

No. 21-35201

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**LORI WAKEFIELD, individually and on behalf of all
other similarly situated,**

Plaintiff—Appellee.

v.

VISALUS, INC.,

Defendant—Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF OREGON, PORTLAND DIVISION,
HON. MICHAEL H. SIMON, DISTRICT JUDGE, CASE NO. 3:15-CV-1857-SI

APPELLANT'S OPENING BRIEF

DYKEMA GOSSETT LLP

BECKY S. JAMES

LISA M. BURNETT

333 SOUTH GRAND AVENUE, SUITE 2100

LOS ANGELES, CALIFORNIA 90071

(213) 457-1800

DYKEMA GOSSETT PLLC

RYAN J. VANOVER

400 RENAISSANCE CENTER

DETROIT, MICHIGAN 48243

bjames@dykema.com, lmburnett@dykema.com, rvanover@dykema.com

ATTORNEYS FOR APPELLANT

VISALUS, INC.

CORPORATE DISCLOSURE STATEMENT

Under Federal Rule of Appellate Procedure 26.1, Defendant-Appellant Visalus, Inc. is a private corporation. Blyth, Inc., a privately held corporation, owns 10% or more of Visalus, Inc.'s stock.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	11
JURISDICTIONAL STATEMENT	15
ISSUES PRESENTED	15
STATEMENT OF THE CASE	16
I. Factual Background.....	16
II. Procedural history.....	18
A. In June of 2018, Plaintiff First Asserted Her Opposition to ViSalus Raising a Consent Defense at Trial.....	20
B. On January 16, 2019, Plaintiff Moved To Preclude ViSalus from Presenting Any Evidence or Argument to the Jury That It Had Consent To Call the Class Members, or That It Had Petitioned the FCC for a Waiver.	21
C. A Three Day Trial Was Held in April of 2019; the Question of Consent Was Not Before the Jury Who Returned a Verdict in Favor of Plaintiff.....	23
D. After Trial, the FCC Issued an Order Granting ViSalus’s Petition for a Retroactive Waiver of the TCPA’s “Prior Express Written Consent” Requirement; the District Court Refused To Consider the Waiver in Its Decision To Deny ViSalus’s Motions To Decertify the Class, for Judgment as a Matter of Law, and for a New Trial.....	24
E. The District Court Denied ViSalus’s Motion To Decertify the Class, Declined To Consider the FCC Waiver as a Standing Issue, and Ruled ViSalus Waived Any Consent Defense.	25
F. ViSalus Again Argued That the FCC Waiver Should Be Credited, Not Ignored, in Its Renewed Motion for Judgment as a Matter of Law and for a New Trial, and Its Reply in Support.....	26

G.	The District Court Denied ViSalus’s Motion Challenging the Statutory Damages Award of Nearly One Billion Dollars as Unconstitutionally Excessive.	28
	SUMMARY OF THE ARGUMENT	29
	ARGUMENT	32
I.	Judgment for the Class Should Be Reversed Because Plaintiff Failed To Establish That Any Class Member Suffered a Concrete Injury in Fact Under <i>TransUnion</i>	32
A.	Standard of Review.	32
B.	In <i>Transunion</i> , the Supreme Court Held That Plaintiffs Bear the Burden To Establish, Through Evidence Adduced at Trial, That Each Class Member Suffered a Concrete Injury in Fact.....	32
C.	Wakefield Failed To Carry her Burden To Prove All Class Members Suffered a Concrete Injury in Fact.....	38
1.	The district court erred as a matter of law when it held that Wakefield need not establish an injury in fact beyond alleging a violation of the TCPA.....	39
2.	Neither plaintiff nor any member of the class has standing because ViSalus obtained written consent from the class members.....	41
3.	A party is not remotely harmed by receiving a call it consented to.	45
II.	The District Court Erred When It Refused to Consider the FCC’s Retroactive Waiver of its Heightened Regulatory Requirements in Determining Whether To Dismiss for Lack of Standing, Decertify the Class, or Grant Judgment as a Matter of Law or a New Trial	48
A.	Standard of Review.	49
B.	The District Court Erred as a Matter of Law When It Concluded that ViSalus Had Waived the FCC Waiver.....	51

C.	The District Court Erred as a Matter of Law When It Failed To Apply the FCC Waiver To Decertify the Class and Dismiss Plaintiff’s Claims.....	58
1.	The district court erred as a matter of law by failing to recognize that the named Plaintiff lacks standing, requiring decertification and dismissal of her individual claims.	59
2.	The district court also abused its discretion when it failed to decertify the class because, following the FCC waiver, individual issues of consent predominated over class questions.....	62
D.	The District Court Also Erred in Denying ViSalus’s Motion for Judgment as a Matter of Law or for New Trial.	69
III.	At a Minimum, Remand Is Required To Substantially Reduce the Unconstitutionally Excessive Damages.	71
A.	Standard of Review.	71
B.	The Damages Award in This Case Violates the Due Process Clause Because It Is So Severe and Oppressive as To Be Wholly Disproportioned to the Offense and Obviously Unreasonable.	72
	CONCLUSION.....	76
	STATEMENT OF RELATED CASES	77
	CERTIFICATE OF COMPLIANCE.....	78

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Am. Unites for Kids v. Rousseau</i> , 985 F.3d 1075 (9th Cir. 2021)	33
<i>Ballaris v. Wacker Siltronic Corp.</i> , 370 F.3d 901 (9th Cir. 2004).....	33, 40
<i>Brodsky v. Humanadental Ins. Co.</i> , 269 F. Supp. 3d 841 (N.D. Ill. 2017)	63, 64, 65
<i>Carroll v. Nakatani</i> , 342 F.3d 934 (9th Cir. 2003).....	32, 49
<i>Casillas v. Madison Ave. Assocs.</i> , 926 F.3d 329 (7th Cir. 2019) (Barrett, J.)	38
<i>In re CGB Denies Wakefield’s Petition for Reconsideration of TCPA Order</i> , 35 FCC Rcd 10039 (F.C.C. August 28, 2020)	19, 57
<i>City of L.A. v. Cty. of Kern</i> , 581 F.3d 841 (9th Cir. 2009).....	60
<i>Commerce & Indus. Ins. Co. v. Unlimited Constr. Servs.</i> , 353 F. Supp. 3d 904 (D. Haw. 2018).....	47
<i>Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Retroactive Waiver Filed by ViSalus, Inc. Under the Telephone Consumer Protection Act</i> , CG Docket No. 02-278, Public Notice, 33 FCC Rcd 6027 (CGB 2018).....	19, 57
<i>Curtis Pub. Co. v. Butts</i> , 388 U.S. 130 (1967).....	54

Estate of Diaz v. City of Anaheim,
840 F.3d 592 (9th Cir. 2016)..... 50

Dixon v. Wallowa Cty.,
336 F.3d 1013 (9th Cir. 2003)..... 33

East Tex. Motor Freight System, Inc. v. Rodriguez,
431 U.S. 395 (1977)..... 69

Flores v. City of Westminster,
873 F.3d 739 (9th Cir. 2017)..... 50

GenCorp, Inc., v. Olin Corp.,
477 F.3d 368 (6th Cir. 2007)..... 53

Gene & Gene LLC v. BioPay LLC,
541 F.3d 318 (5th Cir. 2018)..... 67

Gene and Gene,
541 F.3d at 327–29 68

Harbeson v. Parke Davis, Inc.,
746 F.2d 517 (9th Cir. 1984)..... 49

Hart v. Massanari,
266 F.3d 1155 (9th Cir. 2001)..... 52

Hawknet, Ltd. v. Overseas Shipping Agencies,
590 F.3d 87 (2d Cir. 2009) 53, 54

Holzager v. Valley Hosp.,
646 F.2d 792 (2d Cir. 1981) 53

Huerta-Guevara v. Ashcroft,
321 F.3d 883 (9th Cir. 2003)..... 51

Jamison v. First Credit Services, Inc.,
290 F.R.D. 92 (N.D. Ill. 2013) 68

Legg v. PTZ Ins. Agency, Ltd.,
321 F.R.D. 572 (N.D. Ill. 2017)..... 45, 63

In re Lidoderm Antitrust Litig.,
 No. 14-md-02521-WHO, 2017 U.S. Dist. LEXIS 24097
 (N.D. Cal. Feb. 21, 2017) 69

Lightfoot v. District of Columbia,
 246 F.R.D. 326 (D.D.C. 2007) 62

Loyhayem v. Fraser Fin. & Ins. Servs.,
 No. 20-56014, 2021 U.S. App. LEXIS 23660
 (9th Cir. Aug. 10, 2021) 52

Marlo v. United Parcel Serv., Inc.,
 639 F.3d 942 (9th Cir. 2011)..... 62, 68

Maryland v. Universal Elections, Inc.,
 862 F. Supp. 2d 457 (D. Md. 2012) 73

Min Sook Shin v. Umeken USA, Inc.,
 773 F. App'x 373 (9th Cir. 2019)..... 61

Muransky v. Godiva Chocolatier, Inc.,
 979 F.3d 917 (11th Cir. 2020) 38

O'Shea v. Littleton,
 414 U.S. 488 (1974)..... 61

Opperman v. Path, Inc.,
 205 F. Supp. 3d 1064 (N.D. Cal. 2016) 47

Perez-Farias v. Glob. Horizons, Inc.,
 499 F. App'x 735 (9th Cir. 2012)..... 72

*In re Rules & Regulations Implementing the Tel. Consumer Protection
 Act of 1991*, 7 FCC Rcd. 8752 (1992) 70

*Rules and Regulations Implementing the Telephone Consumer
 Protection Act of 1991*, 27 FCC Rcd. 1830 (2012)..... 41

Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.,
 863 F.3d 460 (6th Cir. 2017)..... 63, 64, 66, 68

Simmons v. Navajo Cnty.,
609 F.3d 1011 (9th Cir. 2010)..... 54, 55

Simon v. Healthways, Inc.,
No. CV 14-08022-BRO, 2015 U.S. Dist. LEXIS 176179
(C.D. Cal. Dec. 17, 2015)..... 63, 64, 65

Sinochem Int’l Co. v. Malay. Int’l Shipping Corp.,
549 U.S. 422 (2007)..... 59

Smith v. Microsoft Corp.,
297 F.R.D. 464 (S.D. Cal. 2014)..... 64, 67

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016)..... 36

St. Louis, I.M. & S. Ry. Co. v. Williams,
251 U.S. 63 (1919)..... 71, 73, 74, 75

Stormans, Inc. v. Selecky,
586 F.3d 1109 (9th Cir. 2009)..... 32, 49

Texas v. Am. Blastfax, Inc.,
164 F. Supp. 2d 892 (W.D. Tex. 2001)..... 73

Thole v. U.S. Bank N.A.,
140 S. Ct. 1615 (2020)..... 36

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021)..... *passim*

True Health Chiropractic, Inc. v. McKesson Corp.,
896 F.3d 923 (9th Cir. 2018)..... 49, 50

