Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Lawmakers Back TCPA In High Court Constitutionality Fight

By **Allison Grande**

Law360 (March 2, 2020, 11:10 PM EST) -- The Senate Democrat who authored the Telephone Consumer Protection Act, more than a dozen of his congressional colleagues and Verizon are among those urging the U.S. Supreme Court to reject a constitutional challenge to the statute's blanket ban on autodialed calls to cellphones, arguing that invalidating the provision would have a "devastating impact" on consumers.

The federal lawmakers and telecom giant made their push in two of eight amicus briefs that were filed in the high court dispute on Monday by a range of stakeholders, Including attorneys general from 33 states, the U.S. Conference of Mayors, the Electronic Privacy Information Center, Public Citizen, the National Retail Federation and the Student Loan Servicing Alliance.

The briefs tackled the issue before the justices of whether an exemption to the 1991 TCPA that allows government-backed debt collectors to skirt the statute's general ban on autodialed calls and texts violates the First Amendment and, if it does, whether the appropriate remedy is to strike down the exemption, as the Fourth Circuit did, or invalidate the entire autodialer ban.

While the group of 15 Democrats from the U.S. Senate and House of Representatives declined to take a position on the constitutionality of the 2015 debt collection exception, they argued that the rest of the TCPA should be preserved, as it remains an "essential" tool for fighting the robocalls it was enacted to deter and that striking down these protections would have a "dramatic and devastating impact" on consumers who already face a barrage of these calls.

"Just as the number of unwanted calls continues to grow despite the existence and enforcement of the TCPA, in the absence of the safeguards provided by the TCPA, the number of unwanted calls would grow exponentially, as businesses and others could make robocalls with impunity," the lawmakers argued. "This robocall explosion would render our cell phones utterly useless as a means of communication."

The lawmakers — led by Sen. Ed Markey of Massachusetts, who authored the TCPA nearly three decades ago as a member of the House, and Rep. Anna G. Eshoo of California — contended that the TCPA "does not and was never intended" to restrict speech, but rather "merely regulates communications when particular technologies are employed based on the relationship between the parties."

"Under any relevant level of scrutiny, the TCPA restrictions on automated calling technologies are an appropriate mechanism for protecting Americans from the plague of unwanted robocalls," the lawmakers said. "Thus, the TCPA is also fully consistent with the First Amendment."

The lawmakers' arguments echoed those made in several other amicus briefs, including one submitted jointly by the National Consumer Law Center, Verizon and the Consumer Federation of America.

Noting that they weren't supporting either litigant in the dispute, which pits the federal government against the American Association of Political Consultants and three other groups, the amici argued that the TCPA "plays a critical role in protecting the country's communications from being deluged by automated, unsolicited calls to mobile phones" and that the Supreme Court shouldn't undermine Congress' ability to enact such legislation that "balances customers' privacy and network integrity against the need for certain important messages to get through to customers."

"In contrast to legitimate calls made by companies to their customers, the TCPA prohibition on robocalls to cellular subscribers without consent constitutes a critical protective measure that, if removed, would risk exponentially increasing the already large number of unwanted robocalls and rendering legitimate calls ineffective" by deterring consumers from picking up calls from "legitimate companies" that use autodialers to connect with customers who have provided their consent, Verizon and the groups argued.

The coalition of attorneys general — led by Indiana and North Carolina and joined by Connecticut, Illinois, Massachusetts, Pennsylvania and more than two dozen other states— also backed the argument that the TCPA's robocall ban survives First Amendment scrutiny.

"No court has ever questioned the constitutionality of the TCPA's robocall restriction," the attorneys general said. "Not even respondents argue that the robocall ban, standing alone, violates the First Amendment. Nor could they: the robocall restriction is a classic content-neutral speech regulation. It applies to anyone who makes a robocall to speak on any topic — or no topic at all — and is narrowly tailored to serve the government's compelling interests to protect individual and residential privacy."

The National Retail Federation and Retail Litigation Center Inc. offered a different perspective.

While declining to take a position on the constitutionality of the TCPA's automated call prohibition or the proper remedy for any constitutional deficiencies, they wrote to instruct the court on the potential consequences of invalidating the provision.

They contended that such a decision wouldn't — as other amici argued — result in an increase in unwanted calls or texts, given that legitimate businesses "have no desire, and no incentive, to alienate their customers by engaging in the unwanted and intrusive practices that motivated the TCPA's enactment."

Additionally, striking down the automated call ban would "provide relief from an arbitrary and punitive regime that actually harms customers by chilling retailers' ability to provide communications customers want and need" by threatening businesses with a "dangerous legal landscape" that exposes them to a deluge of "abusive and counterproductive litigation" seeking uncapped statutory damages of between $500 and $1,500 per violation, according to the groups.

The Supreme Court agreed to take up the dispute in early January and recently announced that it would hear oral arguments on April 22.

The petitioners in the case — U.S. Attorney General William Barr and the Federal Communications Commission — filed their opening brief on Feb. 24, arguing that both the government-backed debt collection carveout and the broader automated call ban should remain intact. The American Association

of Political Consultants and three other groups that regularly engage in political activities, which are the respondents in the dispute, have yet to file their reply.

But they have argued that they should be able to call voters on their cellphones using autodialers or prerecorded messages to solicit donations and advise on political issues. They allege that the special carveout for government-backed debt collectors is unconstitutional and seek to invalidate the TCPA's entire automated call ban.

The members of Congress are represented by Keith J. Keogh of Keogh Law Ltd.

Verizon, the National Consumer Law Center and Consumer Federation of America are represented by Christopher M. Miller, Christopher D. Oatway and Leigh R. Schachter of Verizon and Tara Twomey and Margot F. Saunders of NCLC.

The attorneys general are led by North Carolina Attorney General Joshua H. Stein and Indiana Attorney General Curtis T. Hill Jr.

The retail industry groups are represented by Deborah R. White, Kathleen McGuigan and Stephanie A. Martz of Retail Litigation Center Inc. and by Joseph R. Palmore, Samuel B. Goldstein and Tiffany Cheung of Morrison & Foerster LLP.

Attorney General William Barr and the FCC are represented by Noel J. Francisco, Malcolm L. Stewart and Frederick Liu of the U.S. Solicitor General's Office and Joseph H. Hunt, Mark B. Stern, Michael S. Raab and Lindsey Powell of the U.S. Department of Justice's Civil Division.

The American Association of Political Consultants is represented by Roman Martinez, Andy Clubok, Susan Engel, Tyce Walters, Samir Deger-Sen and Greg in den Berken of Latham & Watkins LLP and by William Edward Raney and Kellie Mitchell Buber of Copilevitz Lam & Raney LLC.

The case is William P. Barr et al. v. American Association of Political Consultants et al., case number 19-631, in the Supreme Court of the United States.

--Editing by Jill Coffey.