

4th Circuit Declares Government Debt Exemption to the TCPA Unconstitutional, But Leaves the Rest of the Statute Intact

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Since its adoption, the Telephone Consumer Protection Act ("TCPA") has periodically been attacked as unconstitutional on grounds that it violates the First Amendment right to free speech due to its content-based restrictions. Until today, those attacks have generally failed, leaving defendants with the threat of potentially crippling statutory damages. Today, the Fourth Circuit announced that part of the TCPA, an exemption for calls to collect government debts, is unconstitutional and will be stricken from the Act.

Generally speaking, and among other restrictions, the TCPA makes it unlawful to call or text a cell phone using an automatic telephone dialing system ("ATDS") or artificial or prerecorded voice without the prior express consent of the called party. As part of the Bipartisan Budget Act of 2015, Congress created a content-specific exemption that allowed ATDS calls to be placed if they were to collect a government-backed debt (the "debt-collection exemption"). In other words, a debt collector calling to collect on certain government backed mortgages or student loans were exempt from the act, but the same debt collector would not be exempt if calling to collecting on a non-government backed loan.

Content-based laws must satisfy the strict scrutiny test of the First Amendment. This means that content-based exemptions, such as the debt-collection exemption, are presumptively unconstitutional and may be justified only if the government can show that the restriction is narrowly tailored to serve a compelling state interest. The Fourth Circuit Court of Appeals, in overturning the District Court's decision, held that the debt-collection exemption does not meet that standard, and is therefore unconstitutional.

This decision was announced in the case of *American Association of Political Consultants, Inc. ("AAPC") et. al v. Federal Communication Commission (FCC)*. The Fourth Circuit agreed with the AAPC that the debt-collection exemption was content based, and consequently that strict scrutiny test was appropriate. As explained by the Court:

Under the debt-collection exemption, the relationship between the federal government and the debtor is only relevant to the subject matter of the call. In other words, the debt-collection exemption applies to a phone call made to the debtor because the call is about the debt, not because of any relationship between the federal government and the debtor... In these circumstances, the debt-collection exemption to the automated call ban constitutes a content-based speech restriction.

The Court also concluded that the debt-collection exemption fails strict scrutiny because it is under-inclusive as it authorized many of the calls that the TCPA was enacted to prohibit. They also found that there was no compelling government interest, as the exemption cut against the privacy interests that Congress sought to safeguard by the TCPA.

Although the Court held that the debt-collection exemption was unconstitutional, it did not invalidate the entire statute as the appellant and many defendants in pending lawsuits had hoped. Instead, it determined that the appropriate remedy was to sever the exemption, leaving the rest of the statute intact.

Despite the Fourth Circuit's decision, the battle over the constitutionality of the TCPA continues. The Ninth Circuit is currently considering a similar constitutional challenge to the TCPA in *Gallion v. Charter Commc'ns Inc.*, in which oral argument was held on March 11.

The Fourth Circuit's opinion in AAPC highlights the ongoing struggle over the scope and application of the TCPA. As we've blogged about before, the FCC is believed to be on the cusp of issuing a new order on the definition of ATDS under the Act, which definition has been a hotbed of litigation and regulatory challenges. We will continue to monitor developments and post updates on this site.