United States v. Dish Network L.L.C.,
954 F.3d 970 (7th Cir. 2020)..... 73

United States v. Dish Network LLC,
256 F. Supp. 3d 810 (C.D. Ill. 2017) 73

United Steel Workers v. ConocoPhillips Co.,
593 F.3d 802 (9th Cir. 2010)..... 62

Wal-Mart Stores, Inc. v. Dukes,
564 U.S. 338 (2011)..... 62

Wolin v. Jaguar Land Rover N. Am., LLC,
617 F.3d 1168 (9th Cir. 2010)..... 50, 63

Federal Statutes

28 U.S.C. § 1291 15

28 U.S.C. § 1331 15

28 U.S.C. § 1367 15

47 U.S.C. §227, *et seq.* 15

Fair Credit Reporting Act, 15 U. S. C. §1681 *et seq.*..... 33

Telephone Consumer Protection Act 15

Rules

Fed. R. Civ. P. 23(b)(3) 68

Fed. R. Civ. P. 23(b)(3)(D) 68

Fed. R. Civ. P. 50(b)..... 15

Rule 8(c) of the Federal Rules of Civil Procedure..... 49

Rule 23..... 62

Rule 23(a)(2) 63

Rule 23(b)..... 62

Rule 26(f) 20, 56

Rule 59(a)..... 50

INTRODUCTION

This is not the typical TCPA case where the defendant company cold-calls individuals from a purchased list of telephone numbers or a computer-generated list of random sequential numbers, disturbing the peace and privacy of the unlucky call recipients. To the contrary, the only “harm” suffered by the plaintiffs in this case was receiving a phone call from a company of which they had become a promoter or purchasing customer, voluntarily provided their number, and opted in to receive marketing communications. For that, Defendant-Appellant ViSalus, Inc. (“ViSalus”) has been smacked with the largest damages award in TCPA history, totaling close to \$1 billion. Fundamentally, Plaintiff’s lawsuit is a cash-grab designed to wrest hundreds of millions of dollars in statutory damages from ViSalus when none of the class members were actually harmed by the conduct she charged.

As the Supreme Court recently held in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), plaintiffs who fail to establish they suffered a concrete injury in fact resulting from a bare statutory violation have no Article III standing. Such is the case here, where neither the named plaintiff nor any of the class members suffered the sort of

“traditional harm” held by the Court in *TransUnion* to be required for Article III standing. Applying this recent authority, this case should be dismissed in its entirety for lack of jurisdiction.

ViSalus is a direct-to-consumer personal health product company that uses a network of promoters to market and distribute its products. Customers and promoters join the ViSalus network by voluntarily filling out an enrollment application on which they can voluntarily provide their phone number and set their communication preferences. ViSalus uses this dataset—not a purchased list of phone numbers or a random number generator—to create call lists for its promotional campaigns.

Appellee Lori Wakefield, a former ViSalus promoter and the named Plaintiff in this class action, brought claims against ViSalus under the TCPA on behalf of herself and 800,000 ostensible “class members” who received promotional calls from ViSalus *after purchasing ViSalus products and opting-in to its network*. Although all of the class members voluntarily provided their phone numbers to ViSalus, and are able to control their communication preferences at any time online or by calling a customer support phone number, Wakefield alleged that calls made to these individuals violated the TCPA because ViSalus’s enrollment

application form does not contain disclosures required under the FCC’s “prior express written consent” requirements that became effective on October 16, 2013.

ViSalus was aware of the new requirements and, like many other similarly situated companies, needed clarification on how the new rules would impact calls to individuals who had given some form of consent prior to October 16, 2013 under the older, more permissive standard. While this matter was pending, ViSalus petitioned the FCC for a retroactive waiver of the new requirements as to those individuals.

Before the FCC ruled on ViSalus’s petition, a trial was held, and the jury found ViSalus had made roughly 1.8 million prerecorded marketing calls without post-2013 “prior express written consent” in violation of the TCPA. Although no actual damages were asserted on behalf of the class—because individuals who receive a phone call they elected to receive are not actually harmed—the jury determined ViSalus was liable for a staggering judgment of \$925,220,000 in statutory damages—a sum heretofore unequalled in the history of the TCPA and one that will put ViSalus, along with all of its promoters, out of business.

Following trial, the FCC granted ViSalus's petition for retroactive waiver of the TCPA's "prior express written consent" requirements for calls made prior to October 13, 2015, where some written consent was obtained prior to October 16, 2013. In light of the waiver, which applies to a substantial proportion of the allegedly violative calls in this case, including all of those made to Wakefield, the district court should have decertified the class based on the predomination of individualized issues of consent and Plaintiff's lack of standing and dismissed Plaintiff's individual claims for lack of standing, or alternatively have granted ViSalus's motion for judgment as a matter of law or for new trial. Instead, the district court declined to consider the FCC's waiver, failed to decertify the class or dismiss the individual claims, and upheld the jury's verdict, ruling ViSalus waived any consent defense by failing to raise it before trial – even though the FCC waiver did not exist before trial and Plaintiff herself repeatedly and successfully blocked ViSalus from raising the issue any earlier.

Even if the Court could get past the lack of jurisdiction and the fact that ViSalus has been found liable for doing exactly what the FCC has expressly allowed it to do, the damages award cannot be allowed to stand.

The bankrupting award of nearly \$1 billion, for conduct that caused no harm and has been retroactively validated by the FCC itself, is an unconstitutionally excessive damages award if ever there was one.

For all these reasons, as discussed below, the judgment below should be vacated and the case dismissed in its entirety, or at a minimum, remanded for further proceedings.

JURISDICTIONAL STATEMENT

But for the lack of standing addressed below, the district court would have had subject matter jurisdiction over this action under 28 U.S.C. § 1331. The case presents federal questions under the Telephone Consumer Protection Act. *See* 47 U.S.C. §227, *et seq.* Again with the exception of lack of standing, the district court had supplemental jurisdiction over the analogous state law claims under 28 U.S.C. § 1367.

This Court has jurisdiction over this appeal because it arises from a final judgment. 28 U.S.C. § 1291. On February 16, 2021, the district court denied ViSalus's motion under Fed. R. Civ. P. 50(b). (1 ER 1). On March 16, 2021, ViSalus timely filed a notice of appeal. (7 ER 1747).

ISSUES PRESENTED

1. Did Plaintiff and the class members lack Article III standing because they did not suffer a concrete injury in fact, pursuant to the

Supreme Court's recent opinion in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021)?

2. Did the district court err when it refused to honor ViSalus's retroactive waiver from the FCC of the TCPA's "prior express written consent" requirements, issued after trial, based on a misplaced "waiver of the waiver" theory? If so:
 - a. Should the district court have decertified the class and dismissed Plaintiff's individual claims based on lack of standing in light of the retroactive FCC waiver?
 - b. Should the district court have decertified the class because individual claims predominated over class claims in light of the FCC waiver?
 - c. Should the district court have granted judgment as a matter of law or a new trial based on the FCC waiver?
3. Did the district court err in refusing to reduce the unconstitutionally excessive damages award?

STATEMENT OF THE CASE

I. Factual Background

ViSalus is a direct-to-consumer marketing company that sells weight-loss products, nutritional dietary supplements, and other healthy

lifestyle products. (1 ER 31). Individuals sign up with ViSalus as either “customers” who purchase products, or “promoters” who can also earn rewards by referring ViSalus products to new customers. (*Id.*) Promoters and customers become part of the ViSalus marketing network by completing an enrollment application, which includes a space for them to voluntarily provide their phone number and indicate their communication preferences. (4 ER 912:1-14; 2 ER 130, p. 4, Par. 5). ViSalus uses an online resource that permits promoters and customers in its network to set and change their preferred method of communication at any time, and its outbound call lists are generated from this database. (5 ER 920:7-22; 922:24-923:4).

ViSalus communicates with promoters for the purpose of sharing promotions, updates, and news, along with information on how to share ViSalus products with potential customers. (4 ER 913:23-914:8). ViSalus also communicates with customers who have opted in to the ViSalus network by informing them about current sales and special promotions. (4 ER 914:4-23). ViSalus only communicates with promoters and customers who have opted in to receive communications; it never makes calls to individuals who have not already become a ViSalus customer or

promoter and opted in to the ViSalus network through an enrollment application. (4 ER 913:23-914:23).

Plaintiff Lori Wakefield signed up to be a ViSalus promoter in 2012, and purchased, promoted, and attempted to sell ViSalus products. (1 ER 31; 4 ER 852:1-17.) Wakefield voluntarily provided her phone number to ViSalus on her enrollment application. (4 ER 849:17-850:3). Although Plaintiff cancelled her account in 2013, she received several telephone calls from ViSalus in April 2015. (1 ER 31). The calls Wakefield received were part of “win back” campaign (5 ER 667:8-668:23) intended to get former and inactive promoters and customers to return or reactivate their ViSalus memberships by offering promotional pricing on ViSalus products. (5 ER 935:12-15; 953:10-18; 967:18-25).

II. Procedural history

In October 2015, Wakefield, the named Plaintiff in this class action, brought claims against ViSalus under the TCPA on behalf of herself and 800,000 ostensible “class members” whom she alleges received automated promotional calls from ViSalus without their “prior express written consent.” (7 ER 1739, Par. 50). In an order issued on June 23,

2017, the district court granted certification of the “Robocall Class” consisting of:

All individuals in the United States who received a telephone call made by or on behalf of ViSalus: (1) promoting ViSalus’s products or services; (2) where such call featured an artificial or prerecorded voice; and (3) where neither ViSalus nor its agents had any current record of prior express written consent to place such call at the time such call was made.

(1 ER 31 (quoting 7 ER 1529) (emphasis added)). The class allegations were only actionable under the October 2013 enhanced FCC regulations on consent.

On September 14, 2017, ViSalus petitioned the FCC for a retroactive waiver of the TCPA’s heightened “prior express written consent” requirements (the “Petition”) (6 ER 1378), as other businesses had done, whether or not they faced a pending lawsuit. On June 14, 2018, the FCC published public notice seeking comment on ViSalus’s Petition.¹ Plaintiff failed to take part in the FCC proceedings.²

¹ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Retroactive Waiver Filed by ViSalus, Inc. Under the Telephone Consumer Protection Act*, CG Docket No. 02-278, Public Notice, 33 FCC Rcd 6027 (CGB 2018).

