

## Supreme Court protects TCPA, surgically severing government-debt-collection exception rather than nullifying entire Act

July 8, 2020

Two months to the day after closely-watched oral argument,<sup>1</sup> Justice Brett Kavanaugh on Monday, July 6, 2020, handed down the Supreme Court's opinion in *Barr v. American Association of Political Consultants, Inc., et al.* striking and severing the government-debt exception to the Telephone Consumer Protection Act (TCPA or the Act), which exception he characterized as “about as content-based as it gets.”<sup>2</sup> 47 U.S.C.A. § 227(b)(1)(A)(iii). Because the government conceded at oral argument that the government-debt exception could not pass muster under strict scrutiny, the Court necessarily found that the exception imposed an unconstitutional content-based speech restriction in violation of the First Amendment. Having so found, the Court then upheld the constitutionality of the TCPA as a whole, but severed the unconstitutional exception, thus preserving the long-standing robocall restrictions.

The government-debt exception was incorporated into the TCPA in 2015, permitting robocalls “made solely to collect a debt owed to or guaranteed by the United States.” § 227(b)(1)(A)(iii). Plaintiffs, the American Association of Political Consultants and three other political organizations desiring to expand their political outreach through automated calls, challenged the exception as unconstitutionally preferring speech made for collecting government debt over political speech. The government, for its part, advanced three arguments in support of its position that the exception was content-neutral, each of which the Court negated.

First, the government asserted that the exception distinguished between government and non-government speakers—not speech. However, the Court, looking at the plain language of the exception, held that the exception applied to calls “made solely to collect a debt owed to or guaranteed by the United States,” and not all calls from authorized debt collectors. Thus, the exception was directed at the content of the speech, not the speaker.

Second, the government argued that the legality of a robocall under the Act hinged on whether the caller was engaged in a particular economic activity—in this case, collecting government-owed or government-backed debts—and not the content of the speech. The Court, however, reasoned that because the law itself focused on whether the caller was speaking about a particular topic, the exception was content-based.

Third, and finally, the government argued that if the statute was impermissibly content-based for singling out debt-collection speech, then all statutes regulating debt collection, such as the Fair Debt Collection Practices Act, must also fall. The Court, while recognizing the government's underlying concern, reassured the government that “courts have generally been able to distinguish impermissible content-based speech restrictions from traditional or ordinary economic regulation of commercial activity that imposes incidental burdens on speech.”

For the above reasons, the Court found that “[a]lthough collecting government debt is no doubt a worthy goal, the Government concedes that it has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech,” rendering the exception unconstitutional.

The Court then advanced to a larger, looming question: If the unconstitutional exception undermined Congress' purported interest in protecting consumer privacy, is the entire TCPA no longer justified and thus unconstitutional?

Justice Kavanaugh handled this question with ease, acknowledging that while exceptions to speech restrictions “may diminish the credibility of the government’s rationale for restricting speech in the first place,” the government-debt exception is “only a slice of the overall robocall landscape.” Thus, because the TCPA’s broad restrictions contained limited exceptions, and still restricted tens of millions of potential robocalls *every day*, the Court held that the exceptions did not swallow the statute. Rather, the Court found that Congress’ growing interest in collecting government debts did not negate its interest in restricting robocalls.

Having found the government-debt exception unconstitutional and the TCPA constitutional, the Court then evaluated whether, to preserve the longstanding law, the exception could be severed from the whole. Reflecting back to *Marbury v. Madison*, the Court found a longstanding remedial preference has been to salvage rather than destroy laws. Further, the Court found that the express severability clause within the underlying 1991 Communications Act permitted the exception’s severance from the whole. Arguing in the alternative, the Court further noted that even if the severability clause did not apply, severing the narrow exception fully cures the First Amendment unequal treatment issue and does not raise any other constitutional problems. Thus, while the claimants brought the instant action with the intention of expanding its political impact through robocalls, the result of the claim ensured equal treatment by prohibiting both political robocalls and government-debt-collection calls.

In sum, the Court did not “throw the baby out with the bathwater.” The TCPA remains in full force and effect without exception for government-debt collection calls.

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1. "Throwing Out the Baby With the Bathwater ", *Dentons Client Alert*, May 12, 2020.↩

2. Docket No. 19-631.↩

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