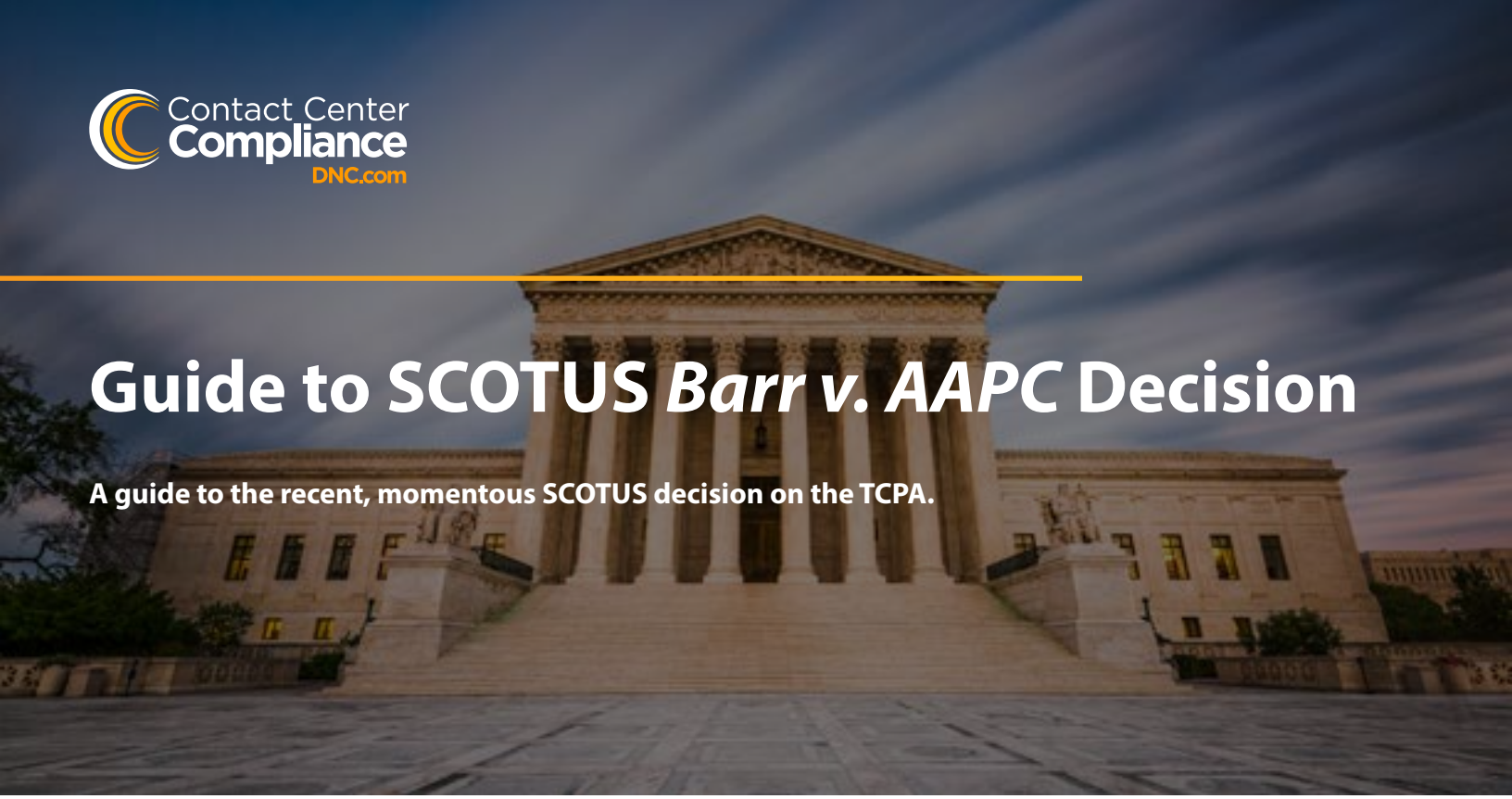


Guide to SCOTUS *Barr v. AAPC* Decision

A guide to the recent, momentous SCOTUS decision on the TCPA.

