

Supreme Court Strikes Government-Debt Exception But Saves Other Restrictions on Automated Telephone Equipment

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On July 6, 2020, the Supreme Court issued a highly anticipated—and highly fractured—ruling in [Barr v. American Association of Political Consultants](#). The nine Justices produced four opinions, none of which commanded a majority. But six of the Justices agreed that the TCPA’s government-debt exception violated the First Amendment, and seven agreed that it could be severed from the rest of the TCPA. The result, then, is that the exception was stricken but the restrictions on automated telephone equipment were saved.

Writing for the plurality, Justice Kavanaugh made quick work of the government’s argument that the exception was content-neutral: “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.” Because the exception was content-based, the plurality applied strict scrutiny—a standard that the government had conceded it could not satisfy.

Having concluded that the exception failed strict scrutiny, the plurality turned to whether the remedy should be to sever the exception or scuttle the restrictions on automated equipment. The plaintiffs had argued that the government-debt exception evidenced that Congress was no longer concerned with protecting privacy, and therefore the restrictions themselves were no longer viable. In rejecting that argument, the plurality reasoned that the exception was “only a slice of the overall robocall landscape,” and in any event was the result of “competing interests,” namely “collecting government debt and in protecting consumer privacy.”

The plurality then cited a “strong presumption” that “an unconstitutional provision in a law is severable from the remainder of a law or statute.” That result was supported by the language of the statute, it found, because the Communications Act—of which the TCPA is one of many parts—has a severability clause. The fact that the severability clause was enacted long before the TCPA did not matter to the plurality because it “squarely cover[ed] the unconstitutional government-debt exception

and require[d] that [the Court] sever it.” But the plurality noted that it would have severed the exception anyway, as the remainder of the law could function independently as a fully-operative law without the exception.

Justices Breyer, Ginsburg, and Kagan concurred with respect to severability but dissented with respect to constitutionality. In an opinion authored by Justice Breyer, they warned that strict scrutiny should not be the “reflexive” response to every content-based regulation of speech regardless of context or consequence. They would instead have analyzed the exception under intermediate scrutiny, and then would have held that it did not violate the First Amendment. Justice Sotomayor filed a two-paragraph opinion agreeing with Justice Breyer’s discussion of why strict scrutiny did not apply, but disagreeing about whether the exception was constitutional. In her view, the exception would have failed even intermediate scrutiny because it was not narrowly tailored to serve a compelling government interest.

Finally, Justice Gorsuch wrote an opinion in which Justice Thomas partially joined. They concurred with respect to constitutionality—albeit for different reasons than the plurality—but dissented with respect to severability. Justice Gorsuch wrote that, although protecting consumer privacy is a legitimate interest, it is questionable for the government to invoke consumer privacy interests to justify banning political speech but not debt collection. The government did not show, for example, that collection calls were less invasive or more uncommon than other calls.

After concluding that the exception violated the First Amendment, Justice Gorsuch explained that simply severing it from the statute was improper for several reasons. First, it provided the plaintiffs—which had challenged the restrictions rather than the exception, and which in theory were the prevailing parties—with no meaningful relief. He explained that the plaintiffs had only pointed to the government-debt exception in order to show that the government lacked a compelling interest in restricting their speech. As he put it, “[t]hey came to court asserting a right to speak, not a right to be free from other speakers.”

Second, Justice Gorsuch reasoned that severance would not only not help the prevailing parties, but also harm nonparties by striking an exception on which they had “ordered their lives and livelihoods” for years. He expressed doubt that this could be remedied by applying the plurality’s decision only prospectively, as Justice Kavanaugh suggested. In his view, simply severing the exception essentially rendered unlawful conduct Congress had made lawful when it amended the TCPA in 2015. This, he cautioned, raised serious separation of powers questions and departed from the Court’s usual reliance on the adversarial process.

In short, the statute now prohibits more speech, not less. And there is sure to be more litigation, not less. All eyes now turn back to the FCC for further guidance on the autodialer definition that has split the circuits, as well as the still-pending petitions for certiorari on that and other issues in [Facebook, Inc. v. Duguid](#) and [Charter Communications, Inc. v. Gallion](#). Indeed, just yesterday Facebook filed a supplemental brief arguing that the Barr decision has only “heightened the importance” of its petition for certiorari on the ATDS issue.

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