

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LAUREN DAVIS, on behalf of herself and all)	
others similarly situated,)	
)	
Plaintiff,)	
)	C.A. No. 19-1686-LPS-JLH
v.)	
)	
D.R. HORTON INC.,)	
)	
Defendant.)	
_____)	

ORDER TO SHOW CAUSE

WHEREAS, Plaintiff filed this class action suit against Defendant D.R. Horton Inc. alleging violations of a provision of the Telephone Consumer Protection Act (TCPA) prohibiting the use of an automatic telephone dialing system to send unwanted text messages to cellular phone numbers, 47 U.S.C. § 227(b)(1)(A)(iii);

WHEREAS, while this case was pending, the U.S. Supreme Court decided *Barr v. American Association of Political Consultants, Inc.*, 140 S. Ct. 2335 (2020) (“AAPC”), holding that a TCPA exception permitting automated calls to collect government-backed debts violated the First Amendment, and that the remedy for such violation was to sever the exception from the remainder of the statute, leaving the automated-call restriction in effect;

WHEREAS, following the AAPC decision, Defendant D.R. Horton moved to dismiss this action for lack of jurisdiction (D.I. 35), arguing that the automated-call restriction was unconstitutional during the period from 2015—when the government-debt exception was enacted—to July 2020—when the Supreme Court invalidated that exception in AAPC;

WHEREAS, in preparation for the March 16, 2021 oral argument on Defendant’s motion, the Court has reviewed the docket and it appears that the government has not been notified about

Defendant's constitutional challenge, *see* Fed. R. Civ. P. 5.1 ("A party that files a . . . written motion . . . drawing into question the constitutionality of a federal . . . statute must promptly: (1) file a notice of constitutional question stating the question and identifying the paper that raises it, if: (A) a federal statute is questioned and the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity; . . . and (2) serve the notice and paper on the Attorney General of the United States if a federal statute is questioned . . . either by certified or registered mail or by sending it to an electronic address designated by the attorney general for this purpose."); 28 U.S.C. § 2403 (providing that "[i]n any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General.");

WHEREAS, Federal Rule of Civil Procedure 5.1(c) allows the government 60 days to intervene from the time it is notified about a constitutional challenge;

WHEREAS, the Court is aware that the government recently intervened in an action pending in the United States Court of Appeals for the Sixth Circuit in which the defendant made the same argument regarding the constitutionality of the TCPA that Defendant D.R. Horton makes here, *see Lindenbaum v. Realgy, LLC*, No. 20-4252, D.I. 34 (6th Cir. Feb. 19, 2021);

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant must show cause why it need not comply with Federal Rule of Civil Procedure 5.1(a). On or before March 1, 2021, Defendant must either comply with the Rule or file a letter brief not to exceed three, single-spaced pages explaining why the Rule does not apply. Plaintiff may, but is not required to, file a three-page letter brief setting forth its position on or before March 1, 2021. After reviewing the submission(s), the Court may choose to reschedule the oral argument currently set for March 16, 2021, in order to permit the government an opportunity to intervene.

Dated: February 22, 2021



Jennifer L. Hall
UNITED STATES MAGISTRATE JUDGE