



CLIENT BULLETIN

Supreme Court of the United States to Evaluate Constitutionality of TCPA Provision on Autodialers (ATDS)

The Supreme Court recently granted a petition for writ of certiorari in *Barr v. American Assoc. of Political Consultants Inc.*, 19-631, on appeal from a Fourth Circuit ruling. In that case, the Fourth Circuit had considered whether the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, violated the First Amendment by prohibiting the use of an automated telephone dialing system (“ATDS”), commonly referred to as an autodialer, in certain circumstances but not others. *Am. Ass’n of Political Consultants, Inc. v. Fed. Communications Comm’n*, 923 F.3d 159 (4th Cir. 2019), *cert. granted sub nom. Barr v. Political Consultants*, 19-631, 2020 WL 113070 (U.S. Jan. 10, 2020). This issue also has been considered by the Ninth Circuit in two cases in which petitions for writ of certiorari are also pending before the Supreme Court. *Duguid v. Facebook, Inc.*, 926 F.3d 1146 (9th Cir. 2019) and *Gallion v. United States*, 772 Fed. Appx. 604, 605 (9th Cir. 2019).

These opinions deal with the TCPA definition of an ATDS and how the scope of the section prohibiting the use of an ATDS to make calls (and send texts) has changed over time through amendments to the Act. Since the TCPA was originally enacted, the definition of an ATDS has remained the same: equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers. 47 U.S.C. § 227(a)(1). However, the section dealing with the prohibition on calls (and texts) made using an ATDS has “evolved” legislatively. Calls made with the consent of the recipient and those made “for emergency purposes” were exempted from the

prohibition years ago. 47 U.S.C. § 227(b)(1)(A). Effective November 2, 2015, Congress added a third exception for calls made to collect a debt owed to, or guaranteed by, the United States. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 301(a)(1)(A), 129 Stat. 584, 588; 47 U.S.C. § 227(b)(1)(A)(iii). It is this post-amendment version of the TCPA, with the addition of the government debt-collection exception, that several TCPA defendants have contended is unconstitutional. They have argued that the debt-collection exception added a “purposive element” to the statute and changed the applicable framework. *Duguid*, 926 F.3d at 1153. The Ninth Circuit in *Duguid* agreed with this argument, holding that, with the addition of the debt-collection exception, the “TCPA now favors speech ‘solely to collect a debt owed to or guaranteed by the United States.’” *Id.*, citing 47 U.S.C. § 227(b)(1)(A)(iii). *Duguid* and other courts have found that this section now “target[s] speech based on its communicative content,” and thus is content-based and subject to strict scrutiny.” *Id.* (quoting *Reed v. Town of Gilbert, Ariz.*, — U.S. —, 135 S. Ct. 2218, 2226, 192 L.Ed.2d 236 (2015)).

If the Supreme Court determines the debt-collection provision is unconstitutional, it must decide whether to sever only the government debt-collection exception from the TCPA or void the entire section prohibiting the use of an ATDS. If the Supreme Court eliminates only the debt-collection exception and leaves the other exceptions in place, it will broaden the statute's limitation on speech and allow the statute to stand as it did prior to the November 2015 debt collection amendment. This



would effectively acknowledge the statute did not violate constitutional principles prior to the 2015 amendment. The general law on severability suggests that courts have latitude to sever portions of statutes that run afoul of constitutional requirements so long as they leave as much of the statute intact as possible. *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 37, 134 S. Ct. 2165, 2173, 189 L. Ed. 2d 83 (2014). Arguably, however, there is a distinction to be made in First Amendment cases with regard to severability which could come into play. Implications are wide-ranging and the impact would be immediate if the Supreme Court voids the entire section prohibiting the use of an ATDS, as the TCPA is heavily litigated nationwide.

Chittenden, Murday & Novotny LLC will continue to monitor developments on this issue and update its clients accordingly.

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