

## Government-Backed Debt Exemption Unconstitutional, Must Be Severed, Says Ninth Circuit

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After the TCPA [went under the Fourth Circuit's knife](#) in *AAPC v. FCC*, No. 18-1588 (4th Cir. Apr. 24, 2019), the statute was back on the operating table with another constitutional challenge before the Ninth Circuit. In *Duguid v. Facebook*, No. 3:15-cv-00985-JST (9th Cir. June 13, 2019), the Ninth Circuit considered the same challenge to the constitutionality of the TCPA brought on the basis that the government-backed debt exemption under the TCPA rendered the Act's prohibition on ATDS calls to cell phones an unconstitutional restriction on free speech. And perhaps not surprisingly, the TCPA once again survived the procedure with the Ninth Circuit taking a page out of the *AAPC* opinion and holding that the government-back debt exemption rendered the TCPA unconstitutional, but the appropriate remedy was to sever the flawed exemption versus striking down the ATDS prohibition in its entirety.

In addition, the court addressed a secondary challenge by Facebook which concerned the meaning and scope of the Ninth Circuit's interpretation of Automatic Telephone Dialing System ("ATDS") in *Marks v. Crunch*, 904 F.3d 1041 (9th Cir. 2018). In its opinion, the Ninth Circuit doubled down on its broad interpretation of the statute, and did not exactly shy away from the fact that its "rearticulated" definition of ATDS may encompass everyday smartphones.

### The Constitutional Issue

The Constitutional issue raised in the case is whether the government-back debt exemption caused the TCPA to violate the First Amendment protection of free speech because it is a content-based speech restriction. The government-back debt exemption to the TCPA was adopted by Congress as part of the Bipartisan Budget Act of 2015. The exemption allows ATDS calls to be placed if they were for the purpose of collecting a government-backed debt (the "debt-collection exemption") without the typical level of prior express consent associated with non-government backed debt calls made using an ATDS. In other words, a debt collector calling to collect on certain government backed mortgages or student loans were exempt from the TCPA, but the same debt collector would not be exempt if calling to collect on a non-government backed loan.

Similar to the Fourth Circuit's *AAPC* opinion, the court in *Duguid* broke the constitutional issue down into the following questions:

1. Does the government-backed debt exemption added by Congress to the TCPA in 2015 render the statute a content-based restriction on free speech that is subject to strict scrutiny?
2. If so, does the TCPA survive strict scrutiny as a narrowly tailored law that serves a compelling state interest?
3. If not, what is the appropriate remedy for curing this constitutional infirmity?



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## **The Government-Backed Debt Exemption Renders the TCPA a Content-Based Restriction on Free Speech That is Subject to Strict Scrutiny**

The Ninth Circuit found that the government-backed debt exemption changed the framework of the TCPA by “favor[ing] speech ‘solely to collect a debt owed to or guaranteed by the United States.’” The court reasoned that, as a result, the TCPA targeted speech based on its “communicative” conduct and was therefore content-based.

The government countered with the same argument it asserted in *AAPC*: the exemption was not based upon the content of the communication, but the relationship with the caller. The court rejected the argument on the basis that—as the exemption was written—“[t]he identity and relationship of the caller are irrelevant.” Instead, the text of the statute “makes clear that the availability of the exception depends exclusively on the purpose and content of the call.”

Notably, the court seemed to suggest that relationship-based exemptions would likely pass constitutional muster, and pointed to a Seventh Circuit opinion in which the court upheld certain exemptions under Indiana’s version of the TCPA that were relationship-based (i.e., school/parent relationships, and current business or personal relationships). And the Ninth Circuit may be on to something here because these types of relationship-based exemptions already exist within the TCPA. For example, the TCPA currently contains exemptions based upon the relationship between the caller and called party, including exemptions based on “personal relationships” and “established business relationships.”

## **The Government-Backed Debt Collection Exemption Fails Strict Scrutiny**

Turning to the next question, the Ninth Circuit found that TCPA failed strict scrutiny calling the compelling interest the government articulated as the basis for the statute a “head-scratcher.” Specifically, the government stated that the interest the exemption advanced was “the protection of personal and residential privacy.” While this may be the interest that animates the TCPA as a whole, the Ninth Circuit was unconvinced this also somehow supported the constitutionality of the content-based government-backed debt exemption because “robocalls to collect government debt are just as invasive of privacy rights as robocalls placed for other purposes.”

The government also “halfheartedly” advanced an alternative interest that justified the exemption: protecting the public fisc. The Ninth Circuit found that even assuming this was a sufficiently compelling interest, the statute would still fail strict scrutiny because the exemption was not narrowly tailored. The court reasoned that there were other content-neutral ways in which Congress could have advanced this interest, including by phrasing the exemption “in terms of the relationship rather than content.”

