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ALERT

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FEDERAL COURT DECLARES TCPA PROVISION UNCONSTITUTIONAL FOR CALLS MADE BEFORE JULY 6, 2020

The United States District Court for the Eastern District of Louisiana determined that Section 227(b)(1)(A)(iii) of the Telephone Consumer Protection Act ("TCPA") is *unconstitutional* and does not apply to calls made during the time frame of November 2015 to July 6, 2020. *Creasy v. Charter Comm'n, Inc.*, No. 2:20-cv-01199 (filed Sept. 28, 2020).

The legality of Section 227(b)(1)(A)(iii) was at issue in this case. This section prohibits any person to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party), using any automatic telephone dialing system or an artificial or prerecord voice, to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service or any service for which the called party is charged for the call, *unless* such call is made solely to collect a debt owed to or guaranteed by the United States ("government-debt exception"). On July 6, 2020, the Supreme Court struck down Section 227(b)(1)(A)(iii) as an unconstitutional content-based restriction on speech and severed it from the rest of the statute. *Barr v. Am. Ass'n. of Political Consultants* (AAPC), 140 S. Ct. 2335 (2020). The Supreme Court did not reach a clear majority decision in *AAPC*.*

The plaintiff in *Creasy* alleged that the defendant violated the TCPA at least 130 times by transmitting auto-dialed calls and texts to the plaintiff without the consent to do so. The telecommunications company countered that the Supreme Court's decision in *AAPC* amounts to an adjudication that the entirety of Section 227(b)(1)(A)(iii) was unconstitutional from the moment Congress enacted the provision to the moment the Supreme Court in *AAPC* severed the government-debt exception to preserve the rest of the law. The plaintiff argued that by severing the government-debt exception to preserve the general ban, the Supreme Court confirmed Section 227(b)(1)(A)(iii) was constitutional all along.

In *AAPC* the three-Justice plurality opinion concluded in non-binding dicta that while "no one should be penalized or held liable for making robocalls to collect government debt" as a result of the Court's invalidation of the exception that purported to authorize such robocalls, the Court's decision would not "negate the liability of parties who made robocalls covered by the robocall restriction" during the timeframe in which the exception remained operative. Justice Gorsuch (joined by Justice Thomas) disagreed. In his view, by "shield[ing] only government-debt collection callers from past liability under an admittedly unconstitutional law," the plurality "[wound] up endorsing the very same kind of content discrimination [it said it was] seeking to eliminate."

The *Creasy* court agreed with Justice Gorsuch's argument as a matter of law and logic. The court reasoned that in the years preceding the government-debt exception and after the *AAPC* decision, Section 227(b)(1)(A)(iii) did not discriminate on the content of robocalls and was a constitutional time-place-manner restriction on speech. However, in the years in which Section 227(b)(1)(A)(iii) permitted robocalls of one category of content while prohibiting robocalls of all other categories of content, the entirety of the provision was unconstitutional.

The *Creasy* court noted that federal district courts are bound by Supreme Court precedent, and in the scenario where a fragmented Supreme Court decides the case, the holding of the Supreme Court may be viewed as that decision taken by those members of the Court who concurred in the judgments on the narrowest grounds. The plurality in *AAPC* spelled out the technical holdings of the Court in explicit terms: (i) "Six Members of the Court . . . conclude that Congress has impermissibly favored debt-collection speech over political and other speech, in violation of the First Amendment," and (ii) "[S]even members of the Court conclude that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute." That much is binding on all other courts. The *Creasy* court ultimately determined that the unconstitutional amended version of Section 227(b)(1)(A)(iii) is what applied to the telecommunications company at the time of the challenged communications at issue, and that fact deprived the court of subject matter jurisdiction to adjudicate the telecommunications company's liability with regard to such communications.

The *Creasy* decision asserts that no federal district court has jurisdiction to oversee TCPA cases for calls made between November 2015 and July 6, 2020. However, federal courts do not always agree when it comes to interpreting and adjudicating TCPA cases, as is evident by the Circuit split over the definition of an automatic telephone dialing system. We frequently advise clients on

Darrell L. Dreher
ddreher@dltlaw.com

Elizabeth L. Anstaett
eanstaett@dltlaw.com

Emily C. Cellier
ecellier@dltlaw.com

Susan L. Ostrander
sostrander@dltlaw.com

2750 HUNTINGTON CENTER
41 S. HIGH STREET
COLUMBUS, OHIO 43215
TELEPHONE: (614) 628-8000 FACSIMILE: (614) 628-1600
WWW.DLTLAW.COM

Michael C. Tomkies
mtomkies@dltlaw.com

Susan M. Seaman
sseaman@dltlaw.com

Lindsay P. Valentine
lvalentine@dltlaw.com

Judith M. Scheiderer
jscheiderer@dltlaw.com

Robin R. De Leo
robin@deher-la.com

federal and state laws regulating telemarketing and non-telemarketing communications with business and consumer customers. We will continue to monitor and report on TCPA updates as they occur. ❑

✧ *Mike Tomkies and Lindsay Valentine*

* Justice Kavanaugh announced the judgment of the Court in a plurality opinion which Chief Justice Roberts and Justice Alito joined in whole, and Justice Thomas joined in part. Justice Sotomayor concurred in the judgment. Justice Breyer, joined by Justices Ginsburg and Kagan, concurred in the judgment with respect to severability, but dissented as to the plurality's application of strict scrutiny to Section 227(b)(1)(A)(iii)'s content-based distinction. Justice Gorsuch issued a final opinion, in which he concurred in the judgment in part and dissented on yet other grounds, and in which Justice Thomas joined in part.