

# Supreme Court Upholds Constitutionality of the TCPA

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On July 6, 2020, in a 7-2 decision, the Supreme Court upheld the constitutionality of the TCPA, but severed as unconstitutional the government debt exception. *William P. Barr et al. v. American Association of Political Consultants et al.*, Case No. 19-631 (2020). Our preview of the Supreme Court's consideration of the *Barr* case can be found [here](#) and our summary of the oral argument can be found [here](#).

## Background

When first enacted in 1991, the TCPA prohibited calls placed using an automatic dialer or prerecorded voice with certain, specific exceptions. In 2015, Congress amended the TCPA to permit calls that relate to the collection of debts guaranteed by the U.S. government. That amendment does not permit the use of the same technology for debts guaranteed by private lenders or calls related to other topics, which served as the basis for challenges that the exception rendered the statute unconstitutionally content-based in violation of the First Amendment. In 2019, the Fourth Circuit agreed, finding the exception failed strict scrutiny, was unconstitutional, and should be severed from the TCPA. The government disagreed with the Fourth Circuit's decision and petitioned the Supreme Court to review the decision. Plaintiffs also filed a cross-petition.

## Supreme Court Affirms

In the controlling opinion written by Justice Kavanaugh (joined by Chief Justice Roberts and Justice Alito), relying on *Reed v. Town of Gilbert* and applying strict scrutiny, the Supreme Court held that the government debt exception to the TCPA was an unconstitutional content based speaker restriction. As a remedy, the majority opted to sever the government debt exception from the TCPA, which leaves the remainder of the TCPA fully operative.

Justice Kavanaugh reasoned that both severability principles and the Communication Act's severance clause mandated severance in this case. Justice Kavanaugh also reasoned that the remainder of the TCPA survived the constitutional challenge because Congress has a continuing interest in protecting consumer privacy, noting that "[t]he continuing robocall restriction proscribes tens of millions of would-be robocalls that would otherwise occur every day."

In a short concurrence, Justice Sotomayor argued that the exception should be subjected to intermediate scrutiny; however, she agreed that the exception also did not survive that analysis and therefore should be severed.

In a partial dissent, Justice Breyer (joined by Justices Ginsburg and Kagan) argued that the Supreme Court should have applied intermediate scrutiny because the restriction did not suppress a particular viewpoint or threaten the neutrality of a public forum. Justice Breyer reasoned that the exception

survived intermediate scrutiny because the speech related harm of the exception was modest in proportion to the important government goal of protecting the public fisc. Justice Breyer also found that the exception was narrowly tailored because it only applied to the limited categories of calls related to the collection of government debt. For Justice Breyer, strict scrutiny should only apply when a restriction interferes with the marketplace of ideas or interferes with an individual's right to communicate with the government. With respect to the proper remedy, however, Justice Breyer agreed that severability of the offending exception was appropriate.

In another partial dissent, Justice Gorsuch (joined, in relevant part, by Justice Thomas) attacked the Court's severability doctrine, including because the application of the doctrine in this instance did not provide the plaintiffs with the relief that they had initially sought. Instead of a remedy which allows for the plaintiffs to speak more freely, severance banned additional speech. For Justice Gorsuch, that result undercuts the purpose of the First Amendment, which is intended to act as a buffer against government restriction of speech, not assist it. Thus, he felt severance was an insufficient response.

Ultimately, 7 Justices agreed that severance of the government debt exception was the proper remedy, while only two (Justices Gorsuch and Thomas) concluded that the entire TCPA should be struck down as an improper content-based restriction.

### **Impact**

Unless a caller was relying upon the government debt exception to avoid liability under the TCPA, this decision does very little to change the status quo on TCPA enforcement and compliance. The opinion did not wade into the contentious definition of an automatic telephone dialing system under the TCPA (which has become the subject of a widening Circuit split). Accordingly, callers should remain vigilant whenever telemarketing and consistently audit their telemarketing procedures to avoid potential liability.

