its violators—many of whom . . . have never heard of this obscure statute."<sup>9</sup> In *Creative Montessori Learning Centers v. Ashford Gear LLC*, he explained:

[C]lass certification . . . turn[ed] a dispute of at most \$3,000 (the maximum statutory penalty for the two unsolicited fax advertisements allegedly . . . received by the plaintiff) into an \$11.11 million suit (assuming no trebling)—an almost four-thousand-fold increase—against a home-furnishings wholesaler in California that has three employees and annual sales of half a million dollars.<sup>10</sup>

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5. See, e.g., *Dish Network, LLC*, 28 FCC Rcd. 6574, 6587 (2013) ("While section 227(b) does not contain a provision that specifically mandates or prohibits vicarious liability, we clarify that the prohibitions contained in section 227(b) incorporate the federal common law of agency and that such vicarious liability principles reasonably advance the goals of the TCPA."), quoted in *Seri v. Crosscountry Mort., Inc.*, No. 1:16-cv-01214-DAP, 2016 WL 5405257, at \*3 (N.D. Ohio Sept. 28, 2016); *Chapman v. Wagener Equities, Inc.*, No. 09-C-07299, 2014 WL 540250, at \*16–17 (N.D. Ill. Feb. 11, 2014) (denying a motion to dismiss when the defendant sent advertisements to recipients bought from a database who had not given consent); *Holtzman v. Turza*, No. 08-C-2014, 2010 WL 4177150, at \*4–5 (N.D. Ill. Oct. 19, 2010) (granting summary judgment and finding the defendant liable for sending facsimiles without a clear "opt-out notice"), *aff'd*, 728 F.3d 682 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1318 (2014).

6. 30 F. Supp. 3d 765 (N.D. Ill. 2014).

7. See *State Farm's Reply in Support of Its Motion to Strike Class Allegations and to Dismiss the Individual Claims of Plaintiffs Friedman and Clark* at 11, *Smith*, 30 F. Supp. 3d 765 (No. 1:13-cv-2018). For another example of multi-million dollar damage exposure, see *Rose v. Bank of Am. Corp.*, No. 5:11-CV-02390-EJD, 2014 WL 4273358, at \*5 (N.D. Cal. Aug. 29, 2014) (approving \$32 million settlement of a TCPA class action).

8. See *State Farm Insurance Cos.*, FORTUNE 500, <http://fortune.com/fortune500/state-farm-insurance-cos-41/> (last visited Nov. 30, 2016) (reporting State Farm's total stockholder equity in 2016 as \$82.7 billion).

9. *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915–16 (7th Cir. 2011).

10. *Id.* at 916.

“Anyway,” wrote Judge Posner, “the statute, with its draconian penalties for multiple [violating communications], is what it is.”<sup>11</sup> It forbids any person from

mak[ing] any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, [or] . . . initiat[ing] any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party . . . .<sup>12</sup>

The TCPA applies to text messages<sup>13</sup> and also prohibits the use of “any [fax] machine, computer, or other device to send, to a [fax] machine, an unsolicited advertisement” unless the sender has an established business relationship with the recipient or the recipient has agreed to receive the fax.<sup>14</sup>

The TCPA’s scope of liability is vague. In 2015, following the proposal of Chairman Thomas Wheeler, the Federal Communications Commission (FCC) issued several declaratory rulings intended to clarify how it will enforce the TCPA.<sup>15</sup> For example, the FCC defines an automatic telephone dialing system (ATDS) to include any machine capable of dialing random or sequential numbers.<sup>16</sup> However, virtually any telephone or computer can function as an ATDS.<sup>17</sup> This “clarification” is so unhelpful that the Third Circuit promptly criticized it as “hardly a model of clarity.”<sup>18</sup> Dissenting

11. *Id.* at 915.

12. 47 U.S.C. § 227(b)(1)(A)–(B); *see also* *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 666–67 (2016) (citing 47 U.S.C. § 227(b)(1)(A)(iii)).

13. *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009); *see Campbell-Ewald*, 136 S. Ct. at 666–67.

14. 47 U.S.C. § 227(b)(1)(C).

15. *See, e.g.*, Declaratory Ruling and Order, *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd. 7961 (2015); *see also* Press Release, FCC, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts (June 18, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333993A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333993A1.pdf).

16. *See* Press Release, FCC, *supra* note 15; FCC Enforcement Advisory, No. 2016-06, 2016 WL 6822902, at \*1 (Nov. 18, 2016).

