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Supreme Court Agrees To Review The Constitutionality of the TCPA

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Given how often TCPA cases are filed—and how often they push the envelope of the statute's scope and the courts' jurisdiction—it should come as no surprise that the Supreme Court is often asked to bring some sanity to the statute's enforcement. Last year was no exception.

For example, a plaintiff petitioned the Supreme Court to reverse the Third Circuit's decision that facsimiles that merely ask to confirm contact information are not "advertisements" for purposes of the TCPA. Such facsimiles are advertisements, the plaintiff had argued, because businesses send them "to enhance the accuracy of their database and thus increase their profits." That may be so, the Third Circuit held, but that does not mean that they qualify as "advertisements" that promote goods or services. "After all," the court observed, "a commercial entity takes almost all of its actions with a profit motivation." The Supreme Court declined to review that decision in November. *See Robert W. Mauthe, M.D., P.C. v. Optum, Inc.*, No. 19-413, 2019 WL 6257433 (U.S. Nov. 25 2019).

Similarly, a defendant petitioned the Supreme Court to reverse the Fourth Circuit's decision that a single call necessarily results in an injury that is concrete for purposes of Article III of the U.S. Constitution. That ruling exacerbated a circuit split, the defendant noted, because the Eleventh Circuit has held that a single text message does ***not*** necessarily result in a concrete harm. The Fourth Circuit's ruling was also wrong, the defendant argued, because it not only "shrinks Article III's concrete injury requirement to a nullity," but also does so "in a context—class action litigation—in which diluting standing requirements is most dangerous." The Supreme Court declined to review that decision in December. *See DISH Network L.L.C. v. Krakauer*, No. 19-496, 2019 WL 6833425 (U.S. Dec. 16, 2019).

But the petitions with perhaps the farthest-reaching implications concern whether the restrictions on automated telephone equipment—i.e., on the use of an "automatic telephone dialing system" or "artificial or prerecorded voice," *see* 47 U.S.C. §227(b)—violate the First Amendment. Indeed, earlier today the Supreme Court decided to grant at least one such petition.

Carrying the flag for defendants on this issue are Facebook and Charter Communications, both of which were sued in federal court in California, and both of which argued that the statute's restrictions on automated telephone equipment are content-based regulations that do not withstand strict scrutiny

because they are not narrowly tailored to serve a compelling governmental interest. The Ninth Circuit agreed that at least one provision—specifically the one that exempts federal debt collection calls from the statute's consent requirement—is a content-based regulation of speech. The Ninth Circuit also agreed that that provision does not survive strict scrutiny. But it disagreed about the proper remedy, deciding to sever that provision in order to salvage the rest of the statute's restrictions on automated telephone equipment.

Facebook and Charter filed separate petitions that make slightly different arguments; whereas Charter's petition focused on whether the content-based restrictions can be severed, Facebook's petition also argued that the statute is unconstitutionally overbroad because its definition of an "automatic telephone dialing system"—at least as it has been interpreted by the Ninth Circuit—is virtually limitless in scope. Given that a single call can result in a class action seeking annihilating aggregate damages, the chilling effect of such an interpretation would be hard to overstate.

Notably, the Attorney General and the FCC filed their own petition seeking review of a similar ruling from the Fourth Circuit, although their mirror-image petition asked the Supreme Court to find that the exemption for federal debt-collection calls does ***not*** violate the First Amendment. And perhaps just as notably, the respondents filed a brief in support of that petition, although they of course asked the Court to find not only that the exemption ***does*** violate the First Amendment, but also that it cannot be severed from the statute. Both briefs also noted that it is the Court's usual practice is to grant certiorari if part of a federal statute has been invalidated, which of course was the case here.

Late today the Supreme Court followed that usual practice and granted the government's petition. Whether it will eventually grant the other petitions and consolidate all three proceedings, or simply hold them and remand them to the Ninth Circuit for further proceedings consistent with whatever opinion it issues in this mater, remains to be seen. In the meantime, interested parties from all quarters will surely begin feverishly drafting amicus briefs on the merits, and defendants in cases that involve the statute's restrictions on automatic telephone equipment—which is to say, ***many*** of them—will very likely begin seeking *Landis* stays while this incredibly important issue is being reviewed.

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