² *In re CGB Denies Wakefield’s Petition for Reconsideration of TCPA Order*, 35 FCC Rcd 10039, 10042 (F.C.C. August 28, 2020).

A. In June of 2018, Plaintiff First Asserted Her Opposition to ViSalus Raising a Consent Defense at Trial.

During pre-trial proceedings, Plaintiff first asserted her opposition to ViSalus raising a consent defense, arguing ViSalus failed to raise the defense in its answer filed on February 2, 2016. (6 ER 1484). ViSalus argued that it sufficiently raised consent as a defense in its answer, in the parties' Rule 26(f) report, and that evidence on consent, which was central to the Plaintiff's charge ViSalus willfully and knowingly violated the TCPA, was sought and provided in written discovery responses and during depositions. (*Id.* at 6-9). When the Plaintiff raised this issue at a pre-trial hearing, the district court ordered ViSalus to file a motion for leave to amend its affirmative defenses. (7 ER 1762-1763). On July 13, 2018, ViSalus moved for leave to amend its affirmative defenses, arguing it had "prior express consent" from the class members at the time of the subject calls. (6 ER 1487). Plaintiff responded that permitting ViSalus leave to amend that defense would be futile because the enrollment applications ViSalus uses do not meet the disclosure requirements of the FCC's then-current "prior express written consent" rules, and Plaintiff intended to seek summary judgment if ViSalus were permitted to add it as a defense. (6 ER 1474; 1479-1480). On July 27, 2018, ViSalus withdrew

its motion, clarifying it does not claim Plaintiff's claims are barred because ViSalus obtained "prior express written consent under 47 C.F.R. § 64.1200(a)(2)-(3)" but reserved the right to present evidence at trial that it had obtained a form of written consent from the class members, which is relevant to whether it knowingly or willfully violated the TCPA, even if it did not rise to the level of an affirmative defense. (6 ER 1452-1453).

B. On January 16, 2019, Plaintiff Moved To Preclude ViSalus from Presenting Any Evidence or Argument to the Jury That It Had Consent To Call the Class Members, or That It Had Petitioned the FCC for a Waiver.

First, Plaintiff argued ViSalus should be precluded from presenting evidence or arguments to the jury regarding "prior express consent" because ViSalus failed to raise the affirmative defense in its answer and did not file an amended answer. (6 ER 1445). Plaintiff then, in a bit of sleight of hand, conflated ViSalus's statement that it would not use "prior express written consent" as an affirmative defense at trial with a broader statement that it would somehow waive the issue of consent entirely. *Id.* As discussed above, this was not and never was ViSalus's position; rather, it reserved its right to argue at trial that consent was relevant to the issue of knowing and willful violation of the TCPA. (6 ER 1452-1453).

The district court granted the motion, in part, mistakenly holding: “ViSalus has expressly stated that it will not present evidence that it had prior express consent to call Ms. Wakefield or any class members and that it will not raise prior express consent as an affirmative defense.” (6 ER 1419-1420). “Because the question of willfulness and knowledge is for the Court, not the jury, this evidence [of “prior express consent”] may not be presented to the jury but may be presented to the Court outside of the presence of the jury.” (6 ER 1420 (emphasis added)).

Second, Plaintiff acknowledged that ViSalus had applied for a retroactive waiver of the TCPA’s “prior express written consent” requirements, and that other companies obtained similar waivers, but argued ViSalus’s petition had not yet been granted: “the fact that other companies may have obtained a waiver has nothing to do with whether ViSalus—which did not obtain a waiver—is liable in this case.” (6 ER 1447). The district court agreed, in part, again holding: “this evidence may not be presented to the jury but may be presented to the Court outside of the presence of the jury. The Court, however, notes that the FCC has not yet ruled on ViSalus’ application.” (5 ER 1420 (emphasis added)).

C. A Three Day Trial Was Held in April of 2019; the Question of Consent Was Not Before the Jury Who Returned a Verdict in Favor of Plaintiff.

A three-day trial was held beginning April 10, 2019. (5 ER 1077; 4 ER 767; 3 ER 567). During pretrial proceedings, ViSalus confirmed that it would not raise the affirmative defense of “prior express written consent” at trial because the form of consent it obtained from the class did not meet the disclosure requirements under the FCC regulations, and the question of consent was not put to the jury. (6 ER 1255). On April 12, 2019, the jury returned a verdict in favor of Plaintiff, finding, in pertinent part, that Plaintiff proved by a preponderance of the evidence:

“Defendant, ViSalus, Inc., made or initiated [4] telemarketing call[s] using an artificial or prerecorded voice to a residential telephone line (residential landline) belonging or registered to Ms. Wakefield in violation of the TCPA”; and “Defendant, ViSalus, Inc., made or initiated [1,850,436] telemarketing call[s] using an artificial or prerecorded voice to either: (a) a mobile (or cellular) telephone or (b) a residential telephone line (residential landline), belonging or registered to one or more class members other than Ms. Wakefield, in violation of the TCPA”

(1 ER 16).

D. After Trial, the FCC Issued an Order Granting ViSalus’s Petition for a Retroactive Waiver of the TCPA’s “Prior Express Written Consent” Requirement; the District Court Refused To Consider the Waiver in Its Decision To Deny ViSalus’s Motions To Decertify the Class, for Judgment as a Matter of Law, and for a New Trial.

On June 13, 2019, nearly two years after it was filed, the FCC approved ViSalus’s Petition for a retroactive waiver of the “prior express written consent” rule for calls made on or before October 7, 2015, where some written form of consent was obtained prior to October 16, 2013. (2 ER 264). The next day, ViSalus filed notice with the district court raising the FCC’s decision, stating the waiver “obviously has implications for other matters and issues before the Court and issues central to the case, including class certification, new trial, and others.” (2 ER 259). ViSalus argued: “The Order further demonstrates that . . . ViSalus had consent to call Plaintiff and the members of the class which – until yesterday – were in a form that did not meet the technical requirements of the FCC’s changed regulations[.]” *Id.*

E. The District Court Denied ViSalus’s Motion To Decertify the Class, Declined To Consider the FCC Waiver as a Standing Issue, and Ruled ViSalus Waived Any Consent Defense.

ViSalus relied on the waiver to argue that the case could no longer continue as a class action for three reasons. (2 ER 219) First, named Plaintiff Wakefield fell squarely within the scope of the waiver and therefore had no claims and no standing. (2 ER 224). Second, thousands of individual inquiries as to whether each call to each class member fell under the FCC waiver would predominate over common questions. (2 ER 231). Third, a class action would not be manageable or superior because Plaintiff Wakefield had failed to provide common proof on the class claims and individualized inquiries on prior express consent under the waiver would now need to be conducted. (2 ER 240).

The district court shot down ViSalus’s attempts to have the waiver considered and appeared to have stopped making the distinction between an affirmative defense and mere relevant evidence. It held: “ViSalus has waived reliance on the affirmative defense that it obtained prior written consent from class members and [the court] will not consider the FCC’s recent order as a basis to decertify the class.” (1 ER 38). The district court reasoned: “ViSalus did not plead consent as an affirmative defense in its

answer. Further, throughout this litigation, ViSalus has disclaimed any reliance on consent as a defense to liability” (1 ER 35). The district court also stated ViSalus knew it had applied for the waiver in September 2017, and knew other petitioners had been granted waivers, but did not plead consent as an affirmative defense (in a manner consistent with the FCC waiver that it sought), the parties did not conduct discovery on the issue, consent was not an issue at trial, and ViSalus never asked the court to stay the litigation pending the FCC’s ruling on its Petition. (1 ER 36). “At this late stage, the Court declines to delve into the factual dispute surrounding whether ViSalus obtained written consent from class members.” (1 ER 37).

F. ViSalus Again Argued That the FCC Waiver Should Be Credited, Not Ignored, in Its Renewed Motion for Judgment as a Matter of Law and for a New Trial, and Its Reply in Support.

In its renewed motion for judgment as a matter of law and for a new trial (3 ER 523) and supporting reply, ViSalus again urged: “The FCC’s Waiver Order should be credited, not ignored” because “the FCC Order granted ViSalus a retroactive waiver from compliance with the technical requirements of “prior express written consent” under the TCPA, thus providing ViSalus with a defense of consent[,]” and that ViSalus could

not have waived the consent defense because it was not available “at the time of the alleged acts of waiver.” (2 ER 63; 2 ER 82-83). ViSalus argued it took two years for the FCC to issue its waiver, that ViSalus had no control over when the waiver was issued, and that it diligently alerted the Court the day after the FCC’s order was issued. (2 ER 64).

[It would not] have made sense to assume that the waiver would be granted and thereby engage in discovery and trial preparation as if it would. That would not be diligence; that would have been wasteful—and undoubtedly would have led to strenuous (and justifiable) objections by Plaintiff. Plaintiff no doubt would have argued that a consent defense was not available to ViSalus or relevant.

(Id.)

ViSalus also argued that the FCC waiver constituted an intervening change in the law which creates an exception to the waiver rule, and “the power of granting a new trial—during the small window of opportunity allowed for such relief—exists in part to account for momentous changes that could materially alter a judgment.” *Id.*

The Court denied ViSalus’s motion. (1 ER 8).

G. The District Court Denied ViSalus's Motion Challenging the Statutory Damages Award of Nearly One Billion Dollars as Unconstitutionally Excessive.

ViSalus stressed that the “astronomical” statutory damages awarded in this case, totaling \$925,220,000.00, were unconstitutionally excessive because ViSalus did not know the written consent it obtained from its customers and promoters was insufficient, it was confused, as were other businesses, regarding the FCC’s 2013 rule changes and received a waiver of those new rules as a result, no class members were actually harmed by ViSalus’s technical deficiency, and if the award is allowed to stand, ViSalus will be driven out of business. (2 ER 86, passim). The district court acknowledged that other courts around the country had reduced massive TCPA awards on a constitutional basis, but recognized that whether due process limits aggregated TCPA awards (as opposed to awards on a per violation basis) has not been addressed by this Court. (1 ER 17-22). The court noted that “ViSalus does not identify any . . . Ninth Circuit authority on how a district court should reduce damages that are found to be unconstitutionally excessive. Nor can the Court find any Ninth Circuit precedent on that issue.” (1 ER 24 (quote and citation omitted)). The district court then determined that the

legislative history and language of the TCPA “do not support a limitation on aggregated damages[,]” and denied ViSalus’s motion. (*Id.*)

On March 16, 2021, ViSalus timely filed this appeal. (7 ER 1744).

