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TCPA Class Actions – Supreme Court Severs Government Debt Collection Exception

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Takeaway: In *Barr v. American Association of Political Consultants, Inc*, No. 19-631, 2020 WL 3633780 (U.S. July 6, 2020), the Supreme Court invalidated the exception for calls made for the purpose of collecting government debt under the Telephone Consumer Protection Act ("TCPA"), finding it violated the First Amendment. But applying the presumption of severability, the Supreme Court declined to invalidate the entire TCPA.

The TCPA broadly prohibits telemarketing calls placed to cell-phones using automatic telephone dialing systems or "auto-dialers." In 2015, Congress passed an amendment to the TCPA that carved out calls "made solely to collect a debt owed to or guaranteed by the United States." 47 U.S.C. § 227(b)(1)(A)(iii). The American Association of Political Consultants (the "Association") filed a declaratory judgment action challenging the exception on First Amendment grounds, arguing that it is a "content-based" regulation of speech that favors one type of speech (government debt collection) over other types of speech, including the Association's political fundraising calls. Because the restriction is content-based, the Association argued, it was subject to strict scrutiny.

The District Court found that the exception was content-based, but that it survived strict scrutiny because of the Government's compelling interest in debt collection. The Fourth Circuit vacated that judgment, finding the exception could not withstand strict scrutiny and also severing the exception from the remainder of the statute. Both sides petitioned for certiorari. The Government argued that the Fourth Circuit erred in finding that the exception violated the First Amendment. The Association argued that the Fourth Circuit erred in severing the government debt-collection exception and should have instead struck down the entire TCPA for violating the First Amendment. The Association contended that, by severing just the exception as opposed to the entire law, the Fourth Circuit outlawed *more* speech.

In a fractured, plurality opinion authored by Justice Kavanaugh, the Supreme Court affirmed the judgment, finding that the government-debt exception violated the First Amendment and that the exception should be severed from the TCPA.

- Six Justices (Justices Kavanaugh, Roberts, Thomas, Alito, Gorsuch, and Sotomayor) agreed that the exception violated the First Amendment.
- Five Justices (all of the above except Justice Sotomayor) agreed that it was a content-based restriction, subject to strict scrutiny.
- Seven Justices (Justices Kavanaugh, Roberts, Alito, Breyer, Sotomayor, Ginsburg, and Kagan) agreed that, assuming the exception is unconstitutional, it should be severed.

Justice Sotomayor, writing for herself, disagreed that the exception is content-based, but found it failed

intermediate scrutiny and should be severed. Justices Breyer, writing for the remainder of the Court's liberal bloc, disagreed that the exception was content-based and found a sufficient governmental interest in debt collection to survive intermediate scrutiny. Those justices, however, agreed that it should be severed if the majority found it unconstitutional. Justice Gorsuch, joined by Justice Thomas in part, agreed that the exception was content-based and unconstitutional, but for separate reasons than the plurality. Justices Gorsuch and Thomas would have struck down the entire statute as unconstitutional. When the Supreme Court granted cert, there were concerns (or hopes) in TCPA circles that the Court intended to strike down the entire statute as unconstitutional. Justice Kavanaugh's opinion made clear from the first line that fear was unfounded. The opening passage, sure to be a favorite of the TCPA plaintiffs' bar, describes Americans as starkly divided "about many things," but "largely united in their disdain for robocalls." Justice Kavanaugh did not view severability as a close call. He concluded that, even if the TCPA did not have an express severability clause (it does), the presumption of severability would have required the Court to sever the government-debt exception.

Bottom line: Going forward, the opinion will require telemarketers who previously believed their plans fit within the exception to develop plans to ensure TCPA compliance. It otherwise leaves the TCPA unchanged. The Supreme Court's recent grant of cert in a case that addresses the circuit split about the definition of auto-dialer (that we addressed in a prior post) suggests that the next term will be even more critical to the future of the TCPA.