

# Ninth Circuit Holds that Texts Are “Calls” Under the TCPA But Embedded Videos Are Not Recorded Messages

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On January 13, the U.S. Court of Appeals for the Ninth Circuit issued a decision in *Howard v. Republican National Committee (RNC)* offering two important interpretations of the applicability of the Telephone Consumer Protection Act (TCPA) to certain text message communications:

1. Text messages are “calls” under the TCPA.
2. A text message that merely *includes* a video file with a prerecorded voice — requiring the recipient to press play — does *not* constitute “initiating” a “call using an artificial or prerecorded voice.”

## Background

The plaintiff received a text message from the RNC that included a video file that was automatically downloaded to the recipient’s phone. The plaintiff claimed this violated the TCPA’s restrictions on: (1) calls to cell phones; and (2) calls to residential lines “using an artificial or prerecorded voice.” The district court dismissed the complaint and the Ninth Circuit affirmed.

### 1. Text Messages as “Calls” Under the TCPA

The Ninth Circuit held that a text message is a “call” for TCPA purposes. The court relied on precedent explaining that “call” means an attempt to communicate by telephone, and “text messaging plainly fits within that literal definition” because it is a form of communication between telephones. The court emphasized that its conclusion rests on the statute’s plain language, independent of any deference to Federal Communications Commission guidance, particularly after the Supreme Court’s decision in *Loper Bright*. The court reasoned that texts trigger the same kind of immediate privacy intrusion as voice calls.

### 2. Embedded Video Files Are Not “Prerecorded Voice Messages”

The more novel issue was whether a text message that includes a video file is a prohibited “call using an artificial or prerecorded voice.” The court began by reaffirming that “voice” in the TCPA means audible sound, not text alone. However, the court held that sending an embedded video did not constitute “making” or “initiating” a call “using ... an artificial or prerecorded voice.” Looking to ordinary dictionary definitions, the court determined that these provisions regulate how the call begins. From that, the court concluded that the TCPA limits the use of artificial or prerecorded voices to begin a call, not any subsequent, optional use of a recording once the connection

is established. Because the plaintiff's voluntary decision to press play was an intervening step, any playing of the prerecorded voice was not part of the manner in which the call was made or initiated.

Judge Rawlinson dissented from the prerecorded voice portion of the court's decision. She would have held that the text plus automatically downloaded video was a single "call" that used an artificial or prerecorded voice within the statute's plain language. In Judge Rawlinson's view, the TCPA prohibits "any call" made "using an artificial or prerecorded voice," and does not require that the prerecorded voice be what initiates the call.

## **Key Takeaways**

Text campaigns remain squarely within TCPA "call" territory.

- Text messages continue to be treated as "calls."
- Consent, revocation, and opt-out practices for text messages should be aligned with TCPA standards for calls.

Embedded video is not automatically a "prerecorded call" in the Ninth Circuit.

- A text that includes a video is not, by itself, a "call using an artificial or prerecorded voice" if the video's audio plays only after the recipient chooses to press play.

Risk assessment across jurisdictions

- *Howard* is a Ninth Circuit decision. Other courts may approach embedded content differently and the dissent in *Howard* signals a competing interpretation plaintiffs may invoke.

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