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Overview

In 2020, after literally decades of legal challenges and important rulings in lower courts, the United States Supreme Court finally heard a case with the potential to determine the fate of the Telephone Consumer Protection Act (TCPA).

Well, the ultimate result of *William P. Barr, et al. v. American Association of Political Consultants, et al.* is that the Supreme Court upheld the TCPA by severing the offending portion from the law. So the status quo remains.

However, there are many questions raised by this case, from its background to its arguments to its conclusions and finally to its potential consequences. This guide will ask and answer some of the most common and pertinent of those questions.

Read Ahead

Are you mostly concerned what this ruling means for your telemarketing business? Skip ahead to the final section of this guide, titled "Consequences".

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Background

What is the origin of the TCPA issue in this case?
The TCPA, as originally enacted in 1991, contained two statutory exemptions to its ban on autodialed calls: one for calls made for "emergency purpose" and one for calls made with "the prior express consent of the called party." These two exemptions remain foundational aspects of TCPA compliance to this day. In 2015, Congress added a third exemption for calls "made solely to collect a debt owed to or guaranteed by the United States." This third exemption is the cause of the dispute at the center of this case.

How was this government-owned debt exemption challenged?
In May 2016, the American Association of Political Consultants (AAPC), a group representing political and polling organizations, filed suit (*American Association of Political Consultants, Inc., et al v. FCC*) against the Federal Communications Commission (FCC) over this new exemption. The AAPC challenged it on First Amendment grounds, alleging that it creates a content-based restriction on speech.

The plaintiffs argued that, because content-based laws must satisfy the strict scrutiny test of the First Amendment, the TCPA ban on the use of automatic telephon dialing systems (ATDS) to make phone calls to cellphones without prior consent was an unlawful, content-based restriction on free speech. They reasoned that the debt collection exemption created a rule that unconstitutionally favored a select group.

How was *AAPC v. FCC* decided?
When this case originally came before the District Court in 2018, the court ruled in favor of the government. They concluded that the government-backed debt exemption, though content-based, passed strict scrutiny and was constitutional.

In April 2019, the case came before the Fourth Circuit on appeal. The court ruled that the debt-collection exemption does not pass strict scrutiny and, therefore, violates

Fun Fact

Throughout the various iterations of this case, the AAPC has consistently argued that the only correct remedy to the constitutional issues with the debt exception is to invadilate the TCPA as a whole.

the First Amendment because it caused the statute to unconstitutionally discriminate against other forms of speech which did not enjoy the same exemption.

What was the Fourth Circuit's reasoning for finding the debt exemption to be unconstitutional?
In their ruling, the Fourth Circuit agreed with the District Court's conclusion that the exemption was content-based. They found that "the relationship between the federal government and the debtor is only relevant to the subject matter of the call. In other words, the debt collection exemption applies to a phone call made to the debtor because the call is about the debt, not because of any relationship between the federal government and the debtor."

The Fourth Circuit disagreed with the District Court on whether the exemption survived strict scrutiny. They claimed the exemption authorized "the intrusive calls that the [TCPA] was enacted to prohibit," thereby undermining any privacy protections and deviating "from the purpose of the automated call ban."

To show how the government exemption did not pass strict scrutiny, the Fourth Circuit specifically pointed to the volume of federal student loan debt. There are over 41 million borrowers, as reported by the FCC, who owe over $1 trillion on federal student loans. The court viewed this fact as evidence that the government debt exemption was not "narrow" in scope, as would be required to pass the strict scrutiny test.

What remedy did the Fourth Circuit apply in this decision?
The court did not find the TCPA's ban on automated calls unconstitutional as a whole. Such a ruling would have totally invalidated the TCPA and caused unprecedented chaos in heavily regulated telephony industries. Instead, the court severed "the flawed exemption" from the TCPA, holding that the TCPA had operated successfully for 24 years without the exemption, which suggested that removing the exemption was a better outcome than invalidating the entire statute.

Fun Fact

The TCPA has now enjoyed 29 years of service. It celebrates its 30th birthday in December of 2021.

