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SCOTUS upholds and strengthens the TCPA's ban against autodialed calls to cell phones

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Monday marked another important milestone for the Telephone Consumer Protection Act ("TCPA") as it survived constitutional scrutiny by the U.S. Supreme Court. In *Barr v. American Association of Political Consultants*, the Court struck down as unconstitutional a narrow exception in the TCPA that allowed debt collectors to use autodialing technology without recipient consent when making calls to collect on a federally backed loan. Justice Brett Kavanaugh wrote the plurality opinion, finding that the "government-debt exception" violated the First Amendment's Free Speech Clause because it regulated speech based on its content. The plurality decision tracks a course we forecasted after oral argument:[1] while one majority of six justices struck down the content-based exception, a differently constituted majority of seven justices concluded that the exception should be severed from the statute, leaving the baseline restrictions on autodialed calls untouched and thereby largely preserving the status quo.

Path of the case

The nearly 30-year-old statute has been as controversial as it is popular. While American consumers, lawmakers, and judges alike praise the TCPA's laudatory goal of reducing the volume of unsolicited phone calls and text messages received by Americans daily, many well-meaning businesses have found strict compliance to be nearly impossible, while many opportunistic class action lawyers have been all too happy to take advantage of the uncertainty in the statute to pursue oversized monetary demands far in excess of any harm actually caused.

The TCPA's autodialer provision prohibits calls or text messages sent using any "automatic telephone dialing system" or an artificial or prerecorded voice to any cellular telephone, except when the called party consented to receive such calls. As part of a bipartisan budget package in 2015, Congress amended the TCPA to create another exception for any calls "made solely to collect a debt owed or guaranteed by the United States." Congress's goal was to increase the success rate for federal debt collections. Soon after its passage, however, an association of political consultants and

[1] For a more detailed summary of the facts of the case, the procedural posture, and the legal issues presented, please see our previous summary of the Supreme Court's oral arguments, "SCOTUS hears case with potential to flush the TCPA down the toilet."

related organizations filed suit claiming that both the autodialer ban and the government-debt exception violated the First Amendment because its combined application focuses on the content of the speech.

The U.S. Court of Appeals for the Fourth Circuit reversed a lower court decision upholding both the rule and its exception, holding that the exception violated the Free Speech Clause. But the appellate court saved the statute by ruling that it would simply strike the unconstitutional exception and leave the rest of the statute intact. While the Supreme Court's decision charts the same course, it could only do so by stitching together two separate majorities.

The Supreme Court's fractured decision

In the first majority, the five traditionally conservative justices (Kavanaugh, Roberts, Thomas, Alito, and Gorsuch) applied strict scrutiny to conclude that the government-debt exception violated the First Amendment's Free Speech Clause. These justices rejected arguments that the law is content-neutral, finding that the statute focuses on the message—"calls made solely to collect a debt"—rather than the messenger—e.g., government-backed debt collectors. They also rejected the "slippery-slope" argument that all statutes regulating debt collection could be viewed as content-based restrictions. Justice Kavanaugh distinguished the Fair Debt Collection Practice Act—which burdens speech through restrictions directed at commerce or conduct (something the First Amendment does not prevent)—from the debt-collection exception, which is directed squarely at the content of the message. While Justice Sotomayor declined to apply strict scrutiny, she concluded that the government-debt exception could not satisfy even the lower threshold of intermediate scrutiny. Thus, Justice Sotomayor cast a sixth vote striking down the exception as unconstitutional.

Justice Gorsuch, joined by Justice Thomas, wrote separately to reject the plurality's decision to sever the unconstitutional exception from the statute. In their view, the Court should have struck down the entire autodialer ban in the TCPA. But the other seven justices, including the so-called liberal wing of the Court, made up the second majority, agreeing with Justice Kavanaugh that, in this case, the appropriate remedy is to sever the offending exception and preserve the general prohibition, which remains popular with the American public.

In a partial dissent, Justice Breyer, joined by Justices Ginsburg and Kagan, argued that because the content-based restrictions do not touch on "the formation of public opinion or the transmission of the people's will to elected representatives," a rigid application of strict scrutiny is not warranted. The dissent found that the autodialer ban is merely a commercial regulation and "has next to nothing to do with the free marketplace of ideas." Accordingly, the dissent would have applied intermediate scrutiny and concluded that the governmental interest in pursuing public debt is sufficient to justify the rule.

Key takeaways

The Supreme Court's fractured, yet decisive decision in *Barr v. American Assoc. of Political Consultants* leaves us with several takeaways. First, and most immediately with a presidential election fast approaching, it should not be missed that the petitioning political organizations fell short of their goal, succeeding in persuading only two justices that the autodialer ban should be thrown out. Thus, political campaigns remain barred from using autodialers to send unsolicited political messages to cell phones.

Second, debt collectors collecting on federally backed loans, such as student loans and mortgages, will have to quickly come back into compliance with the TCPA's automated call ban, as they were required to do before the 2015 amendment. As a practical matter, this will mean scrubbing their records to ensure they have appropriate consent before using autodialers to make debt collection calls.

Perhaps most importantly for businesses generally, the TCPA's signature provision against autodialers has survived constitutional scrutiny, meaning the TCPA is alive and well and the machine of TCPA litigation will continue to hum along. Businesses can expect a new wave of TCPA litigation as plaintiff's lawyers will seize on the victory as well as certain language in the Supreme Court's opinion lauding the TCPA's role in curbing invasive robocalls. Government debt collectors will again find themselves in the cross hairs.

With the TCPA's autodialer ban now perched on solid constitutional ground, the focus will likely shift back to the definition of an "autodialer," as it was a broad interpretation of that term that drove the explosion of TCPA litigation in the past decade. The Supreme Court is potentially poised to address that question as a petition for certiorari on that very issue is presently pending before the Court. The Federal Communications Commission is also set to weigh in with more clarity on its interpretation of the autodialer definition, and legislation on the subject has been percolating in Congress for years as well. In short, the path of the TCPA will continue to be dynamic and shifting, and we will continue to track developments and keep you updated.

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