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# Unwanted Opt-in Text Messages as a Basis for Constitutional Standing

51 Rutgers L. Rec. 79 (2023) | WestLaw | LexisNexis | PDF **I. INTRODUCTION**

A multi-circuit split has illuminated a new issue in constitutional law: whether receiving advertisements and promotions in the form of text messages may constitute an injury for the purposes of standing. A majority of the circuits have held that receipt of such text messages is sufficient to show injury, but the Eleventh Circuit has deviated from that pattern, holding that receipt of those text messages is insufficient to show injury.1 Because of the disparity in the circuit courts' holdings, a fact intensive analysis should be employed.2 The main statute in question is the Telephone Consumer Protection Act (TCPA), which was intended to protect individuals against invasive telemarketing calls.3 One of the aims of the TCPA is to balance the privacy rights of consumers, while also making room for ?legitimate telemarketing practices.?4 The recent circuit opinions regarding what types of communications that the TCPA covers have focused mainly on the former aim, while making little to no mention of the latter aim.5 This note suggests that the courts should give the second factor more weight when determining whether text messages constitute injury for the purposes of standing. While the importance of individual privacy rights cannot be understated, companies must be allowed some leeway in using technology to promote their goods and services, especially in situations where the consumer willingly provides a contact number, such as opt-in text messages from businesses. Furthermore, the courts should also take into consideration both the quantity of texts that the plaintiff has received and any action that the plaintiff has taken to stop the defendant from sending the text messages. If the plaintiff has voluntarily elected to receive such text messages, businesses should not be penalized for utilizing this channel of communication with consumers, especially given the aforementioned aims of the TCPA.

Part II of this note will discuss an overview of the TCPA, including its history and the plaintiff's burden in establishing standing under the TCPA. Part III will continue the discussion with an analysis of the current difficulties in applying the TCPA to various forms of communication, as well as how various circuit courts have used the TCPA in these situations. In Part III, this note will also argue that the circuits should consider both the quantity of the texts that the plaintiff has received and the plaintiff's own actions in receiving the initial text messages. Part IV discusses the current actions that the legislature and the FCC have taken to refine the TCPA.

1 See Salcedo v. Hanna, 936 F.3d 1162, 1173 (11th Cir. 2019).

2 Id.

3 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(7), 105 Stat. 2394, 2394.

4 Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9), 105 Stat. 2394, 2394.

5 See Cranor v. 5 Star Nutrition, L.L.C., 998 F.3d 686, 692 (5th Cir. 2021); see also Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1040 (9th Cir. 2017).

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