SUMMARY OF THE ARGUMENT

Plaintiff’s claims rest on the allegation that the form of consent ViSalus obtained from its members did not meet the informational requirements of the TCPA. Even if true, this merely amounts to a technical violation of the TCPA, which Plaintiff failed to establish caused any actual harm to herself or any class member, all of whom voluntarily provided their phone numbers to ViSalus when they opted in to its network. As the Supreme Court made clear last term, plaintiffs in class actions cannot establish Article III standing based on technical statutory violations in the absence of a showing of *actual harm*. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, (2021). If ever there was a case involving, at most, technical violations with no actual harm, it is this one. Thus, neither Plaintiff, nor any member of the class, has Article III standing, and this Court should vacate the judgment and order the dismissal of Plaintiff’s individual and class claims on this basis alone.

Even if the plaintiff class could get past the threshold standing question, the district court erred in several ways when it refused to consider the retroactive waiver granted to ViSalus by the FCC regarding application of the FCC's 2013 "prior express written consent" regulations. The district court erred as a matter of law when it held the waiver did not create an intervening change in the law sufficient to permit ViSalus to raise a "prior express consent" defense. The district court erred when it held ViSalus was not diligent in bringing the defense and should have raised it earlier in the litigation, especially in light of Plaintiff's own repeated and successful efforts to preclude ViSalus from raising the defense in pretrial and trial proceedings.

Reversal is required based on the district court's refusal to acknowledge the FCC waiver. First, the FCC waiver required decertification of the class and dismissal of the individual claims because no named plaintiff had standing. Wakefield indisputably had given her consent and received the calls within the period covered by the FCC waiver. In refusing to decertify and dismiss based on lack of standing, the district court erroneously applied the pleading standard rather than the trial standard.

Second, the district court abused its discretion when it failed to decertify the class following the FCC waiver because individual issues of consent then predominated over class questions, and Plaintiffs did not and cannot show that these inquiries can be satisfied through class-wide evidence. For this same reason the class action mechanism is no longer a superior method of adjudicating these claims. The class is also over-inclusive because it contains a substantial amount of members who fall under the FCC waiver, who were not harmed in any sense.

Third, the district court should have granted ViSalus's Motion for Judgment as a Matter of Law or for New Trial. The evidence was undisputed that Plaintiff and the other class members gave consent, just not the "prior express written consent" required in the October 2013 regulations. Thus, with the FCC waiver of application of those regulations, there can be no TCPA violation as a matter of law. At a minimum, the district court should have granted a new trial to allow the issue of consent to be presented to the jury in light of the FCC waiver.

Finally, the district court failed to meaningfully apply the legal standard for reducing a judgment due to unconstitutionally excessive

damages. At a minimum, this requires a remand to the district court for a substantial reduction in damages.

ARGUMENT

I. Judgment for the Class Should Be Reversed Because Plaintiff Failed To Establish That Any Class Member Suffered a Concrete Injury in Fact Under *TransUnion*.

Plaintiff's individual and class claims should be dismissed following the Supreme Court's recent decision in *TransUnion* because Plaintiff failed to meet her burden to prove any class member suffered a concrete injury in fact resulting from ViSalus's alleged violation of the TCPA.

A. Standard of Review.

Standing is an element of subject matter jurisdiction, which may be raised for the first time on appeal, and this Court reviews standing *de novo*. *Carroll v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009).

B. In *Transunion*, the Supreme Court Held That Plaintiffs Bear the Burden To Establish, Through Evidence Adduced at Trial, That Each Class Member Suffered a Concrete Injury in Fact.

Last term, the Supreme Court clarified that class action plaintiffs must show an actual injury – not a mere statutory violation – as to each member of the class in order to establish Article III standing. *TransUnion*

LLC v. Ramirez, 141 S. Ct. 2190 (2021).³ *TransUnion* involved a class action lawsuit alleging violations of the Fair Credit Reporting Act, 15 U. S. C. §1681 et seq., which requires consumer reporting agencies to follow reasonable procedures to assure maximum accuracy in consumer reports and, upon request, to provide consumers all information in their consumer file, including a disclosure of the consumer’s rights. *Id.* at 2200-01. Like the TCPA, the FCRA creates a statutory cause of action for consumers to sue and recover statutory damages for certain violations. *Id.* at 2201 (citing 15 U. S. C. §1681n(a)).

Defendant TransUnion, a credit reporting agency, created a service where it would run consumers’ names against a government list of known terrorists and criminals (the “OFAC List”). *Id.* at 2200-01. TransUnion would indicate in a consumer’s credit file when a “potential match” was found, and provide that information to customers who ordered a copy of the consumer’s credit file. *Id.*

³ Although *TransUnion* was decided after the district court rendered its decision in this case, this Court considers “intervening precedent” on appeal. *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 911 (9th Cir. 2004); see also *Dixon v. Wallowa Cty.*, 336 F.3d 1013, 1018 (9th Cir. 2003) (applying intervening Supreme Court precedent decided after district court decision); *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1081 (9th Cir. 2021) (same).

Plaintiff Sergio Ramirez (“Ramirez”) tried to obtain credit to buy a car but was refused because his credit report indicated his name was on a “terrorist list.” *Id.* After requesting a copy of his credit report, Ramirez received two separate mailings on consecutive days: the first mailing did not indicate Ramirez’s name was considered a “potential match” for a name on the OFAC list; the second mailing included that information, but did not include a summary of his rights. *Id.* at 2201-02.

Ramirez brought suit against TransUnion for failing to comply with the FCRA’s obligations (i) to follow reasonable procedures to ensure the accuracy of credit files (Count I); and (ii) to provide a consumer with his complete credit file upon request (Count II), including a summary of rights (Count III). *Id.* at 2207. Ramirez also sought to certify a class of people who received a mailing from TransUnion that was similar in form to the second mailing he received. *Id.* at 2202. The parties stipulated the class contained 8,185 members and that only 1,853 members of the class had their credit reports disseminated by TransUnion to potential creditors. *Id.* The district court ruled that all 8,185 class members had Article III standing to recover damages for all three counts. *Id.* The Ninth Circuit affirmed in relevant part, finding all class members had Article

III standing to recover damages for all three claims. *Id.* At trial the jury ruled in favor of plaintiffs, and awarded each class member statutory and punitive damages.

The Supreme Court granted certiorari to determine whether the 8,185 class members had Article III standing as to their three claims. In its opinion, the Supreme Court established that, in a class action lawsuit that proceeds to trial, even in the context of a statutory violation, plaintiffs bear the burden to establish through adequate evidence that every member of the class suffered a concrete injury in fact. *Id.* at 2190 (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). In a class action, “every class member must have Article III standing in order to recover individual damages.” *Id.* at 2208 (citing *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016)). “A plaintiff must demonstrate standing ‘with the manner and degree of evidence required at the successive stages of the litigation.’” *Id.* (quoting *Lujan*, 504 U.S. at 561.) “Therefore, in a case like [*TransUnion* (and this case)] that proceeds to trial, the specific facts set forth by the plaintiff to support standing ‘must be supported adequately by the evidence adduced at trial.’” *Id.* (quoting *Lujan*, 504 U.S. at 561).

“Article III standing requires a concrete injury even in the context of a statutory violation,” and a plaintiff does not “automatically satisf[y] the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016); *see also Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620-21 (2020) (same). Congress may “elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law,” but Congress “may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.” *TransUnion*, 141 S. Ct. at 2205 (citations omitted).

To determine whether an injury elevated by Congress is sufficiently “concrete” to confer Article III standing, a court must analyze (1) whether the alleged harm has a “close relationship” to a harm “traditionally” recognized as a basis for a lawsuit in American courts, and (2) the “instructive” view of Congress, and its ability to elevate concrete *de facto* injuries that were previously insufficient under common law to legally cognizable harms. *Id.* at 2204.

Applying these principles to the facts in *TransUnion*, the Court ruled that the 1,853 class members whose inaccurate credit reports were disseminated to third parties had standing because the plaintiff established the harm they suffered (being labeled a “potential terrorist” to a third party) had a “close relationship” with the concrete reputational harm “traditionally” associated with the longstanding common law tort of defamation. *Id.* at 2209-10.

The Court ruled the remaining 6,322 class members did not have standing for that claim. Unlike the analog between the harm suffered by those class members whose information was disseminated, “there is no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury.” *Id.* at 2210 (citing *Owner-Operator Indep. Drivers Ass'n v. United States DOT*, 879 F.3d 339, 344-45 (2018)). “The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm.” *Id.* at 2010.

For plaintiff’s disclosure claims, the Court ruled that plaintiff failed to adduce evidence at trial that any class member (aside from Ramirez) suffered an injury in fact. *Id.* at 2214. The only harm the plaintiffs

established was that TransUnion’s violation of the FCRA deprived them of their right to receive information in the format required by statute. *Id.* at 2213. “But the plaintiffs have not demonstrated that the format of TransUnion’s mailings caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts. In fact, they do not demonstrate that they suffered any harm at all from the formatting violations.” *Id.* (citation omitted).⁴

C. Wakefield Failed To Carry her Burden To Prove All Class Members Suffered a Concrete Injury in Fact.

TransUnion controls the outcome of this case because Wakefield did not show and could not show that all class members suffered a concrete injury in fact meeting the above standard. Class members received phone calls to which they had consented and for which they had voluntarily provided their phone number to ViSalus. (4 ER 912:1-14). The only basis for claiming damages was technical noncompliance with newly revised

⁴ See also *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 921 (11th Cir. 2020) (“Because the plaintiff alleged only a statutory violation, and not a concrete injury, he has no standing.”); *Casillas v. Madison Ave. Assocs.*, 926 F.3d 329, 332 (7th Cir. 2019) (Barrett, J.) (“Because Madison's violation of the statute did not harm [plaintiff], there is no injury for a federal court to redress.”).

FCC regulations (which the FCC has since waived as to a large proportion of the class). (2 ER 264). Neither receiving a phone call after voluntarily consenting to receive such a phone call, nor technical noncompliance with a later-waived regulatory requirement, constitutes a “harm traditionally recognized as providing a basis for a lawsuit in American courts.” *TransUnion*, 141 S. Ct. at 2213. Standing is therefore absent and the judgment should be vacated and the case remanded with instructions for dismissal.

