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MAY 6, 2020

SCOTUS hears case with potential to flush the TCPA down the toilet

By Dan Deane, Troy K. Lieberman, and Henry Caldwell

The U.S. Supreme Court heard oral argument this morning in a case challenging the constitutionality of an exemption to the automated call ban of the Telephone Consumer Protection Act (TCPA). Fittingly, due to the COVID-19 pandemic, the arguments were conducted via teleconference call, which was live-streamed to the public. In *Barr v. American Association of Political Consultants, Inc.*, the parties address whether the federal government debt-collection exemption to the TCPA violates the Free Speech Clause of the First Amendment and, if so, whether the proper remedy is to sever just the exemption or to strike down the entire TCPA prohibition on automated calls. The latter outcome would upend—and likely drastically reduce—TCPA litigation as it stands today. During oral argument, a majority of justices sounded dubious about the constitutionality of the government debt-collection exemption. Nevertheless, notwithstanding an audible flushing sound during arguments, the questions and comments of most justices suggested that they may rule narrowly, severing the exemption and refraining from flushing the statute altogether.[1]

In 2015, Congress carved out an exemption to the TCPA for automated calls related to the collection of debts owed to or guaranteed by the federal government. This "federal government debt-collection exemption" was challenged by the American Association of Political Consultants (AAPC), which sued the Federal Communications Commission (FCC) claiming that the exemption was unconstitutional, namely because the exemption "create[d] a regime that permits—and thereby unconstitutionally favors—a select group of otherwise prohibited automated calls to cell phones." The AAPC argued that the exemption violates the Free Speech Clause of the First Amendment because the content of the call (i.e., government-backed debts versus other commercial debts) ultimately determined whether a call is permissible under the TCPA.

The North Carolina federal district court granted summary judgment to the FCC, ruling that the debt-collection exemption did not violate the Free Speech Clause despite the exemption making

[1] Multiple court watchers, including these authors, have reported hearing the unmistakable sound of a toilet handle being pushed, followed by a whoosh of rushing water. *See, e.g.*, Ariane de Vogue, "Supreme embarrassment: The flush heard around the country."

content-based distinctions—rather than focusing on the relationship of the parties to the call—because the exemption does not "subvert the privacy interests" furthered by the automated call ban. In other words, the debt-collection exemption does not hinder the automated call ban from furthering the government's interest in protecting "the well-being, tranquility, and privacy" of American consumers from intrusive automated phone calls.

A unanimous panel of the U.S. Court of Appeals for the Fourth Circuit reversed, holding that the debt-collection exemption was unconstitutional. The Fourth Circuit ruled the plain language of the exemption was content-based rather than relationship-based and therefore failed to advance a sufficiently important government objective in a narrowly tailored fashion. Focusing on the context of student loan debt, the Fourth Circuit noted that millions of debtors owe debts about which third parties can make otherwise prohibited calls. Unlike the consent and emergency exemptions to the TCPA, the debt-collection exemption impedes the privacy interests of the automated call ban and "is thus an outlier among the [other] statutory exemptions" under the TCPA. However, the Fourth Circuit did not go so far to find that the entire TCPA prohibition on automated calls was unconstitutional. Rather, the Fourth Circuit severed the exemption, leaving the TCPA's automated call ban intact. A similar result was reached by the U.S. Court of Appeals for the Ninth Circuit as well as in federal district courts in Delaware, Florida, and Massachusetts.

The Supreme Court granted the government's writ of certiorari. There are at least three possible outcomes from the Supreme Court. The *first*, and perhaps most likely result, based on the questions and tone of the justices today, is that the Court will affirm the Fourth Circuit's ruling in its entirety, finding the debt-collection exemption unconstitutional and severing it from the rest of the TCPA. Most of the justices seemed troubled by the content-based distinction drawn by the exemption—allowing debt collectors to make commercial robocalls at will while stifling political organizations from using the same technology to spread political messages. At the same time, a majority also seemed hesitant to jettison an immensely popular consumer protection statute that has not faced a significant constitutional challenge in nearly 30 years. If the majority rules this way, it would mean that debt collectors making calls on debts owed to or guaranteed by the federal government would again be regulated by the TCPA. While a spike in new TCPA litigation would likely follow, ultimately, this result would not substantially change the status quo.

Second, the Supreme Court could affirm the unconstitutionality of the debt-collection exemption, but find that it cannot be severed from the TCPA. This outcome would have the effect of striking most, if not all, of the TCPA statute and upend the entire TCPA landscape. Such a result would be a welcome relief to many businesses who currently risk massive liability whenever they attempt to use modern communication strategies to stay in contact with their customers and consumers. Indeed, the U.S. Chamber of Commerce filed an amicus brief with the Supreme Court, advocating to the business-friendly wing of the Court, writing that almost 3,000 TCPA cases were filed in the first three months of 2020 and "[t]he rush will continue unless this Court intervenes." This outcome seems unlikely, however, as the majority of the justices seemed to recognize the important privacy interests that the TCPA safeguards.

Finally, a reversal of the Fourth Circuit's opinion would allow the debt-collection exemption to remain in place and indicate that Congress could further carve out permissible content-based exemptions to the TCPA's prohibitions. A minority of justices—namely, Breyer and Kagan—made comments indicating that they might support such a result. They appeared less offended by the debt-collection exemption's impact on speech, seeing the statute, coupled with the exemption, as a tool designed to regulate economic activity more so than speech.

Nixon Peabody's TCPA team is continuing to monitor this case as well as other TCPA developments in the federal courts. Among others, another petition currently pending before the Supreme Court raises a related question—for purposes of the autodialer ban, what exactly is an autodialer? This case could also have a massive impact on TCPA litigation going forward.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Dan Deane, 603-628-4047, **ddeane@nixonpeabody.com**
- Troy Lieberman, 617-345-1281, **tlieberman@nixonpeabody.com**
- Henry Caldwell, 312-977-4435, **hcaldwell@nixonpeabody.com**