

# TCPA In Jeopardy? US Supreme Court Reviews Constitutionality

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On Wednesday, May 6th, the U.S. Supreme Court will hear oral argument in a case concerning the scope of the Telephone Consumer Protection Act (“TCPA”) that is of great interest to businesses and communications industry practitioners. In *William P. Barr et al. v. American Association of Political Consultants et al.*, Case No. 19-631 (2020) (“*Barr*”) the Supreme Court agreed to review a ruling by the Court of Appeals for the Fourth Circuit, which declared a 2015 government debt collection exemption unconstitutional and severed the provision from the remainder of the 1991 TCPA. The 2015 amendment exempts calls from the TCPA’s autodialer restriction, if the call relates to the collection of debts guaranteed by the U.S. government. On Wednesday, the Supreme Court will consider if: 1) the government-debt exception to the Telephone Consumer Protection Act of 1991’s automated-call restriction violates the First Amendment; and 2) whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

TCPA litigation has largely focused on the autodialer restriction over the past decade. In 2015, the Federal Communications Commission (“FCC”) [adopted an expansive interpretation](#) of the restriction, which the U.S. Court of Appeals vacated and remanded in 2018. While the industry has waited for the FCC to offer further guidance, entities making calls and sending texts have navigated an environment [plagued by uncertainty](#). Several courts of appeals have adopted conflicting interpretations of the autodialer provision. Meanwhile, the FCC could offer its interpretation at any time, throwing the issue into further litigation in all probability. In this environment, the Supreme Court agreed to hear the constitutionality of one TCPA exemption in the *Barr* case. Many are hoping for a decision that goes beyond the 2015 amendment and offers definitive guidance on the autodialer provision’s scope. This post discusses what to expect – and what to watch for – in the Supreme Court’s oral argument this week.

## Background

In *Am. Ass’n of Political Consultants v. Sessions*, 323 F. Supp. 3d 737 (E.D.N.C. 2018), a group of political and polling organizations who wished to use autodialer technology to contact potential

voters, sued the Government challenging the constitutionality of the TCPA's autodialer ban. The group argued that the autodialer ban is a content-based restriction on speech, which does not survive strict scrutiny under First Amendment jurisprudence. According to the plaintiffs, the autodialer restriction fails strict scrutiny's narrow tailoring requirement because it allows the FCC to promulgate various exemptions based on the content of the call and the 2015 amendment exempts calls related to the collection of government debt. Therefore, the law is not narrowly tailored to advance the privacy interests of the TCPA. Additionally, Plaintiffs asserted that less restrictive means could advance the TCPA's interests.

The district court disagreed with the Plaintiffs and found that the government debt collection exemption survived strict scrutiny because it is a narrow exception, which furthers the compelling interest of government debt collection. Additionally, the court declined to consider the constitutionality of the FCC's exemptions because it reasoned that it was not the correct court to hear such challenges. Regarding Congressional delegation of authority to the FCC to create exemptions, the court reasoned that the delegation "does not substantively except any communications" and therefore "is not facially or inherently content-based." Lastly, the court concluded that the supposed less restrictive means would not be as effective in achieving the purposes of the TCPA.

Plaintiffs appealed the decision to the Fourth Circuit. In *Am. Ass'n of Political Consultants, Inc. v. Fed. Commc'ns Comm'n*, 923 F.3d 159 (4th Cir. 2019), [the Fourth Circuit held](#) that the government debt exemption failed strict scrutiny due to under-inclusiveness. The Fourth Circuit concluded that the exemption is underinclusive because: (1) the exemption "subverts the privacy protections underlying the ban" by authorizing many intrusive calls, and (2) debt collection calls are "among the most intrusive, disruptive, and complained of phone calls." However, instead of invalidating the entire TCPA, the court relied on a severance clause in the Communications Act of 1934 (which contains the TCPA) and severed the government debt collection exemption. The court reasoned that severance was appropriate because Congress explicitly intended the severance of constitutionally infirm portions of the Communications Act and the autodialer restriction had worked effectively for twenty-four years before Congress amended it to exempt government debt collection calls.

Consequently, on November 14, 2019, the Solicitor General petitioned the Supreme Court to review the Fourth Circuit's decision to settle the question of the TCPA's constitutionality and to provide clarity on the severance of unconstitutional portions of the statute. On January 10, 2020, the Supreme Court accepted the petition for review.