17. Smartphones, which nearly sixty-five percent of American adults own, are powerful miniature computers capable of automatically dialing random phone numbers. *See* PEW RESEARCH CTR., U.S. SMARTPHONE USE IN 2015, at 2 (2015), [http://www.pewinternet.org/files/2015/03/PI\\_Smartphones\\_0401151.pdf](http://www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf).

18. *Dominguez v. Yahoo, Inc.*, 629 F. App’x 369, 372 (3d Cir. 2015).

FCC commissioners worry that the FCC's declaratory rulings have "further increased liability for good actors"<sup>19</sup> and will "target useful communications between legitimate businesses and their customers."<sup>20</sup>

To determine the portion of the TCPA's statutory damages that is punitive rather than compensatory, one can subtract from the statutory damages the recipient's actual harm, which I have estimated generally to be between 6.8 cents and 70.7 cents per violating communication,<sup>21</sup> although some kinds of violating communications can be far more harmful.<sup>22</sup> Consequently, the implicitly punitive component of the TCPA's statutory damages is generally between 706 and 22,058 times greater than its implicitly compensatory component. Depending on the specific circumstances of the violating communication, the TCPA's penalties can exceed by orders of magnitude the recipient's actual harm, such that the TCPA's statutory damages, as applied, violate the Due Process Clause of the Fifth Amendment.<sup>23</sup>

## I. COMPENSATORY AND PUNITIVE COMPONENTS OF STATUTORY DAMAGES

A statutory penalty violates due process when it "is so severe and oppressive as to be wholly disproportioned to the offense and obviously

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19. Declaratory Ruling and Order, *supra* note 15, at 8084 (statement of Comm'r Michael O'Reilly).

20. Declaratory Ruling and Order, *supra* note 15, at 8072 (statement of Comm'r Ajit Pai). The FCC's omnibus ruling is currently on appeal, with the court hearing oral arguments in October 2016. Order at 1, *ACA Int'l v. FCC*, No. 15-1211 (D.C. Cir. July 25, 2016) (scheduling oral arguments for October 19, 2016).

21. *See infra* Part II.

22. Courts disagree over whether the TCPA's statutory damages have a punitive component or whether they are entirely compensatory. *Compare Penzer v. Transp. Ins. Co.*, 545 F.3d 1303, 1311 (11th Cir. 2008) (inferring that "the statutory damages were not designed to be punitive damages"), with *Kaplan v. Democrat & Chron.*, 698 N.Y.S.2d 799, 800-01 (N.Y. App. Div. 1999) (holding that TCPA damages are punitive).

23. U.S. CONST. amend. V. The economic analysis presented here is also potentially relevant to whether, under Federal Rules of Civil Procedure 54 and 68, a court should enter judgment upon the same terms proposed in an unaccepted settlement offer, if the damages proposed exceed the maximum amount that the plaintiff could recover in statutory damages if she prevailed at trial. *See* FED. R. CIV. P. 54, 68; *Leyse v. Lifetime Entm't Servs., LLC*, 171 F. Supp. 3d 153, 154-56 (S.D.N.Y. 2016). The TCPA permits the recipient of a violating communication to recover the higher of either actual harm or statutory damages, which amount the court then may treble. *See* 47 U.S.C. § 227(b)(3). The argument in favor of compelling settlement rests on the implicit assumption that a \$1,503 settlement offer per violating communication (that is, 3 x [\$500 + \$1]) unambiguously exceeds the actual harm that the violating communication caused the recipient. The defendant might assert, rather than proffer evidence, that the plaintiff's statutory damages unambiguously exceed her actual harm (particularly if the statutory damages are trebled), but economic analysis can significantly clarify the extent to which that assumption is plausible in particular factual settings.

unreasonable.”<sup>24</sup> The Supreme Court has said that excessive punitive damages can “enter the zone of arbitrariness” that violates due process<sup>25</sup> and that “[s]ingle-digit multipliers” for punitive damages “are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in the range of five hundred to one.”<sup>26</sup> Thus, for the punitive component of the TCPA’s statutory damages to comply with the Court’s reasoning in *State Farm*, the actual harm from a single TCPA violation must be at least \$50—which, as this Essay’s economic analysis reveals, is unlikely.<sup>27</sup> Given the large, implicitly punitive component of the TCPA’s statutory damages, it is understandable that two district courts have not dismissed out of hand the possibility that statutory damages in a TCPA class action might violate due process as applied.<sup>28</sup>

The TCPA “take[s] into account the difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements [and] effectively deter[s] the unscrupulous practice of shifting these costs to unwitting recipients of ‘junk faxes.’”<sup>29</sup> Until 1991, telemarketers used autodialers that could each place 1,500 calls per day and dial every active phone number in a given area code at random.<sup>30</sup> Junk faxes imposed on the recipient the costs of paper, ink, and incremental wear-and-tear of her fax machine, as well as the nuisance of having her fax machine unavailable to use while junk faxes were arriving. Furthermore, the TCPA also accounts for wasted time that a violation causes. Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit has said that “[e]ven a recipient who gets [a] fax on a computer and deletes it without printing suffers *some* loss: the value of the time necessary to realize that the inbox has been cluttered by junk.”<sup>31</sup>

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24. *St. Louis, Iron Mountain & S. Ry. v. Williams*, 251 U.S. 63, 67 (1919).

25. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996).

26. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 425 (2003).

27. *See infra* Table 1.

28. *See Pasco v. Protus IP Sols., Inc.*, 826 F. Supp. 2d 825, 835 (D. Md. 2011); *Green v. Clark Int’l Ins. Brokers*, No. 09-c-1541, 2009 WL 2515594, at \*4–5 (N.D. Ill. Aug. 17, 2009). In contrast, district courts have consistently rejected arguments that the TCPA is facially unconstitutional. *See, e.g., Green*, 2009 WL 2515594, at \*5 (Fifth Amendment); *Centerline Equip. Corp. v. Banner Pers. Serv.*, 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008) (Fifth and Eighth Amendments); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Comm’ns*, 329 F. Supp. 2d 789, 808–09 (M.D. La. 2004) (Fifth and Fourteenth Amendments); *Texas v. Am. Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1091 (W.D. Tex. 2000) (First and Fifth Amendments).

29. *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1166 (S.D. Ind. 1997).

30. *See* Edmund L. Andrews, *Curbing the Telephone Robots*, N.Y. TIMES (Oct. 30, 1991), <http://www.nytimes.com/1991/10/30/business/curbing-the-telephone-robots.html?pagewanted=all>.

31. *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682, 684 (7th Cir. 2013).

The “difficult to quantify” costs of receiving and printing a violating communication have fallen since Congress enacted the TCPA in 1991. File attachments to email have largely replaced faxes. Similarly, mobile phone service is far cheaper today than in 1991. Postpaid service plans, used by more than 77 million U.S. consumers,<sup>32</sup> typically offer unlimited minutes and text messages,<sup>33</sup> such that many consumers face a zero marginal transmission cost of receiving a violating cell phone call or text message. Consequently, the punitive portion of the TCPA’s statutory damages has increased since 1991, all other factors remaining the same.

Whether the TCPA today violates due process as applied depends on the specific circumstances surrounding the violating communication. One consequence of the ubiquity of mobile phones is that the interruption and distraction of a violating communication now can follow the recipient, including when the person is driving a car. Thus, a violating communication might cause or aggravate driver distraction and thus increase the likelihood of an accident, whose actual harm could easily equal or even exceed the amount of the TCPA’s statutory damages.<sup>34</sup> The pervasiveness and easy portability of mobile phones make it difficult to predict the setting in which a person will receive a violating communication, such that a TCPA violation could cause harm in ways that Congress never expected in 1991.

## II. CALCULATING A VIOLATING COMMUNICATION’S ACTUAL HARM

I have calculated the average harm that a violating communication imposes on its recipient.<sup>35</sup> This Part analyzes the actual harm from a violation for each communication channel through which such a violation can occur—a mobile phone call, a landline phone call, a text message, and a fax. The actual harm from a violating communication equals the sum of (1) the cost of the transmission of the advertisement—for example, the cost (if any) that the recipient incrementally pays to her

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32. See Thomas Gryta, *AT&T Tops Expectations, Adds Customers as It Folds in DirecTV*, WALL ST. J. (Apr. 26, 2016, 8:18 PM), <http://www.wsj.com/articles/at-t-tops-expectations-adds-customers-as-it-folds-in-directv-1461703979>.

33. See, e.g., *Verizon Cell Phone Plans*, VERIZON WIRELESS, <http://www.verizonwireless.com/landingpages/verizon-plan/> (last visited Nov. 30, 2016); *Cell Phone Plans*, T-MOBILE, <http://www.t-mobile.com/cell-phone-plans.html> (last visited Nov. 30, 2016).

34. Of course, whether a communication violating the TCPA is the proximate cause of such an accident would be a separate question of tort law, since even a cellphone call or text message that the driver wished to receive while driving could distract her and thus increase the likelihood of an accident.

