

ALERT

The Supreme Court Invalidates TCPA Robocall Exception, with Fireworks About Severability

July 6, 2020

On July 6, 2020, the Supreme Court decided *Barr v. Association Of Political Consultants, Inc.*, a closely watched case involving the First Amendment, robocalling regulations under the Telephone Consumer Protection Act (TCPA), and severability. As predicted in Wiley's analysis of the oral argument, the Court found a First Amendment violation but declined to strike down the entire TCPA, instead severing the government-debt provision from the statute.

Amidst intense government activity on unwanted and illegal robocalls, a legal dispute arose over federal law's favorable treatment of certain calls over others in an exception added to the TCPA in 2015 that permitted robocalls for the collection of debts owed to or guaranteed by the United States. Chagrined that their political calls were regulated, the American Association of Political Consultants and three other organizations that participate in the political system filed a declaratory judgment action, claiming that §227(b)(1)(A)(iii) violated the First Amendment.

In the end, the plaintiffs are not now able to make their political calls free from TCPA regulation, but they succeeded in invalidating the government debt-collection exception, because the Supreme Court agreed it unconstitutionally favors debt-collection speech over political and other speech. The real fight ended up being over severability, which will continue to be disputed. Going forward, calling parties need to be careful in their campaigns.

What Was at Stake?

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The TCPA matters because all sorts of entities want to communicate with American consumers and voters using auto-dialing and prerecorded messages. Numerous regulations apply to calling using auto-dialers, as we know from years of working with the statute. A misstep can subject calling parties to enormous damages and liability, so the law has spawned a cottage industry of litigation.

The political callers in this case wanted to be able to make their desired calls and claimed that the restriction on them violated the First Amendment because it was content-based. They seized on the law's exception for government debt-collection calls to show unfair treatment based on the content of their communications.

The issues before the Court were whether the TCPA's preferential treatment was a content-based regulation of speech, what level of scrutiny applied if it was, and whether the TCPA's broad robocalling restrictions had to be invalidated if the exception violated the First Amendment.

First, the court found that Section 227(b)(1)(A)(iii)'s robocall restriction, with the government-debt exception, is content based because it favors speech made for the purpose of collecting government debt over other speech. As Justice Kavanaugh wrote:

Under §227(b)(1)(A)(iii), 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 wrote that “[t]he robocall restriction with the government-debt exception cannot satisfy strict scrutiny. The Government has not sufficiently justified the differentiation between government-debt collection speech and other important categories of robocall speech, such as political speech, issue advocacy, and the like.” Justice Sotomayor agreed that the exception violated the First Amendment but would have applied intermediate scrutiny instead of strict scrutiny.

Justice Breyer, joined by Justice Ginsburg and Justice Kagan, would have upheld the government-debt exception, but given the contrary majority view, agreed that the provision is severable from the rest of the statute.

Was the Case Really About Severability?

Many court watchers were worried about the severability issue, fearing the entire TCPA could be invalidated if the debt collection exception was struck down. The majority refused to undermine the TCPA, spurring an important doctrinal debate between Justices Kavanaugh and Gorsuch. (Justice Thomas joined the part of Justice Gorsuch's opinion at issue here.)

The majority and Justice Gorsuch debated the role of severability. Gorsuch questions whether the outcome in the decision constitutes real relief for these plaintiffs, and whether that outcome makes sense, given that these plaintiffs still cannot make their desired phone calls to cell phones: “somehow, in the name of vindicating the First Amendment, our remedial course today leads to the unlikely result that not a single person will be

allowed to speak more freely and, instead, more speech will be banned.”

Justices Gorsuch and Thomas wrote 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.”

Justice Kavanaugh took a pragmatic view to saving the statute, writing that Justice Gorsuch’s “proposed remedy of injunctive relief, plus stare decisis, would in effect allow all robocalls to cell phones— notwithstanding Congress’s decisive choice to prohibit most robocalls to cell phones. That is not a judicially modest approach but is more of a wolf in sheep’s clothing. That approach would disrespect the democratic process, through which the people’s representatives have made crystal clear that robocalls must be restricted.” For his part, Justice Gorsuch was “doubtful of our authority to rewrite the law in this way,” namely by rewriting the exception adopted in 2015. “Just five years ago, Congress expressly authorized robocalls to cell phones to collect government-backed debts. Yet, today, the Court reverses that decision and outlaws the entire industry.”

Justice Gorsuch closed by suggesting that severability doctrine may need to be reconsidered. Justice Kavanaugh asked “when and how? As the saying goes, John Marshall is not walking through that door. And this Court, in this and other recent decisions, has clarified and refined severability doctrine by emphasizing firm adherence to the text of severability clauses, and underscoring the strong presumption of severability. The doctrine as so refined is constitutionally well-rooted, [and] the Court’s current approach as reflected in recent cases.... is constitutional, stable, predictable, and commonsensical.” (citations omitted). Future cases will put severability back in front of the Justices, a majority of whom have suggested it is constitutionally grounded and required by the separation of powers.

What’s Next for the TCPA and Political Callers?

From a practical perspective, the TCPA lives on. For now and importantly for this election cycle, the TCPA still imposes restrictions on political callers, among others, including a restriction on initiating calls or texts to wireless numbers using an “automatic telephone dialing system” (ATDS) before obtaining consent from the called party. However, a recent Declaratory Ruling issued by the Federal Communications Commission’s Consumer and Governmental Affairs Bureau—which narrowly construed the term ATDS—will likely give political callers more comfort in reaching out to voters without the threat of stifling penalties.

Moreover, this case is unlikely to be the statute’s last visit to the Supreme Court. A circuit split on the meaning of the TCPA’s definition of ATDS seems destined for Supreme Court review. That future case may have more impact than *Barr v. Association Of Political Consultants, Inc.* on the sweep of the TCPA.

Wiley counsels clients across sectors about the TCPA and its requirements. We represent companies before the Federal Communications Commission and the Federal Trade Commission on compliance and regulatory matters and litigate TCPA cases.

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