### **Previewing the Supreme Court Review**

The Supreme Court accepted two questions regarding the TCPA:

1. Is the 2015 government debt collection exemption constitutional, and
2. Is the appropriate remedy to sever the provision from the TCPA?

#### *Constitutionality*

On the first question, the Government argued that the government debt collection exemption is not content-based but relationship-based as it is dependent on the relationship between debtors (called parties) and their creditor (the Government). Therefore, it argued, the government debt collection exemption is actually subject to intermediate scrutiny, which it passes since it is a narrow exception, which applies to a few calls only and furthers the significant interest of protecting the public fisc. This

comports with the autodialer restriction, which is a content-neutral time, place, and manner restriction. The American Association of Political Consultants (Respondents in the Supreme Court) asserted that the Fourth Circuit correctly found that the autodialer restriction as currently written is a content-based restriction, which fails strict scrutiny and renders the TCPA unconstitutional.

### *Remedy*

As to the second question, Respondents argued that First Amendment jurisprudence mandates that courts should issue decisions that protect speech and not abridge it. Thus, Respondents argued, finding the TCPA to contain a content-based restriction on speech, the proper remedy should have been to strike down the restriction on speech, not to sever the “speech-promoting exception.” Respondents also argued that the autodialer restriction must be invalidated because the TCPA, even after the Fourth Circuit’s remedy, continues to be an unconstitutional restriction on speech. .

### *Amicus Curiae Positions*

In addition to the arguments presented by the litigants, interested parties filed 17 amicus curiae briefs. On the one hand, supporting the government and the constitutionality of the exemption were many states, members of Congress, student loan servicing centers and several consumer interest groups. In the amicus brief submitted by the states, the states argued, among other things, that the robocall ban should be upheld because it prohibits highly intrusive robocalls regardless of content and therefore passes First Amendment scrutiny. In the amicus brief submitted by the members of Congress, they argued that the TCPA is a critical law that stops intrusions on Americans’ privacy, deters scams, and protects the integrity of the telephone as a means of communication. Consumer groups similarly argued that the TCPA protects government interests “of the highest order” (according to Public Citizen) and argued that invalidation would harm consumer privacy. The consumer interests generally argued that, even if the government debt collection provision fails to satisfy scrutiny, the remainder of the TCPA should survive.

Notably, while not supporting either party, consumer groups the National Consumer Law Center and Consumer Federation of America, joined by telecommunications carrier Verizon, argued that the government’s interest is compelling and argued in support of the TCPA’s restrictions on calling, particularly restrictions on unconsented calls to cellular phones.

On the other hand, supporting the position that the provision is unconstitutional were the U.S. Chamber of Commerce, debt collection companies, several business groups and several free speech groups. In its amicus brief, the Chamber of Commerce argued that the TCPA should be invalidated because the autodialer restriction has become a tremendous source of meritless litigation that FCC guidance has not addressed. Similarly, trade groups such as the Retail Energy Supply Association argued that the government debt collection exemption is not severable because Congress would not have adopted such broad restrictions on automated calls without the exemptions adopted in the statute. Debt collectors such as Portfolio Recovery Associates sounded a similar point, arguing that the TCPA’s “open ended delegation of authority” to the FCC to create exemptions renders the statutory scheme unconstitutional. The Retail Litigation Center, while ostensibly not taking a position on either issue, offered an extensive critique of the TCPA’s “real world effects” on communications with customers and urged the Court to “address this dysfunction” in its disposition of the case.

### **What to Watch For in Oral Argument**

With this lineup of arguments, the Supreme Court will hear oral argument in a highly unusual setting. Due to the COVID-19 pandemic, the Supreme Court scheduled its first-ever arguments to be held via

teleconference for this week, giving court-watchers an unprecedented opportunity to hear arguments live, rather than via audio files released after the argument. Due to the teleconferencing format, the Justices will ask questions in order of seniority, rather than the customary rapid-fire open questioning format. In earlier arguments this week, the approach permitted a more straightforward examination of the issues, with fewer interruptions in the litigant's arguments.

The resolution of *Barr* could affect many stakeholders. A key question to watch will be the extent to which the Court entertains questions relating to severability of the government debt collection exemption and the broader TCPA critiques offered by various amicus parties. While the Supreme Court has ruled in several TCPA cases recently, thus far, it has addressed the issues narrowly or on grounds not exclusive to the TCPA. We will be watching to see if the Court may deviate from this approach in *Barr* and bring some clarity to the more contentious provisions of the TCPA.