35. For a similar, though less detailed, estimation, see Hal Varian et al., *The Demographics of the Do-Not-Call List 6* (Nov. 5, 2014) (unpublished manuscript), <http://eml.berkeley.edu/~woroch/demographics.pdf> (estimating that the national do-not-call registry provides somewhere between \$60 million and \$3.6 billion of value to consumers annually).

mobile network operator to receive a text message—and (2) the opportunity cost of the time that the recipient spends receiving and terminating the violating communication.<sup>36</sup> A person's opportunity cost is the value of her time—it is “the anticipated value of ‘that which might be’” if she were to spend her time differently.<sup>37</sup>

Using data from the International Telecommunication Union (ITU), I calculated the respective transmission costs in the United States of receiving a violating communication as a mobile phone call, a landline phone call, and a text message. The mobile phone call data and text message data are for prepaid mobile service plans. Of course, many U.S. consumers use postpaid service plans that offer unlimited mobile phone calls and text messages.<sup>38</sup> For those consumers, the marginal transmission cost of receiving a violating communication is zero,<sup>39</sup> such that this method exaggerates the cost of receiving a violating mobile-phone call or text message. Data available from newspapers are used to estimate an upper bound on the recipient's cost of receiving a fax communication, such that the actual cost of receiving a violating fax advertisement is likely overestimated.

Next, the average U.S. hourly wage is used to estimate the opportunity cost of a recipient's time spent receiving a violating communication. Economists commonly use the wage rate as a proxy for the opportunity cost of a person's time when calculating the value of delay, nuisance, or wasted time—for example, when analyzing the optimal level of traffic congestion for purposes of assessing the net societal benefit from a proposed freeway or subway.<sup>40</sup> A consumer's wage rate is the opportunity cost of her time because the time that she spends answering a telemarketing call she could instead spend working and earning a wage. For example, if a consumer's hourly wage is \$15, then one can estimate

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36. For simplicity, the calculation of harm assumes that a violating communication has zero offsetting benefit. Whether or not a violating call results in any benefit for the called party, and what the magnitude of that benefit is, are both factual questions that will vary from person to person. Any benefit that the called party derives from a violating call would reduce the total harm to the called party and therefore produce a greater punitive damages multiplier.

37. James M. Buchanan, *Opportunity Cost*, in 3 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 7296 (John Eatwell et al. eds., 1st ed. 1987).

38. See The Charge Team, *Questions to Carriers: What Are Prepaid, Postpaid and No Contract Plans?*, CHARGE (Oct. 1, 2015), <https://charge.co/blog/questions-to-carriers-what-are-prepaid-postpaid-and-no-contract-plans/>.

39. See *supra* note 33 and accompanying text.

40. See, e.g., PATRICK S. MCCARTHY, *TRANSPORTATION ECONOMICS* 453 (2001) (assuming, on the basis of the wage rate and for purposes of calculating the cost of traffic delay, that travelers value their time at \$4.50 per hour); MICHAEL L. KATZ & HARVEY S. ROSEN, *MICROECONOMICS* 200–01 (McGraw-Hill 3d ed. 1998) (1991); Austan Goolsbee & Peter J. Klenow, *Valuing Consumer Products by the Time Spent Using Them: An Application to the Internet*, 96 *AM. ECON. REV.* 108, 108–10 (2006) (using the wage rate to estimate the value of a consumer's time).

that the consumer values her time at \$15 per hour, because, in theory, a person works until the value of an hour worked is equal to the value gained from not working (that is, value from instead consuming leisure). To estimate the recipient's opportunity cost of receiving a violating communication, I analyzed the income that an average American would have earned in the amount of time during which she took (and terminated) the violating call. As a factual matter, the actual harm that a TCPA violation imposes on its recipient will vary from case to case and from person to person.

In December 2014, the average U.S. hourly wage was \$24.62.<sup>41</sup> For simplicity, it is assumed that the average violating call to a mobile phone or landline takes ten seconds, that it takes ten seconds to read and delete an unwanted marketing text message, and that it takes ten seconds to identify, ignore, and discard an unwanted fax advertisement. Thus, the opportunity cost of receiving a violating mobile phone call, a violating landline call, a violating text message, and a violating fax is 6.8 cents.<sup>42</sup> In certain cases, the TCPA also imposes liability for callers even if the call's intended recipient does not answer the phone.<sup>43</sup> For simplicity, it is assumed that the harm that such a call imposes—in other words, the opportunity cost of the time it takes to notice a missed call, or to listen to a voicemail—is equal to the harm imposed by a call answered by its intended recipient. However, whether that assumption holds true is a fact-based inquiry that might vary from case to case and from person to person. Table 1 below summarizes these calculations to determine the total actual harm that different kinds of TCPA violations impose on their recipients.

