

Supreme Court Upholds TCPA's Robocall Ban, But Strikes Government-Debt Exception As Unconstitutional Under First Amendment

Client Alert | July 6, 2020

Decided July 6, 2020

***Barr v. American Association of Political Consultants, Inc.*, No. 19-631**

Today, the Supreme Court held 6-3 that the federal-debt-collection exception to the TCPA's robocall ban violates the First Amendment, but also held 7-2 that the proper remedy is to sever the exception—leaving in place the entirety of the TCPA's 1991 ban on robocalls.

Background:

The Telephone Consumer Protection Act of 1991 (TCPA) generally prohibits robocalls to cell phones and home phones. In 2015, Congress amended the Act to exempt robocalls to cell phones for collecting debts owed to or guaranteed by the federal government—including student-loan and mortgage debts—from the TCPA's general prohibition.

Plaintiffs—a group of political and nonprofit organizations seeking to make robocalls—sued the U.S. Attorney General arguing that the 2015 government-debt exception violates the First Amendment by unconstitutionally favoring debt-collection speech over political and other speech. As relief, the plaintiffs sought to invalidate the TCPA's entire robocall ban for cell phones, rather than only the 2015 government-debt exception. Plaintiffs' theory was that the exception undermines the credibility of the purported privacy interest supporting the entire robocall ban.

The district court held that the 2015 government-debt exception was a content-based speech regulation, but that it survived strict scrutiny given the government's compelling interest in collecting debt. The Fourth Circuit reversed, holding that the government-debt exception failed strict scrutiny. Applying traditional severability principles, the Fourth Circuit then concluded that the government-debt exception should be severed from the statute, leaving the TCPA's robocall ban in effect.

Issue:

1. Whether the government-debt exception from the TCPA's robocall ban for cell phones violates the First Amendment.
2. If so, whether the TCPA's entire robocall ban is unconstitutional.

Court's Holding:

1. The government-debt exception is a content-based speech restriction that impermissibly

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favors debt-collection speech over political and other speech in violation of the First Amendment.

2. The TCPA's robocall ban stands because the government-debt exception is severable from the remainder of the statute.

"Congress has impermissibly favored debt-collection speech over political and other speech . . . As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech."

Justice Kavanaugh, writing for a plurality of the Court

What It Means:

- The TCPA's robocall ban remains in effect as it existed before 2015, prohibiting virtually all automated voice calls and text messages to cell phones. Six Justices (writing a total of three opinions) agreed that the 2015 government-debt exception was content based and that the government, in attempting to defend the content-based speech restriction, failed to sufficiently justify treating government-debt-collection speech differently from other important categories of robocall speech, such as political speech and issue advocacy.
- Seven Justices agreed that the 2015 government-debt exception could be severed from the remainder of the statute to preserve the underlying 1991 robocall restriction. Not only has the Communications Act (of which the TCPA is part) had an express severability clause since 1934, the Court explained, but also, even without the severability clause, the presumption of severability would still apply—and the remainder of the restriction is capable of functioning independently without the narrow government-debt exception.
- As in *Seila Law LLC v. Consumer Financial Protection Bureau* (No. 19-7), Justices Gorsuch and Thomas dissented from the Court's severability holding. Justice Gorsuch wrote, "[s]evering and voiding the government-debt exception does nothing to address the injury" of barring plaintiffs from engaging in political speech robocalls. Slip. op. 6 (Gorsuch, J., concurring in the judgment in part and dissenting in part). Justice Gorsuch and Justice Thomas argued that the Court should reconsider its severability doctrine.

The Court's opinion is available [here](#).

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the following practice leaders:

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