

# Consumer Litigation

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## Constitutionality of the TCPA Between 2015 and 2020

A question has arisen regarding whether the TCPA was constitutional between the enactment of the government-debt exception in 2015 and the AAPC decision in 2020.

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As always, the Telephone Consumer Protection Act (TCPA) is subject to litigation throughout the country. Recently, the U.S. Supreme Court handed down a decision in *Facebook, Inc. v. Duguid*, No. 19-511 (U.S. 2021), regarding the definition of an automated telephone dialing system (ATDS). Although the *Facebook* case, which was decided in April 2021, has received the majority of attention, another question has arisen regarding whether the TCPA was constitutional between the enactment of the government-debt exception in 2015 and the *Barr v. American Ass'n of Political Consultants, Inc. (AAPC)* decision on July 6, 2020. 140 S. Ct. 2335, 207 L. Ed. 2d 784 (2020).

On July 6, 2020, in a plurality opinion, the U.S. Supreme Court decided *AAPC*. Since then, this decision has already led to a split in authority regarding the effect of the severance of the government-debt exception on robocalls made to cellular phones by nongovernment debt collectors from November 2, 2015, to July 6, 2020. Courts interpreting *AAPC* have analyzed whether its holding prevents a reviewing court from having subject matter jurisdiction over TCPA claims involving robocalls made by a nongovernment debt collector during the period of constitutional limbo.

### Background

The government-debt exception was added to 47 U.S.C. § 227(b)(1)(A)(iii) on November 2, 2015. It states that

it shall be unlawful for any person . . . to make any call (other than for an emergency or with prior express consent) using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any . . . cellular telephone or any service which

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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.*

47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added).

The U.S. Supreme Court addressed the constitutionality of the government-debt exception in *AAPC*, whereby it affirmed the findings of the U.S. Court of Appeals for the Fourth Circuit that the government-debt exception failed to survive strict scrutiny; and, as a result, the U.S. Supreme Court invalidated and severed the unconstitutional portion. Despite a footnote from Justice Kavanaugh stating that robocallers could not escape liability during the window of time that the government-debt exception was in the statute, *AAPC* left unanswered whether and to what extent nongovernment debt robocallers could be found liable for calls made between November 2, 2015, and July 6, 2020, which has resulted in several conflicting opinions.

## Unconstitutionality and Subject Matter Jurisdiction

First, district courts that held that the severance of the government-debt exception in *AAPC* requires the conclusion that the entirety of 47 U.S.C. § 227(b)(1)(A)(iii) is unconstitutional, and enforceable from its inception until severance, resulting in a lack of subject matter jurisdiction for the reviewing court, have done so reasoning that (1) the government-debt exception is an unconstitutional content-based restriction; and (2) the government-debt exception was not void *ab initio*, and you cannot make something constitutional that is unconstitutional.

In *Creasy v. Charter Communications, Inc.*, the U.S. District Court for the Eastern District of Louisiana found that “the entirety of the pre-severance version of § 227(b)(1)(A)(iii) is void because it itself was repugnant to the Constitution before the Supreme Court restored it to constitutional health in *AAPC*.” E.D. La. No. 20-1199, 2020 U.S. Dist. LEXIS 177798, at \*13 (Sept. 28, 2020). In so ruling, the court held that the very nature of a content-based restriction, such as the government-debt exception, implicates “treat[ing] different categories of content differently”; and therefore “an exception cannot be unconstitutionally discriminatory without reference to the broader rule in which it appears.” *Id.* at \*11. As a result, the court determined it lacked subject matter jurisdiction.

In *Lindenbaum v. Realty*, the court agreed with *Creasy* in finding the government-debt exception a content-based restriction that was unconstitutional at the time of the violations alleged in the case. No. 1:19 CV 2862, 2020 U.S. Dist. LEXIS 201572, at \*19 (N.D. Ohio Oct. 29, 2020). The court reasoned that the plurality in *AAPC* did not intend to treat the

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government-debt exception as void *ab initio* because doing so means that the statute was universally enforceable pre-severance. *Id.* at \*18. Because the government-debt exception only applied to government debt collectors, treating the exception as void *ab initio* results in treatment of the statute one way as to government debt collectors and a second way as to nongovernment debt collectors, raising equal treatment concerns.

Last, in reliance on *Lindenbaum* and *Creasy*, in *Hussain v. Sullivan Buick-Cadillac-GMC Truck, Inc.*, the court held that “the government-debt exception, changed an otherwise valid statute to an unconstitutional content-based restriction. Thus, at the time defendants engaged in the speech at issue in the case, defendants were subject to an unconstitutional content-based restriction.” M.D. Fla. No. 5:20-cv-38-0c-30PRL, 2020 U.S. Dist. LEXIS 236577, at \*9 (Dec. 11, 2020). The court determined that it lacked subject matter jurisdiction to enforce an unconstitutional statute. *Id.*

## Constitutionality and Enforceability

Conversely, other courts have taken an opposite approach and determined that regardless of the severance of the government-debt exception in *AAPC*, the remainder of 47 U.S.C. § 227(b)(1)(A)(iii) is enforceable and constitutional.

For example, in Arizona, the court in *Canady v. Bridgecrest Acceptance Corp.*, No. CV-19-04738-PHX-DWL, 2020 U.S. Dist. LEXIS 161629 (D. Ariz. Sept. 3, 2020), opined that *AAPC* only struck down the government-debt exception and the remainder of 47 U.S.C. § 227(b)(1)(A)(iii) was alive and well. *Id.* at \* 5. Notably, the *Canady* court’s analysis of the retroactive or prospective application of the severance and unconstitutionality of the government-debt exception is nowhere to be found. Instead, the only issue before the court in *Canady* was whether the court could stay the proceedings until the U.S. Supreme Court issued a decision in *Duguid*.

## California Court Cases

Courts in California provide far more guidance with two holdings in the U.S. District Court for the Central District Court of California.

In *Shen v. TriColor California Auto Group, LLC*, Case No. 2:20-cv-7419 (C.D. Cal. Dec. 17, 2020), the defendant argued that dismissal of the TCPA claims for lack of subject matter jurisdiction was appropriate as the defendant “could not have violated a statutory provision that contained an unconstitutional content-based restriction at the time it made

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the calls to plaintiff's cell phone" because there was no valid law of the United States to enforce. *Id.* at \*4–5 (citations omitted). In declining to grant the defendant's motion to dismiss, the *Shen* Court was seemingly offended by the defendant's overly expansive view of the holding in *AAPC* and reasoned that *AAPC* only intended to "invalidate[] and sever[] unconstitutional provisions from the remainder of the law rather than razing whole statutes or Acts of Congress." *Id.* at \*12.

Post-*Shen*, the same court decided *Trujillo v. Free Energy Savings Co., LLC*, which introduced a new argument to address the retrospective application of *AAPC*. Case No. 5:19-cv-02072 (C.D. Cal. Dec. 21, 2020). In *Trujillo*, the court held that the government-debt exception was void *ab initio*. *Id.* at \*7. In so doing, it treated the government-debt exception as never existing, concluding that the exception did not affect the constitutionality of the original statute. *Id.* at \*7–8. The court acknowledged that its decision could affect government debt collectors' liability during the post-amendment and pre-severance period, but it declined to address the concern as the calls at issue were not made by government debt collectors. *Id.*

## Conclusion

These arguments are new, and, as of this writing, no courts of appeals have addressed these issues. In all likelihood, some appellate courts will opine on the issue within the next year. Until then, we should expect more inconsistent decisions out of the district courts.

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