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41. Economic News Release, Bureau of Labor Statistics, Table B-3. Average Hourly and Weekly Earnings of All Employees on Private Nonfarm Payrolls by Industry Sector, Seasonally Adjusted (Mar. 4, 2016), <http://www.bls.gov/news.release/empst19.htm>. For ease of exposition, an average wage rate is used in the calculation of harm. However, determining the actual wage rate of the called party is a fact-based inquiry that will vary from case to case and from person to person and which will affect that individual's opportunity cost.

42. Because there are 360 ten-second intervals per hour,  $\$24.62/360 = \$0.068$ . That calculation assumes, for simplicity, that the opportunity cost of an individual's time is constant throughout the year.

43. See Declaratory Ruling and Order, *supra* note 15, ¶¶ 76–78.



**Table 1.** Total Actual Harm from Different Kinds of TCPA Violations<sup>44</sup>

	<b>Transmission Cost</b> [1]	<b>Opportunity Cost</b> [2]	<b>Total Harm from Violating Communication</b> [1] + [2]	<b>Implied Damage Multiple (Range)</b>
Mobile call	\$0.045	\$0.068	\$0.113	4,423–13,273
Landline call	\$0.00	\$0.068	\$0.068	7,352–22,058
Text message	\$0.22	\$0.068	\$0.288	1,735–5,207
Fax	\$0.639	\$0.068	\$0.707	706–2,120

The actual harm that a violating communication imposes on its recipient varies significantly depending on the method of communication. Thus, when analyzing whether the TCPA violates due process as applied, it is essential to consider all the facts of the violating communications, so as to measure accurately the actual harm that those communications cause.

In sum, a violating communication causes actual harm of between 6.8 cents and 70.7 cents per violating communication, depending on the communication channel used. The remainder of the TCPA's statutory damages is purely punitive. Thus, the punitive component of the TCPA's statutory damages is between 706 and 22,058 times the actual harm that a violating communication imposes on the recipient.<sup>45</sup>

44. ITU WORLD TELECOMMUNICATION/ICT INDICATORS DATABASE (2015) (providing the cost of a one-minute local call on a mobile cellular prepaid plan); Robert E. Calem, *Technology; Beyond the Solitary Fax Machine: An Electronic Mailbox*, N.Y. TIMES (Oct. 4, 1992), <http://www.nytimes.com/1992/10/04/business/technology-beyond-the-solitary-fax-machine-an-electronic-mailbox.html> (estimating that it costs, at most, ten cents per page to receive a fax); see also *Producer Price Indexes*, BUREAU LABOR STATISTICS, <http://www.bls.gov/ppi/#tables> (last visited Nov. 30, 2016). It is assumed that the average fax advertisement is four pages long, which is likely an exaggeration. The Producer Price Index (PPI) is used to adjust the estimated cost of ten cents per fax page from October 1992 USD to December 2014 USD. According to the ITU dataset, the price of a one-minute, off-net, peak prepaid mobile-phone call in the United States was \$0.27 in 2014. To calculate the transmission cost of a ten-second mobile-phone call, one must divide \$0.27 by six (because there are six ten-second increments in a minute). That is,  $\$0.27 / 6 = \$0.045$ . The transmission cost for a landline phone call is treated as zero, because providers of landline phone service in the United States do not charge subscribers for incoming calls. To determine the damages range, the total harm from the violating communication is subtracted from the least (\$500) and greatest (\$1500) statutory damages amounts. Those differences are then divided by the total actual harm from the violating communication to determine the least and greatest damages multiple for that violation.

45. Settlement agreements over TCPA class actions have resulted in payouts as great as 182 times the actual harm from a violating communication. See, e.g., Plaintiff's Motion for Preliminary Approval of Class Action Settlement at 6, *Douglas v. W. Union Co.*, No. 14-cv-1741, 2015 WL 9302316 (N.D. Ill. Oct. 28, 2015), ECF No. 52. Under the settlement, Western Union agreed to pay

## CONCLUSION

The punitive component of the TCPA's statutory damages is between 706 and 22,058 times the total actual damages that a violating communication imposes. That multiplier can vary significantly according to the specific circumstances of the violating communication. Given the Supreme Court's jurisprudence on punitive damages, lower courts must take seriously the possibility that the TCPA's statutory damages violate the Due Process Clause of the Fifth Amendment as applied.

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\$8.5 million to an 823,472-member class of consumers that received unsolicited text messages from Western Union, resulting in damages of \$10.32 per class member. *See id.*; Steven Trader, *Western Union to Pay \$8.5M to End TCPA Class Action*, LAW360 (Oct. 29, 2015, 10:11 PM), <http://www.law360.com/articles/720929/western-union-to-pay-8-5m-to-end-tcpa-class-action>.