## **The Appropriate Remedy is to Sever the Government-Backed Debt Collection Exemption From the TCPA**

Having found that the exemption at issue rendered the TCPA unconstitutional, the Ninth Circuit next considered whether to use a sledgehammer or a scalpel in fashioning the appropriate remedy. The court followed suit with the Fourth Circuit and chose the scalpel. The court reasoned that severance was the appropriate remedy to cure the constitutional defect created by the government-backed debt collection exemption for two reasons. First, Congress had stated a preference toward severability with respect to the various statutes contained within its broader communication laws (which include the TCPA). Second, the debt collection exemption was not “integral” to the TCPA, and so excising it would “preserve[] the fundamental purpose,” of the statute.

## **The ATDS Issue**

The text messages at issue in Duguid’s lawsuit were certain automated account notifications sent by Facebook to alert its users when an unrecognized browser was attempting to access the user’s Facebook account (but the problem was Duguid allegedly did not have a Facebook account, and never consented to the texts).

Initially, Facebook called out the [Marks ATDS definition](#) for what it does: sweep ordinary smartphones within the scope of the TCPA’s regulations. It argued, however, that this result may be avoided by reading a distinction into the definition between “reflexive” messages (i.e. like those sent by Facebook) versus “proactive” messages (such as messages sent as part of an advertising campaign).

In *Marks*, the Ninth Circuit effectively re-defined (or in its words, “rearticulated”) the statutory definition of an ATDS as “equipment which has the capacity—(1) to store numbers to be called or (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically.” Facebook’s argument was based upon its reading of the term “to be called,” and it reasoned that the term was inapplicable to “purely responsive messages because numbers stored to send such messages were not stored ‘to be

called.’”

The Ninth Circuit was ultimately unconvinced by this creative argument, finding “no basis to exclude equipment that stores numbers ‘to be called’ only reflexively,” particularly where the TCPA only requires that a system only have the “capacity” to store numbers to be called. Notably, while the Ninth Circuit seems to have acknowledged the fact that its “rearticulated” ATDS definition could encompass smartphones, it largely danced around this problem in the opinion. The court simply remarked that the problem pointed out by Facebook would not be remedied by the proposed “active-reflexive” distinction since “the quintessential purpose for which smartphone users store numbers is ‘to be called’ proactively.”

Ultimately, this aspect of the court’s opinion shows that the Ninth Circuit is neither shying away nor backing down from the broad, “rearticulated” definition of ATDS set forth in *Marks v. Crunch*.

## Takeaways

The Ninth Circuit really just took a page out of the Fourth Circuit’s *AAPC* opinion. Notably, this was considered a likely outcome, as we [pointed out](#) when the Fourth Circuit’s *AAPC* opinion was issued in April of this year:

*AAPC* may very well be a bellwether on what we might expect out of the similar constitutional challenges to the TCPA pending before the Ninth Circuit. Although the Ninth Circuit is generally protective of the First Amendment, it also showed a propensity to do-no-harm to the TCPA in last year’s *Marks v. Crunch* appeal in which it applied an expansive interpretation of ATDS to preserve the status quo on the applicability of the TCPA to modern dialing technology. Thus, we might very well see the Ninth Circuit take a page out of *AAPA* in its own approach to the issue.

Two major challenges to the TCPA have now been brought before the Ninth Circuit—one based on the definition of ATDS, and the other based upon the constitutionality of the statute. In both instances, the Ninth Circuit has acted to preserve the TCPA status quo. The first in *Marks*, by “rearticulating” the statutory definition of ATDS to encompass modern-day dialing technology. The second in *Duguid*, by preserving the overall statutory scheme by excising a constitutionally infirm exemption.

To the extent Congress takes up the exemption again—which it might since two circuit courts have elected to sever the exemption from the statute—it could re-state the exemption as a relationship-based versus content-based exemption. As discussed, the Ninth Circuit seemed to suggest that such an exemption would pass constitutional muster and, as pointed out above, the TCPA already contains other types of relationship-based exemptions.

In practical terms, the *Duguid* opinion means that collectors of government-backed debt (including student loans), just had the rug pulled out from under them in the Ninth Circuit, potentially leaving such businesses naked in the face of private TCPA litigation. This will likely lead to an uptick in TCPA lawsuits against these types of businesses, at least within the Ninth Circuit’s footprint. And this was just what we saw within the Fourth Circuit when, just days after the *AAPC* opinion, a large national student loan debt collector was hit with a TCPA class action lawsuit.

The Ninth Circuit’s opinion again illustrates that there is no silver bullet when it comes to the TCPA. Given the current public climate over the issue of robocalls, it’s more important now than ever to ensure that your call and text message campaigns are TCPA compliant.

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