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## Supreme Court Invalidates TCPA Government-Debt Collection Exception but Otherwise Preserves Law

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On July 6, 2020, the Supreme Court added to the tome of jurisprudence surrounding the Telephone Consumer Protection Act of 1991 (known as the “TCPA”). While the TCPA generally prohibits robocalls using automatic telephone dialing systems to cell phones and home phones, a 2015 amendment to the TCPA excepted robocalls made to collect debts owed to or guaranteed by the Federal Government. At issue in [\*Barr v. American Association of Political Consultants\*](#) was whether this government-debt exception to the TCPA ran afoul of the First Amendment. In a fractured opinion, six justices agreed to invalidate the exception and seven justices agreed that the appropriate remedy was to sever the exception from the statute.

Plaintiffs in the case were political and nonprofit organizations that sought to make political robocalls to cell phones. Invoking the First Amendment, they argued that the 2015 government-debt exception unconstitutionally favored debt-collection speech over political and other speech. As relief, plaintiffs urged the Court to invalidate the entire robocall restriction rather than simply invalidate the 2015 government-debt exception.

Justice Kavanaugh announced the judgment of the court and issued a plurality opinion which Chief Justice Roberts and Justice Alito joined in full and which Justice Thomas joined with respect to the First Amendment analysis but not the remedy. In his opinion, Justice Kavanaugh relied on the premise that a law “is content-based if a regulation of speech on its face draws distinctions based on the message a speaker conveys.” *Am. Assoc. of Political Consultants*, No. 19-631 at 7. Justice Kavanaugh concluded that, under the statute, “the legality of a robocall turns on whether it is made solely to collect a debt owed to or guaranteed by the United States. A robocall that says, ‘Please pay your government debt’ is legal. A robocall that says, ‘Please donate to our political campaign’ is illegal. That is about as content-based as it gets.”

Justice Kavanaugh then went on to address the appropriate remedy, applying “ordinary severability principles.” *Id.* at 10. The plurality opinion explained that when Congress includes an express severability or nonseverability clause in a statute, the Court should adhere to such clause as long as the remainder of the statute “is capable of functioning independently and thus would be fully operative as a law.” *Id.* at 10, 16-17. Based on the existence of a severability clause, and the fact that the TCPA

could function independently without the unconstitutional provision, Justice Kavanaugh concluded that severance was the appropriate remedy.

Justice Sotomayor filed an opinion concurring in the judgment, finding that the government-debt exception failed intermediate, rather than strict, scrutiny under First Amendment jurisprudence and agreeing that severance was the right remedy. *Id.* at 1 (Sotomayor, J., concurring).

Justice Breyer, in a partial dissent joined by Justices Ginsburg and Kagan, found that the government-debt exception did not violate the First Amendment but agreed that, in light of the six justices' opinion invalidating the exception, the appropriate remedy was to sever the exception rather than completely invalidate the law. *Id.* at 11 (Breyer, J., dissenting in part).

Justice Gorsuch filed an opinion concurring in the judgment in part and dissenting in part, joined by Justice Thomas as to remedy. While Justice Gorsuch agreed that the government-debt exception violated the constitution, he disagreed that severance was the appropriate remedy. Instead, Justice Gorsuch opined that, "[b]ecause the challenged robocall ban unconstitutionally infringes on their speech, I would hold that the plaintiffs are entitled to an injunction preventing its enforcement against them. This is the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future . . . . [Going] this far, but no further, would avoid short circuiting the democratic process by interfering with the work of Congress any more than necessary." *Id.* at 5 (Gorsuch, J., dissenting).

The Court's opinion suggests that the TCPA, along with the flood of associated litigation, is here to stay.

Indeed, the Court's decision only expands the universe of robocalls deemed impermissible. The relevance of this opinion extends to all entities that use robocalls as a means to disseminate information. That means that all firms employing robocalling must continue to adhere diligently to the TCPA's mandates.

To ensure such compliance, companies must obtain the appropriate prior express consent of all called parties. This can often be obtained, for instance, through customer contracts, the agreed-to conditions of a text messaging platform or mobile application, or the terms set forth on a company website. Furthermore, because the TCPA imposes severe consequences for violating the robocall restriction—private parties can sue to recover up to \$1,500 per violation, or three times their actual monetary losses—penalties can add up quickly. To help safeguard against such losses, companies should be particularly prudent about including arbitration clauses with express class action waivers when contracting with private parties where robocalling may be involved.

The Court's ruling may also portend what is to come: a proliferation of courts striking down other exceptions and carve-outs to the statute, making it increasingly difficult to justify robocalling. And, more immediately, the ruling may prompt the filing of numerous TCPA cases by plaintiffs who were holding off on their claims in anticipation of the Court's decision in this matter. Lastly, the Court's ruling may instigate the filing of suits against debt collectors in the business of collecting debts owed to or guaranteed by the Federal Government, including student loans and mortgage loans, who were previously immune from TCPA liability.

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