- 1. The district court erred as a matter of law when it held that Wakefield need not establish an injury in fact beyond alleging a violation of the TCPA.**

In its order denying ViSalus’ post-trial motion to decertify the class, the district court held:

Under the TCPA, a plaintiff need not show actual injury or actual damages to prevail. See *Van Patten*, 847 F.3d at 1043. ViSalus argues that, although class members might not have given legally adequate consent to receive its telemarketing messages, some of the class members may have nonetheless wanted to receive those calls and thus have suffered no injury. The harm that the TCPA protects against is the harm of being called without first giving prior express written consent, and as the Ninth Circuit has made clear, a plaintiff alleging a violation of the TCPA “need not allege any additional harm beyond the one Congress has identified.”

(1 ER 43-44 (emphasis added) (quoting *Van Patten*, 847 F.3d at 1043)).⁵

But *TransUnion* makes clear that the exact opposite is true: a plaintiff must establish that each member of a class suffered a concrete injury in fact resulting from the defendant's statutory violation to retain standing after trial. It is insufficient to merely establish a statutory violation "that Congress has identified" by a defendant if that violation caused no concrete harm. While the district court of course did not have the benefit of *TransUnion* at the time of its ruling, the Supreme Court's recent analysis must be applied to this purely legal question affecting the court's subject matter jurisdiction. *See, e.g., Ballaris*, 370 F.3d at 911. Under that analysis, Plaintiff must indeed show actual injury beyond the mere violation of the TCPA.

"Prior express written consent" is no more than a disclosure requirement for written consent requests under the TCPA.⁶ As was the

⁵ In denying ViSalus a new trial, the Court reiterated "[t]he harm that the TCPA protects against is the harm of being called without first giving prior express written consent, not receiving undesired calls." (1 ER 8) (quotes omitted).

⁶ The TCPA requires all requests for a consumer's written consent to receive telemarketing "robocalls" include the telephone number that the consumer authorizes may be called with telemarketing messages, and clear and conspicuous disclosures informing the consumer that: (1) the consumer authorizes the seller to deliver telemarketing calls to that

case in *Transunion*, Wakefield cannot establish standing for each class member by merely establishing ViSalus failed to conform to the TCPA's formatting requirements, which is all she did in this case. See *TransUnion*, 141 S. Ct. at 2214 (“An asserted informational injury that causes no adverse effects cannot satisfy Article III.”) (quote and citation omitted). She must establish the statutory violation caused each plaintiff harm that bears “a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts.” *TransUnion*, 141 S. Ct. at 2213. She failed to do that.

2. Neither plaintiff nor any member of the class has standing because ViSalus obtained written consent from the class members.

It is doubtful whether the mere receipt of *any* unwanted phone call could meet the standard of an injury in fact under *TransUnion*. But it is certainly clear that receiving a phone call that one has affirmatively consented to receive cannot meet that standard. Here, there was no

number using an automatic telephone dialing system or an artificial or prerecorded voice; and (2) the consumer is not required, directly or indirectly, to provide written consent as a condition of purchasing any property, goods, or services. See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1833 ¶ 7 (2012).

dispute that ViSalus obtained written consent from each class member. By no stretch could receiving a phone call after providing such written consent constitute the sort of traditional actual harm deemed sufficient to confer Article III standing in *TransUnion*.

Indeed, this Court has recognized the presence of consent and therefore the lack of any harm – even under the TCPA – in these precise circumstances. In *Van Patten v. Vertical Fitness Grp., Ltd. Liab. Co.*, this Court analyzed consent under the TCPA prior to the FCC’s heightened requirements becoming effective on October 16, 2013. 847 F.3d 1037 (9th Cir. 2017). In that case, the plaintiff (“Van Patten”) gave his telephone number to a gym in conjunction with his gym membership agreement. *Id.* at 1046. After cancelling his membership, Van Patten received two text messages that were part of a “come back” campaign to get former and inactive gym members to reactivate their gym membership. *Id.* This Court held as a matter of law that Van Patten consented to receive texts that were part of a “come back” campaign to get former and inactive gym members to return or reactivate their memberships once Van Patten had provided his phone number to the gym in the context of applying for a gym membership. *Id.*

The facts in this case are nearly identical to those in *Van Patten*. Wakefield provided her phone number to ViSalus in connection with her application to become a ViSalus promoter (4 ER 849:17-850:3) so she could buy, sell, and promote ViSalus' products (4 ER 852:1-17), and the calls she received were part of a "win back" campaign, intended to get former and inactive promoters to reactivate their ViSalus memberships by offering promotional rates on ViSalus products. (5 ER 935:12-15; 953:10-18; 967:18-25; 4 ER 667:8-668:23). As in *Van Patten*, because the questioned calls relate to the context in which Wakefield provided her phone number to ViSalus—buying, selling, and promoting ViSalus's products—ViSalus had written consent to make those calls as a matter of law. *Van Patten*, 847 F.3d at 1046.

The same is true for any class member who provided their phone number to ViSalus in an enrollment application in connection with buying, selling, or promoting ViSalus' products as a customer or promoter, and were later contacted by ViSalus in connection with a "win back" campaign, or any other campaign related to buying, selling, or promoting ViSalus products. Evidence adduced at trial showed that ViSalus promoters and customers voluntarily provide their phone

number to ViSalus as part of their enrollment application to opt in to ViSalus's network.⁷ (4 ER 912:1-14). Plaintiff did not establish that any class member was confused by the form of ViSalus' consent request, that they believed they were "required, directly or indirectly, to provide written consent as a condition of purchasing any property, goods, or services," or that they would have not provided their phone number to ViSalus if provided the disclosures required by 47 C.F.R. § 64.1200(f)(9). ViSalus uses an online resource that permits promoters and customers to set and change their preferred method of communication. (4 ER 915:7-22). ViSalus's outbound call lists are generated from this database. (5 ER 922:24-923:4).

Because ViSalus's call lists are generated from a database of phone numbers voluntarily provided by its promoters and customers on written enrollment applications, and ViSalus communicated with customers and promoters for purposes related to the context in which they gave their

⁷ Following the FCC granting its petition for retroactive waiver, ViSalus produced over 30 applications forms on which customers or promoters gave their phone numbers to ViSalus prior to October 16, 2013, and offered to produce additional samples. (2 ER 129-218). Plaintiff produced no evidence at trial that any class member provided its number to ViSalus in any way other than through its enrollment applications.

phone numbers to ViSalus (buying, selling, or promoting ViSalus' products), ViSalus had written consent for the calls it placed to the class members as a matter of law. *Van Patten*, 847 F.3d at 1046.

3. A party is not remotely harmed by receiving a call it consented to.

Simply put, a party is not remotely harmed when it receives a phone call to which it subjectively consented.⁸ This is true whether the recipient orally consented to the call, provided some form of written consent for the call, or provided written consent that met the requirements of the TCPA. Congress “may not simply enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is.” *TransUnion*, 141 S. Ct. at 2205 (citations omitted).

This Court has acknowledged the concrete harm Congress intended, and had the power, to elevate to a legally cognizable harm

⁸ See *Legg v. PTZ Ins. Agency, Ltd.*, 321 F.R.D. 572, 577 (N.D. Ill. 2017) (“The lack of a writing does not make the calls unsolicited. If the class members agreed to receive the calls, they lack a ‘genuine controversy’.... [I]f [a class member] has expressly agreed and expected to receive calls from defendant, and did receive those calls, the [class member] has not been injured in any way, even if defendants technically violated a procedural requirement of the TCPA”).

under the TCPA was the receipt of unsolicited telemarketing calls received without consent:

“Congress identified unsolicited contact as a concrete harm, and gave consumers a means to redress this harm. . . . Congress aimed to curb telemarketing calls to which consumers did not consent by prohibiting such conduct and creating a statutory scheme giving damages if that prohibition was violated. . . . [t]he telemarketing text messages at issue here, absent consent, present the precise harm and infringe the same privacy interests Congress sought to protect in enacting the TCPA. Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients.”

Van Patten, 847 F.3d at 1043 (emphasis added).⁹ The calls at issue in this case were solicited and made with the written consent of the recipients, just not in the format required by the TCPA. That caused no harm at all.

⁹ Although this Court also determined that the issue of consent was not part of the standing inquiry, the texts in *Van Patten* were sent prior to the FCC’s “prior express written consent” disclosure requirements becoming effective on October 16, 2013. *Id.* at 1045. After *TransUnion*, it is clear that, where a plaintiff provided some form of consent for the allegedly violative calls, the question of whether that plaintiff suffered a concrete injury in fact because the defendant failed to obtain written consent in the *format* required by the TCPA must be part of the standing inquiry.

Plaintiff cannot and has not identified any concrete harm “traditionally recognized as providing a basis for a lawsuit in American courts” that is an analog to receiving a phone call for which a party gave written consent, but in a form that does not meet the disclosure requirements of “prior express written consent,” as defined in 47 C.F.R. § 64.1200(f)(9). Indeed, the ancient maxim, “volenti non fit injuria,” which signifies that no wrong is done to one who consents, applies to common law torts including nuisance, intrusion upon seclusion, and invasion of privacy—the “traditional harms” this Court identified as those Congress intended to prevent by enacting the TCPA. *See Van Patten*, 847 F.3d at 1043.¹⁰ So plaintiff has failed to establish that ViSalus’s informational violation of the TCPA caused any class member a concrete injury in fact sufficient to confer Article III standing.

¹⁰ *See also* Restatement (Second) of Torts § 892A (1979) (“One who effectively consents to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or for harm resulting from it.”); *Commerce & Indus. Ins. Co. v. Unlimited Constr. Servs.*, 353 F. Supp. 3d 904, 912 (D. Haw. 2018) (“A defendant may assert the affirmative defense of consent for intentional tort claims, including private nuisance and trespass actions.”) (citing Spieser et. al., 1A American Law of Torts § 5:7 (2018)); *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1072 (N.D. Cal. 2016) (“Effective consent negates an intrusion upon seclusion claim.”).

Because Plaintiff failed to establish any class member suffered a concrete injury in fact arising out of ViSalus' informational violation of the TCPA, as the Supreme Court did in *TransUnion*, this Court should vacate the judgment and remand with instructions to dismiss Plaintiff's individual and class claims for lack of standing.

II. The District Court Erred When It Refused to Consider the FCC's Retroactive Waiver of its Heightened Regulatory Requirements in Determining Whether To Dismiss for Lack of Standing, Decertify the Class, or Grant Judgment as a Matter of Law or a New Trial

Following trial, on June 13, 2019, after the conclusion of trial and nearly two years after ViSalus filed its Petition, the FCC granted ViSalus a retroactive waiver of the TCPA's "prior express written consent" requirements. (2 ER 264). For calls covered by the waiver – i.e. calls made during 12 of the 15 months at issue¹¹ - ViSalus need only satisfy the lower, pre-October 16, 2013, standard of consent for prerecorded telemarketing calls (1) made on or before October 7, 2015; (2) to customers or promoters who provided some form of written consent (*e.g.*, voluntarily providing a phone number to ViSalus in connection with an enrollment application); (3) where consent was obtained prior to October

¹¹ (4 ER 665:22-656:3).