Barr v. AAPC

What happened after the Fourth Circuit ruling?
The government appealed the Fourth Circuit's ruling, still arguing that the debt exemption was constitutional. Eventually, the Supreme Court agreed to hear the case. In May 2020, the Supreme Court heard oral arguments in the case—now appearing as *William P. Barr, et al. v. American Association of Political Consultants, et al.*

How did the government defend its position?
The government essentially conceded before oral arguments that the government-backed debt exemption did not survive strict scrutiny, leaving it to argue instead that the exception should survive on the grounds that it is not a content-based restriction.

The justices did not seem especially receptive to this argument, with Justice Brett Kavanaugh saying, "I think the government-debt exception is almost certainly content-based. You don't argue that it could satisfy strict scrutiny. Those two things make this a case about severability."

Severability, of course, refers to the remedy utilized by the Fourth Circuit, as recounted above.

Did the justices seem persuaded by this argument?
The justices also seemed skeptical of severability as a good remedy. Chief Justice John Roberts pointed out that the courts usually sever provisions because they are, themselves, illegal, whereas, in this case, the provision ostensibly makes the statute, as a whole, unconstitutional.

Fun Fact

Due to the COVID-19 crisis, the case was one of the first to have oral arguments delivered over the phone rather than in person.

Justices Clarence Thomas, Sonia Sotomayor, and Ruth Bader Ginsburg also questioned the appropriateness of severing the exception.

Justice Neil Gorsuch pointed out that the government had not actually even argued for the exception to be severed and did not have the standing to seek that remedy anyway.

Did this make it more likely that they'd get rid of the entire statute?

While this seemingly pointed to the likelihood of the court invalidating the TCPA as a whole, multiple justices repeatedly went out of their way to describe it as a very popular law. Chief Justice Roberts said, "It's an extremely popular law. Nobody wants to get robocalls on their cell phone." Justice Kavanaugh said, "This is one of the more popular laws on the books because people don't like cell phone robocalls. That seems just common sense."

Ok, is it just me, or does this seem a little all over the place?

It's not just you. In the immediate aftermath of oral arguments, the general consensus from TCPA experts and legal analysts was that it was extremely difficult to predict how the justices would rule, with at least a half a dozen different plausible outcomes.

Fun Fact

Most of the FCC's enforcement efforts against the sorts of illegal robocalls that the Justices decried involve technological solutions like STIR/SHAKEN rather than the TCPA.

SCOTUS Decision

Did the Supreme Court invalidate the TCPA in its *Barr v. AAPC* decision?
No. The Court opted to affirm the Fourth Circuit's ruling and sever the unconstitutional exemption on government-backed debt rather than ruling the entire TCPA to be unconstitutional.

What was the reasoning behind this decision?
To begin, the Court affirmed that the debt exemption was an unconstitutional, content-based restriction due to the fact that it "focuses on whether the caller is speaking about a particular topic" and "does not sufficiently justif[y] the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like."

As to the question of remedy, the Court explained that severability, in general, "supplies a workable solution - one that allows courts to avoid judicial policymaking or de facto judicial legislation in determining just how much of the remainder of a statute should be invalidated."

Regarding the question of whether or not the TCPA could function without the debt exemption, the Court noted that "the remainder of the robocall restriction did function independently and fully operate as a law for 20-plus years before the government-debt exception was added in 2015."

In light of all of this, the plurality of justices agreed that the best remedy was to sever the debt exemption and allow the rest of the statute to remain in force.

Did You Know?

The Communications Act of 1934—the underlying law which the TCPA amends—contains a severability clause that can apply to the debt exemption.

Did the justices continue to invoke the supposed popularity of the TCPA?
Yes. Just as he and other justices had during oral arguments, Justice Kavanaugh's opinion works from the assumption that, aside from the flawed debt exemption, the TCPA is a very effective and popular law. It begins with the following paragraph:

"Americans passionately disagree about many things. But they are largely united in their disdain for robocalls. The Federal Government receives a staggering number of complaints about robocalls—3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints."

Based on the written opinions, is it clear that the justices understand the difference between robocalls and other sorts of calls made with an ATDS?
It is not. Dialing terminology is used haphazardly, with very different forms of dialing that are subject to different kinds of regulations in lower courts being conflated with one another.

How did the individual justices vote?
Perhaps reflecting the muddled oral arguments, the specifics of the decision are somewhat jumbled. Six of the other justices either joined or concurred, as a whole or in part, with Justice Kavanaugh's opinion severing the debt exemption. It is interesting to note that Justices Breyer, Kagan, and Ginsburg did not even find the debt exemption to be unconstitutional but still concurred with the opinion regarding severability. Justices Gorsuch and Thomas were the only members of the court to oppose severing the debt exemption.

Fun Fact

American litigators passionately agree that the TCPA is one of the best cash cows ever enacted with approximately 3,250 TCPA lawsuits filed in 2019 with approximately 1,015 of those being class actions.

Consequences

What does this mean for callers going forward?
For most callers, the landscape of telemarketing regulations remains essentially unchanged.

Does this ruling explicitly change things for anybody?
The one category of telemarketers who may be affected by this ruling are those who collect on government-backed debt. But since the Fourth Circuit's April 2019 decision, even those callers should have been operating under the assumption that the debt exemption was invalid.

Will collectors who relied on the debt exemption between 2015 and 2019 years be found retroactively liable?
The decision does not address this question so it remains to be seen if this will become a source of litigation.

Does this mean the TCPA is permanently enshrined?
Nothing is permanent. In fact, within days of their decision in *Barr*, the Court accepted a petition for writ of certiorari for a case, *Facebook v. Duguid*, that more directly challenges the ATDS issue and the TCPA as a whole.

For the time being, though, the *Barr* decision definitely does strengthen the TCPA. During a Contact Center Compliance webinar to discuss the *Barr* ruling, we hosted a TCPA plaintiff attorney as a guest. He posited that he could imagine this decision causing himself and his fellow plaintiff attorneys to feel more emboldened to bring cases and ask for larger damages.

Will TCPA litigation increase in the wake of this decision?
In all likelihood, yes. In the months leading up to oral arguments and the decision in this case, the number of TCPA cases filed had actually decreased slightly. Some lower courts had even stayed decisions until after the SCOTUS ruling in *Barr*. With the uncertainty about the TCPA's future removed by the Court's decision, it seems like a fair bet that litigation will increase.

Fun Fact

In 2016 the FCC declared that "the TCPA does not apply to calls made by or on behalf of the federal government in the conduct of official government business, except when a call made by a contractor does not comply with the government's instructions." A footnote in the *Barr* ruling seemingly referenced this declaratory ruling by mentioning that "[t]he robocall restriction applies to 'persons,' which does not include the Government itself."

What does this mean for the various kinds of dialing technology at the center of the ever-changing debate over the definition of an ATDS?
Barr was focused pretty squarely on the debt exemption and never addressed the issues relating to the ATDS definition. However, the aforementioned, forthcoming *Facebook v. Duguid* case seems likely to address this question.

What can I do to protect myself?
If you are a telemarketer, the most important lesson that you should take from this case is you need to protect yourself. The TCPA remains a powerful but vaguely and variously interpreted weapon for litigators, regulators, and plaintiffs. Whatever compliance procedures you have, double-check them to make sure they are solid. Scrub for litigators. Have good procedures for acquiring and documenting consent. Maintain an internal Do Not Call (DNC) list and abide by the strictures of the state and federal DNC lists. Track your Established Business Relationships (EBRs). And just to emphasize it, we'll repeat it: make sure you have proper consent.

Are there any silver linings?
There is a 16th-century Irish proverb: better the devil you know than the devil you don't. The TCPA, for all its flaws, is a known entity. There are proven methods to protect your business and reduce your risks of facing litigation.

But if the TCPA had been invalidated, it could have opened a Pandora's Box. Litigators would not have simply folded their hands and sat quietly. Instead, they likely would have pursued cases based on state laws, regulatory statutes, and a wide variety of other methods that do not have a track record anywhere near as long or comprehensible as the TCPA.

While the prospect of the TCPA being thrown out and eventually replaced by a less flawed statute is an enticing fantasy, the immediate result of such a decision almost certainly would have been very messy.

Fun Fact

State-level telemarketing regulations are such a confusing morass, made up of numerous overlapping and sometimes contradictory statutes.