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Nine Amicus Briefs Filed in Support of Attempt to Invalidate TCPA Autodialer Ban

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On April 1, 2020, nine amicus briefs were filed in *Barr, et al. v. American Association of Political Consultants, et al.*, currently pending in the Supreme Court, in support of an attempt to invalidate the TCPA's ban on autodialed calls and texts to cellphones. The ban generally restricts persons or entities from placing automated calls or texts to cell phones without the recipients' prior express consent. A host of businesses and associations affected by the ban—including Facebook and businesses from the energy, financial services, and tech industries—filed the amicus briefs and argued the TCPA's blanket ban on autodialed calls and texts to cell phones should be struck down.

The appeal stems from a Fourth Circuit decision (previously discussed here), which found a provision that exempted government-backed debt collectors from the autodialer ban unconstitutional and in violation of the First Amendment. The Court reasoned that the exemption was a content-based restriction on free speech that did not pass "strict scrutiny" review. In doing so, the Fourth Circuit severed the offending provision from the rest of the statute but did not strike down the entire autodialer ban. The amici argued that the Fourth Circuit incorrectly severed the offending provision and that the proper remedy for the First Amendment violation was to invalidate the entire autodialer ban.

For example, Facebook argued, "[s]everability principles do not empower courts to rewrite a statute or deny successful litigants an effective remedy." Facebook Brief at 19. Accordingly, "the proper remedy for a successful challenge is to invalidate the speech-abridging prohibition [the autodialer ban], not to excise a speech-permitting exception [the government-backed debt collectors' exemption] with the net effect of having the courts abridge even more speech than Congress [did]." *Id*.

The other amici raise similar arguments in their own briefs. The Cato Institute argued that the government-backed debt collectors' exemption makes the TCPA "fundamentally incompatible with basic First Amendment principles" because it "prefer[s] speech that benefits the government based on its content." Cato Institute Brief at 2. The Retail Energy Supply Association argued that virtually all content-based regulations of speech contained in the TCPA are unconstitutional in light of the Fourth Circuit striking down the government-backed debt collectors' exemption. Importantly, it also argues that Congress would never have enacted the autodialer ban if it knew there could be virtually no content-based carve outs from the ban. Similarly, the U.S. Chamber of Commerce argued that "the

remedy for a First Amendment violation is *more* speech, not less[,]" and that this case presented the Supreme Court with an opportunity to stop the rising tide of "meritless TCPA litigation" in the federal courts. Chamber of Commerce Brief at 3, 5.

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