16, 2013.¹² *Id.* The district court erred as a matter of law when it prohibited ViSalus from raising the consent defense arising from this waiver and refused to consider the FCC waiver in deciding whether Plaintiff had standing, whether to decertify the class, and whether to grant ViSalus’s motion for judgment as a matter of law or for new trial.

A. Standard of Review.

“A question concerning the waiver of an affirmative defense involves the interpretation of Rule 8(c) of the Federal Rules of Civil Procedure and, as such, is a question of law reviewed *de novo*.” *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984) (citation omitted). As discussed above, this Court reviews standing *de novo*. *Carroll*, 342 F.3d at 940; *Stormans*, 586 F.3d at 1119. This Court also reviews “*de novo* the district court’s application of the law to the facts.” *True Health Chiropractic, Inc. v. McKesson Corp.*, 896 F.3d 923, 928 (9th Cir. 2018). This Court reviews a district court’s orders regarding class certification as well as the underlying factual determinations for abuse of discretion.” *Id.* “A district court abuses its discretion when it applies the wrong legal

¹² As established above, under this Court’s ruling in *Van Patten*, for the calls covered by the waiver, ViSalus obtained “prior express consent” under the FCC’s pre-October 16, 2013 rules. 847 F.3d at 1046.

standard[.]” *id.*, or “in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them.” *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010).¹³

This court reviews the district court’s grant or denial of a renewed motion for judgment as a matter of law *de novo*. *See Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 604 (9th Cir. 2016). The test applied is whether the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury’s verdict. *See id.* A district court’s ruling on a motion for new trial pursuant to Rule 59(a) is reviewed for an abuse of discretion. *See Flores v. City of Westminster*, 873 F.3d 739, 755-56 (9th Cir. 2017).

¹³ Because the district court failed to correctly apply the law to the facts in this case when it denied ViSalus’s post-trial motions (i.e., failed to apply the correct standard of consent required under the TCPA following the FCC’s waiver), this Court should review the district court’s decertification ruling under a *de novo* standard. However, even the higher abuse of discretion is met because the district court applied the incorrect legal standard in its analysis.

B. The District Court Erred as a Matter of Law When It Concluded that ViSalus Had Waived the FCC Waiver.

The district court held: “ViSalus has waived reliance on the affirmative defense that it obtained prior written consent from class members and [the court] will not consider the FCC’s recent order as a basis to decertify the class.” (1 ER 38). The district court stated: “Parties are excused from waiver only when there is an intervening change in the law *and* there was strong precedent before the change such that the failure to raise the issue was not unreasonable and the opposing party was not prejudiced by the failure to raise the issue sooner.” (1 ER 37 (emphasis in original) (citing *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 144 (1967)); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886 (9th Cir. 2003)). The district court did not dispute that the FCC waiver was an intervening change in the law, but erred as a matter of law when it concluded that ViSalus’s failure to raise the issue was unreasonable given prior precedent and that Plaintiff was prejudiced.

First, the district erroneously considered “the FCC’s previous orders granting waivers to at least nine similarly situated petitioners[.]” as the “strong precedent” rendering ViSalus’s failure to raise the FCC waiver issue unreasonable. The relevant precedent is not waivers

granted to other entities, but the FCC regulations, which have twice been acknowledged by this Court.¹⁴ (1 ER 38). The fundamental rules of precedence are well-settled and clearly defined in this Circuit: “A district court bound by circuit authority . . . has no choice but to follow it[.]” *Hart v. Massanari*, 266 F.3d 1155, 1175 (9th Cir. 2001). The then-current FCC regulations, and this Court’s acknowledgment thereof, is the relevant precedent for an analysis of whether an intervening change in the law created an exception to the waiver rule.

Indeed, Plaintiff herself made this very argument in her motion in limine to exclude evidence ViSalus applied to the FCC for a waiver and that other similarly situated businesses had been granted similar waivers. Plaintiff argued that “the fact that other companies may have obtained a waiver has nothing to do with whether ViSalus—which did not obtain a waiver—is liable in this case . . . [and] [b]ecause ViSalus’ Petition has not been granted, it could not possibly have any relevance to any issue in this case.” (6 ER 1446-1447 (emphasis added)). The Court

¹⁴ See *Van Patten*, 847 F.3d at 1045; *Loyhayem v. Fraser Fin. & Ins. Servs.*, No. 20-56014, 2021 U.S. App. LEXIS 23660, at *6 (9th Cir. Aug. 10, 2021) (for publication) (both acknowledging the “prior express written consent” rule).

agreed, granting Plaintiff's motion, in part, and noting "the FCC has not yet ruled on ViSalus' application." (6 ER 1420).

Even more fundamentally, ViSalus could not have waived the defense of "prior express consent" because it was not available at the time of the alleged acts of waiver. ViSalus had no viable legal basis to raise the defense at any time prior to the FCC's retroactive waiver, and diligently raised the defense with the Court the day after the waiver was issued. See *Holzager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) ("[A] party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made, especially when it does raise the objections as soon as their cognizability is made apparent."); *GenCorp, Inc., v. Olin Corp.*, 477 F.3d 368, 374 (6th Cir. 2007) ("The intervening-change-in-law exception to our normal waiver rules . . . exists to protect those who, despite due diligence, fail to prophesy a reversal of established adverse precedent."); *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (finding no waiver of affirmative defense where, prior to an intervening change in the law, raising the affirmative defense would have been directly contrary to controlling precedent.).

It took two years for the FCC to issue its waiver. ViSalus could not be reasonably expected to predict whether or when the FCC would grant its Petition. *See Curtis Pub.*, 388 U.S. at 143 (courts do not require parties to read “the handwriting on the wall.”); *Hawknet*, 590 F.3d at 92 (“[T]he doctrine of waiver demands conscientiousness, not clairvoyance, from parties.”). It would have been unreasonable for ViSalus to assume the waiver would be granted and thereby engage in discovery and trial preparation as if it would. That would not be diligent; that would be wasteful. Indeed, Plaintiff argued that the “express prior consent” defense was not available to ViSalus or relevant, in opposing an amendment to the answer. (6 ER 1474; 1479-1480).

The district court further erred in concluding that Plaintiff would have been unfairly prejudiced had ViSalus been permitted to raise the issue of “prior express consent” upon its receipt of the FCC waiver. Plaintiff had fair notice since the beginning that consent was at issue in this case. She knew perfectly well that ViSalus had applied for a waiver. (2 ER 116). “The key to determining the sufficiency of pleading an affirmative defense is whether it gives plaintiff fair notice of the defense.” *Simmons v. Navajo Cnty.*, 609 F.3d 1011, 1023 (9th Cir. 2010) (citation

omitted). The allegations in Plaintiff's first amended complaint mention the word "consent" 16 times. (7 ER 1724). ViSalus denied those allegations and raised the affirmative defenses (1) that Plaintiff's first amended complaint failed to state a claim upon which relief may be granted; (2) ViSalus had at all times complied with the TCPA and the regulations thereunder; and (3) that Plaintiff and the putative class could not meet the statutory requirements to recover damages for a willful TCPA violation. (7 ER 1719, Aff. Def. Nos. 1, 2, and 6). This was sufficient to put Plaintiff on notice that ViSalus intended to argue it had consent for the questioned calls, even if it did not meet the TCPA's "prior express written consent" requirements. *See Simmons*, 609 F.3d 1011, 1023 (9th Cir. 2010) (noting that "the proper focus of our inquiry is whether framing the defense as a denial of an allegation specifically deprived [the plaintiff] of an opportunity to rebut that defense or to alter her litigation strategy accordingly") (quote and citation omitted). Indeed, Plaintiff acknowledged she was aware that "prior express consent" is "one of only a few viable defenses to a TCPA claim[.]" (6 ER 1474).

Prior to trial (and the FCC waiver) the issue of consent was central to the question of whether ViSalus had "willingly or knowingly" violated

the TCPA, a charge which could have amounted to enhanced damages. This question was vigorously litigated by the parties. ViSalus raised consent as an issue in the parties' Rule 26(f) report; evidence on consent was sought and provided in written discovery responses; and Plaintiff elicited testimony from three separate witnesses regarding how ViSalus obtained consent to contact its customers and promoters during depositions. (6 ER 1487-1490).

Although ViSalus acknowledged the written consent it obtained from the class does not meet "prior express written consent" as defined under 47 C.F.R. § 64.1200(f)(9), and represented that it would not bring a "prior express written consent" defense at trial, ViSalus also reserved its rights to adduce evidence of consent at trial:

ViSalus does have the right to present evidence of its practice and policy of placing marketing calls only to its customers and promoters ViSalus also has the right to present evidence of its practice and procedure for obtaining telephone numbers from customer and promoters, the way that customers and promoters could change their or remove their contact information online . . . and how the telephone numbers called on the calling sheets for the subject marketing campaigns were drawn from the telephone numbers in customers' and promoters' online accounts. As the opposition discusses, there was discovery into these issues and documents produced.

(6 ER 1452-1453). This is the very evidence adduced at trial that establishes ViSalus obtained “prior express consent” under the FCC’s pre-2013 standard.

Plaintiff knew about ViSalus’ Petition for a retroactive waiver on June 14, 2018, when the FCC published public notice¹⁵ seeking comment on ViSalus’s Petition—ten months before the trial. Plaintiff admitted as much, acknowledging that she declined to participate in the FCC proceedings because she was “uncertain that she was an ‘interested person’ entitled to comment on ViSalus’s Petition.”¹⁶ The FCC found: “As a party to active litigation with ViSalus, she did have the right to participate and could have done so even if she was not certain that the waiver would have bearing on the litigation.” *Id.*

Plaintiff admits ViSalus raised the issue of its FCC Petition “many times in its pretrial submissions and pretrial hearings.” (2 ER 116). Plaintiff opposed ViSalus’s motion to add affirmative consent defenses (to

¹⁵ *Consumer and Governmental Affairs Bureau Seeks Comment on Petition for Retroactive Waiver Filed by ViSalus, Inc. Under the Telephone Consumer Protection Act*, CG Docket No. 02-278, Public Notice, 33 FCC Rcd 6027 (CGB 2018).

¹⁶ *In re CGB Denies Wakefield’s Petition for Reconsideration of TCPA Order*, 35 FCC Rcd 10039, 10042 (F.C.C. August 28, 2020).

the extent it had any prior to the FCC waiver) (6 ER 1474), and moved in limine to preclude ViSalus from introducing any evidence of “prior express consent,” that ViSalus petitioned the FCC for waiver of the “prior express written consent” requirements, or that other similarly situated parties had received similar waivers. (6 ER 1444-1447).

Plaintiff had fair notice and was in no way surprised or unfairly prejudiced when ViSalus diligently and reasonably raised the defense of “prior express consent” the day after the FCC waiver was issued. The intervening change in law exception to the waiver rule applies here, and the district court erred as a matter of law when it held ViSalus waived the defense of “prior express consent” and failed to consider the waiver for any purpose.

C. The District Court Erred as a Matter of Law When It Failed To Apply the FCC Waiver To Decertify the Class and Dismiss Plaintiff’s Claims.

In denying ViSalus’ motion to decertify, the district court held: “ViSalus has waived reliance on the affirmative defense that it obtained prior written consent from class members and [the court] will not consider the FCC’s recent order as a basis to decertify the class.” (1 ER 38). As set forth above, the district court’s reliance on ViSalus’s supposed

waiver of the waiver was misplaced. When the FCC waiver is properly considered, there are several reasons why the class must be decertified and Plaintiff's individual claims dismissed.

- 1. The district court erred as a matter of law by failing to recognize that the named Plaintiff lacks standing, requiring decertification and dismissal of her individual claims.**

As discussed above, Wakefield had the burden to prove she suffered a concrete injury in fact through evidence adduced at trial sufficient to have standing to recover damages for her individual claim. *TransUnion*, 141 S. Ct. at 2208. The district court was obligated to address standing before even considering any supposed waiver of the FCC waiver because a federal court may not rule on the merits of an issue without first determining if it has subject matter jurisdiction. *See Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 430-31 (2007) (“[A] federal court generally may not rule on the merits of a case without first determining that it has [subject matter jurisdiction]. . . . ‘Without jurisdiction the court cannot proceed at all in any cause’; it may not assume jurisdiction for the purpose of deciding the merits of the case.”) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102 (1998)). The court could not rely on ViSalus's supposed waiver of the FCC

waiver to conclude that Plaintiff had standing. Questions of standing cannot be waived. *City of L.A. v. Cty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009).

Moreover, the district court erred as a matter of law when it held Wakefield met her burden of establishing standing by merely *alleging* ViSalus violated the TCPA. (1 ER 43-44). When the correct standard is applied, Wakefield failed to establish she suffered a concrete injury in fact – or for that matter even a technical TCPA violation – through evidence adduced at trial, and has no standing to recover damages for her individual claim. This is fatal to both her individual and the class claims.

All calls to Wakefield fall under the FCC waiver because (1) she voluntarily gave her telephone number to ViSalus via her written enrollment application in February of 2013, prior to October 16, 2013 (7 ER 1729, Par. 20; 4 ER 849:17-850:3); and (2) all calls to Wakefield occurred during April of 2015, prior to October 7, 2015. (4 ER 828:12-21).

ViSalus had sufficient consent under the FCC's pre-2013 requirements to make these calls to Wakefield as a matter of law, because she provided her phone number to ViSalus in the context for which she

was later contacted (i.e., buying, selling, and promoting ViSalus' products). *Van Patten*, 847 F.3d at 1046. Therefore, Wakefield failed to prove she suffered a concrete injury—or any injury at all—by receiving phone calls for which she gave legally sufficient consent following the FCC's retroactive waiver. She thus has no standing for her individual claim.

Ninth Circuit precedent is clear; because Wakefield has no standing to recover damages for her individual claim, the class should be decertified, and her case should be dismissed. *See NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. Sw., Inc.*, 926 F.3d 528, 532 (9th Cir. 2019) (“Our circuit precedent indicates that when a class is certified and the class representatives are subsequently found to lack standing, the class should be decertified and the case dismissed.”); *Min Sook Shin v. Umeken USA, Inc.*, 773 F. App'x 373, 377 (9th Cir. 2019) (“Because the district court properly dismissed Shin's individual claims [for lack of Article III standing], Shin lacks standing to pursue class claims.”); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (“[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a

case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.”).

2. The district court also abused its discretion when it failed to decertify the class because, following the FCC waiver, individual issues of consent predominated over class questions.

The party seeking to maintain class certification bears the burden of demonstrating that the Rule 23 requirements are satisfied, even on a motion to decertify.¹⁷ The district court also retains an independent obligation to perform a “rigorous analysis” to ensure that the requirements of Rule 23 are satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350-51 (2011). The Rule 23(b) requirement at issue here is “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” (1 ER 30 (citing Fed. R. Civ. P. 23(b)(3))). The predominance inquiry under Rule 23(b) is rigorous, and although

¹⁷ See *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 947 (9th Cir. 2011); *United Steel Workers v. ConocoPhillips Co.*, 593 F.3d 802, 807 (9th Cir. 2010); accord *Lightfoot v. District of Columbia*, 246 F.R.D. 326, 332 (D.D.C. 2007) (“As the proponent of continued class certification, Plaintiffs [retain] the burden of establishing that [all] of the requirements for class certification . . . are met.”).

“there is substantial overlap between” the test for commonality under Rule 23(a)(2) and the predominance test under 23(b)(3), the predominance test “is ‘far more demanding.’” *Wolin*, 617 F.3d at 1172 (citations omitted)

“Generally, when the defendant provides specific evidence showing that a significant percentage of the putative class consented to receiving calls, issues of individualized consent predominate.” *Legg v. PTZ Ins. Agency, Ltd.*, 321 F.R.D. 572, 577 (N.D. Ill. 2017). Numerous courts have decertified or refused to certify class actions in TCPA cases where individual issues of consent predominate after a retroactive waiver is granted by the FCC. *See, e.g., Simon v. Healthways, Inc.*, No. CV 14-08022-BRO, 2015 U.S. Dist. LEXIS 176179 at *11 (C.D. Cal. Dec. 17, 2015) (retroactive FCC waiver created individualized consent issues defeating class certification); *Brodsky v. Humanadental Ins. Co.*, 269 F. Supp. 3d 841, 848 (N.D. Ill. 2017) (same); *Sandusky Wellness Center, LLC v. ASD Specialty Healthcare, Inc.*, 863 F.3d 460, 465–66 (6th Cir. 2017) (affirming district court order denying class certification, in part, because individualized issues of consent predominated after retroactive waiver from FCC).

Brodsky is squarely on point. In *Brodsky*, after a class was certified, the FCC granted a retroactive waiver of the TCPA’s opt-out notice requirements for *solicited* faxes (the Solicited Fax Rule). 269 F. Supp. at 845. Therefore, a primary issue in the case arose as to whether the questioned faxes were solicited (*i.e.*, sent with “prior express invitation or permission”). *Id.* Defendant moved to decertify the class. *Id.* In granting the motion and finding that issues of individualized consent predominated, the court noted various “outstanding questions” and “complicated individualized questions,” including whether members of the class may have revoked consent. *Id.* at 849. The court concluded that the case “will be consumed and overwhelmed by testimony from each individual class member in an effort to determine whether the class member consented to receive the [messages] in question.” *Id.* at 846 (internal quotations and citations omitted).

Similarly, in *Simon*, following the issuance of a retroactive FCC waiver of the Solicited Fax Rule, the court concluded that the “key issue” of consent required an individualized analysis that defeated class certification. 2015 U.S. Dist. LEXIS 176179 at *5; *10-11.

[P]rior express permission is a critical—and individualized—issue in this class action. The

Court cannot and will not engage in hundreds of mini-trials to determine whether a putative class member provided Defendants his or her or its prior express permission. Accordingly, the Court finds that [this] class action is not superior to individual suits as a means to adjudicate this dispute; putative class members may seek recovery in small claims court.

Id. at *22-23; *see also Smith v. Microsoft Corp.*, 297 F.R.D. 464, 469 (S.D. Cal. 2014) (“[A]n alternative method of handling the instant controversy exists: namely, individual plaintiffs may bring TCPA cases in small claims court without an attorney.”).

Here, as in *Brodsky* and *Simon*, “[n]ow that ‘the issue of consent’ is back in ‘the equation’ by virtue of the [June 13, 2019 FCC Waiver], the present class must be decertified.” *Brodsky*, 269 F. Supp. 3d at 848. The FCC waiver granted to ViSalus, which covers 12 of the 15 months the questioned calls in this case were made and likely impacts a substantial (and certainly more than a *de minimis*) portion of the class members, creates several individualized threshold questions that must be answered for each of the 1.8 million calls the jury determined were violative. Specifically, it must be determined: (1) was the call received before October 7, 2015; (2) did the class member submit an enrollment application to ViSalus before October 16, 2013; (3) did the class member

amend its original communication preferences or revoke consent online prior to the alleged call. Whether the FCC's retroactive waiver applies to each of these calls cannot be determined through class-wide evidence.

While the date of the call *may* be ascertained by examining the call spreadsheets on the record, Plaintiff has not asserted (and cannot establish) that the answers to the other individual inquiries can be ascertained through common evidence. Determining which phone number is associated with which class member, and then when each class member provided written consent would necessarily require manually cross-checking 800,000 enrollment applications and online accounts against the 1.8 million allegedly violative calls. (2 ER 129-130, Par. 3-6). This necessary and highly individualized inquiry is sufficient alone to decertify the class based on predominance. *See Sandusky*, 863 F.3d at 465-66 (affirming lower court's decision that class certification was improper because, following a retroactive FCC waiver, "weeding out the solicited from the unsolicited fax recipients to discern proper class membership would require manually cross-checking 450,000 potential consent forms [that established a fax was solicited] against the 53,502 potential class members") (quotes omitted).

Additionally, ViSalus’s online portal is a “live system” so ViSalus can only produce evidence of each class member’s current communication preferences on the day it makes the inquiry, but it has no records of any class member’s historical preferences (*i.e.*, whether or when the individual changed its preferences or revoked its consent).¹⁸ (7 ER 1562, n. 10). This evidence could only be obtained through individual examinations of hundreds-of-thousands of class members¹⁹ as opposed to class-wide evidence, which strongly supports class decertification. *See Microsoft*, 297 F.R.D. at 471 (individualized issues of consent predominate where that information “simply no longer exists” in the defendant’s records, so the plaintiff could not establish lack of consent, nor could the defendant defend itself.); *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 328–29 (5th Cir. 2018) (certification denied on predominance grounds where defendant’s “database entries do not consistently or accurately reflect whether a given recipient had consented” to faxes so consent could not be established by class-wide

¹⁸ Plaintiff acknowledges this fact. (2 ER 252 (“ViSalus has no evidence that even a single class member checked the [“Receive ViSalus News & Updates by Phone” box], much less before October 2013.”).

¹⁹ (2 ER 126-127).

evidence); *Jamison v. First Credit Services, Inc.*, 290 F.R.D. 92, 107 (N.D. Ill. 2013) (certification denied on predominance grounds where issues with consent tracking through defendant’s account record system established there is no way to employ generalized proof to prove consent, or lack thereof).

When the FCC waiver is properly considered, plaintiff cannot meet its burden to advance “a viable theory of generalized proof to identify those persons, if any, to whom [ViSalus] may be liable under the TCPA.” *Gene and Gene*, 541 F.3d at 327–29. “This seems to be the exact type of case that would devolve into a series of mini-trials, which Rule 23(b)(3) seeks to prevent.” *Sandusky*, 863 F.3d at 470.

Fed. R. Civ. P. 23(b)(3)(D) also mandates that a court should consider the “likely difficulties in managing a class action” when evaluating whether class action treatment is superior to other methods of adjudications. The greater the number of individual issues to be litigated, the greater difficulties in managing the class. *Marlo*, 251 F.R.D. at 487 (since “individual issues predominate in this case ... a class action is not the superior method for litigating this matter”) (citing *Abed v. A.H. Robins Co.*, 693 F.2d 847, 856 (9th Cir. 1982)). Given the predominant

nature of the *individualized* inquiries on consent that are now necessary in the wake of the FCC waiver, and because Plaintiff does not (and cannot) show these inquiries can be satisfied by class-wide proof, a class action is no longer manageable nor superior.²⁰

D. The District Court Also Erred in Denying ViSalus’s Motion for Judgment as a Matter of Law or for New Trial.

After receiving the FCC waiver, ViSalus made a Renewed Motion for Judgment as a Matter of Law and for New Trial. (2 ER 67). In that renewed motion, ViSalus argued that the FCC waiver establishes that ViSalus had adequate consent as a matter of law, or alternatively, that

²⁰ Wakefield is also no longer typical of the class because she is only injured if she received calls without some form of written consent, while class members who do not fall under the FCC waiver must have been called without “prior express written consent.” See *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (“a class representative must be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” (citation omitted). Further, the class, defined as persons who received violative calls without “prior express written consent,” is also over-inclusive because it now undoubtedly includes a substantial amount of uninjured class members who fall under the FCC’s retroactive waiver of those requirements. See *In re Lidoderm Antitrust Litig.*, No. 14-md-02521-WHO, 2017 U.S. Dist. LEXIS 24097, at *65 (N.D. Cal. Feb. 21, 2017) (finding over-inclusiveness, including plaintiffs who were not harmed in the class definition, “would not defeat class certification as long as the uninjured parties represent a *de minimis* portion of the class”).

ViSalus should be granted a new trial so that it could present the issue of consent to a jury. (2 ER 82-83).

The district court erred in denying ViSalus's renewed motion in light of the FCC waiver. With the waiver, it is clear that ViSalus had adequate consent as a matter of law under the now-applicable pre-October 16, 2013 law. *See Van Patten*, 847 F.3d at 1046; *see also In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991*, 7 FCC Rcd. 8752, 8769 (1992) (“persons who knowingly release their phone number have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary”). The evidence was not in dispute that each of the promoters in this case provided a telephone number to ViSalus in writing, which now constitutes consent as a matter of law.

Alternatively, and at a minimum, the district court should have ordered a new trial to allow ViSalus to present its consent defense to the jury. As discussed above, Plaintiff vigorously and successfully advocated against ViSalus from presenting a defense based on consent. Even though ViSalus agreed only not to present a “prior express written consent” defense (acknowledging it could not meet that standard),

ViSalus was precluded from presenting any defense of consent at all. Now, with the intervening change in the law as a result of the FCC waiver, it is clear the jury should have been asked to decide whether Plaintiff and the class members consented under the pre-October 16, 2013 standard. Without such a finding, the verdict in this case cannot be allowed to stand.

III. At a Minimum, Remand Is Required To Substantially Reduce the Unconstitutionally Excessive Damages.

The district court erred in denying ViSalus's post-trial motion to reduce the aggregated damages award as unconstitutionally excessive under the governing legal standard. Nearly one billion dollars in damages for conduct that was not proven to have caused actual legal harm to anyone is clearly excessive under the prevailing legal precedents from federal courts that have spoken on this issue.

A. Standard of Review.

While the Ninth Circuit has not yet addressed the question of whether due process limits aggregated statutory damages awards under the TCPA, this Court has applied *de novo* review when district courts have applied the due process standard for statutory damages as set forth by the Supreme Court in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251

U.S. 63, 67 (1919). *See Perez-Farias v. Glob. Horizons, Inc.*, 499 F. App'x 735, 737 (9th Cir. 2012) (applying *de novo* review to a district court's award of statutory damages).

B. The Damages Award in This Case Violates the Due Process Clause Because It Is So Severe and Oppressive as To Be Wholly Disproportioned to the Offense and Obviously Unreasonable.

The aggregated damages award in this case is unconstitutionally excessive. While Congress has broad discretion to provide for statutory damages, a statutory damages award must satisfy the Constitution. *Golan v. FreeEats.com, Inc.* (Golan II), 930 F.3d 950, 962 (8th Cir. 2019). Such an award violates the Due Process Clause if it is “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Perez-Farias*, 499 F. App'x at 737 (quoting *St. Louis*, 251 U.S. at 67).

While the question of whether due process limits the aggregated amount of statutory damage awards (as opposed to the amount per violation) under the TCPA has not been decided in the Ninth Circuit, in a substantially similar case, the Eighth Circuit recently held: “The absolute amount of the award, not just the amount per violation, is relevant to whether the award is so severe and oppressive as to be wholly

disproportioned to the offense and obviously unreasonable.” *Golan*, 930 F.3d at 963 (applying *St. Louis* standard to determine an aggregated damage award under the TCPA was unconstitutional and reducing the amount of damages awarded per claim to \$10); *see also United States v. Dish Network LLC*, 256 F. Supp. 3d 810, 951-52 (C.D. Ill. 2017) (relying on *St. Louis* to reduce statutory damages under the TCPA from roughly \$8.1 billion to roughly \$280 million even though defendant’s culpability was “significant”);²¹ *Maryland v. Universal Elections, Inc.*, 862 F. Supp. 2d 457, 466 (D. Md. 2012) (reducing TCPA damages to \$9 per violation even with a finding of willfulness); *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 900-901 (W.D. Tex. 2001) (reducing TCPA damages to 7 cents per call but trebling damages to 21 cents per call because defendant’s violations were willful).

With no Ninth Circuit precedent on this issue, the district court declined to follow the reasoning in these cases, determined that due process limits do not apply to aggregated statutory damages under the

²¹ This decision was vacated in *United States v. Dish Network L.L.C.*, 954 F.3d 970, 980 (7th Cir. 2020), and remanded to the lower court to reduce the damages based on the harm inflicted, rather than the violator’s ability to pay.

TCPA, and did not apply the *St. Louis* standard. (1 ER 20-25). The district court's reasoning appears to be motivated by its concern that the *St. Louis* standard was too difficult to apply. (1 ER 24) (“ViSalus does not identify any . . . Ninth Circuit authority on how a district court should reduce damages that are found to be unconstitutionally excessive. Nor can the Court find any Ninth Circuit precedent on that issue.”) (quote and citation omitted). Just because this Court has yet to articulate a concrete method of reducing unconstitutionally excessive statutory damages does not mean that the district court could simply throw its hands in the air on this constitutional issue.

Here, the class members voluntarily provided their phone numbers and communication preferences to ViSalus, no actual damages were asserted on behalf of the class, and no concrete injuries (beyond a formatting violation) were alleged by the class. The FCC granted ViSalus a retroactive waiver of the TCPA's “prior express written consent” requirements, in part, because of industrywide confusion regarding the retroactive effects of its 2012 regulations. (2 ER 266). The district court held that ViSalus did not knowingly or willfully violate the TCPA. (2 ER 242). ViSalus had never been sued under the TCPA prior to this lawsuit,

and ceased making outbound marketing calls shortly after this lawsuit was filed. (2 ER 246). **ViSalus is nevertheless liable for a staggering judgment of \$925,220,000**—a sum that would force ViSalus into bankruptcy and end its business, along with all its promoters, all for conduct to which the FCC has now given its blessing. (1 ER 13; 2 ER 91). In fact, ViSalus has been unable to locate a larger aggregated damages award that was sustained in the history of the TCPA. In light of these circumstances, this astronomical award is certainly “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *St. Louis*, 251 U.S. at 67.

As did the Eighth Circuit, this Court should hold that, under the TCPA: “The absolute amount of the award, not just the amount per violation, is relevant to whether the award is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Golan*, 930 F.3d at 963. If this Court does not vacate the judgment in its entirety, it should hold that, under this standard, the damages award in this case is unconstitutionally excessive and remand with instructions to reduce the amount of the damages award to an amount that would not

be a death sentence for ViSalus and would instead be proportioned to the non-existent actual harm from the consensual calls at issue in this case.

CONCLUSION

For all of the foregoing reasons, ViSalus respectfully requests that this Court vacate the judgment and issue an order directing the district court to dismiss all claims and enter judgment in favor of ViSalus. In the alternative, ViSalus requests this Court vacate the damages award as unconstitutional and remand with instructions to reduce the damages to fall within constitutional limits.

Dated: October 25, 2021

Respectfully submitted,

DYKEMA GOSSETT LLP

By: /s/ Becky S. James
 Becky S. James

Attorneys for Appellant
ViSalus, Inc.

STATEMENT OF RELATED CASES

Appellant is unaware of any related cases pending before this Court.

Dated: October 25, 2021

Respectfully submitted,

DYKEMA GOSSETT LLP

By: */s/ Becky S. James*
 Becky S. James

Attorneys for Appellant
ViSalus, Inc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form08instructions.pdf>

9th Cir. Case Number(s)

I am the attorney or self-represented party.

This brief contains words, excluding the items exempted

by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief (*select only one*):

- complies with the word limit of Cir. R. 32-1.
- is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- complies with the longer length limit permitted by Cir. R. 32-2(b) because (*select only one*):
 - it is a joint brief submitted by separately represented parties;
 - a party or parties are filing a single brief in response to multiple briefs; or
 - a party or parties are filing a single brief in response to a longer joint brief.
- complies with the length limit designated by court order dated
- is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature

Date

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov