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Trend: Ninth Circuit Joins The Fourth In Severing The TCPA's Government Backed Debt Exemption

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The First Amendment has long held a special place in constitutional jurisprudence. Given its importance to a well-functioning government and public discourse, courts take special care to enforce its protections, even for unwanted speech or around the periphery of what could be considered a content-based restriction. And when a statute did discriminate on content, courts were careful to rule in a matter that did not restrict *more speech* than Congress intended.

Enter the TCPA.

Compounding a dangerous precedent set by the Fourth Circuit, the Ninth Circuit recently severed the government-backed debt exemption to the TCPA after finding that it is an impermissible content-based restriction on speech. See *Duguid v. Facebook, Inc.*, No. 17-15320, 2019 U.S. App. LEXIS 17675 (9th Cir. June 13, 2019).

The Ninth Circuit agreed with the Fourth that the government-backed debt exemption renders the TCPA a content-based restriction, subject to strict scrutiny. The Ninth Circuit also agreed that, under *Reed v. Town of Gilbert*, the exemption itself had to pass strict scrutiny, not the "TCPA writ large." Finally, it held that the exemption is not narrowly tailored to the government's purported privacy interest, and thus fails strict scrutiny. None of that is surprising. As we have mentioned multiple times, the TCPA is the broadest restriction on constitutionally protected speech in current American law.

So far, so good – the TCPA is unconstitutional. But what about the remedy? That's where things began to go off the rails. Again.

The Ninth Circuit also followed the Fourth Circuit's lead in severing the government-backed debt exemption instead of striking down the TCPA as a whole. That sets a very dangerous precedent, as two federal appellate courts have now restricted speech that Congress plainly intended to permit. And although both opinions interpreted the TCPA, nothing in either courts' analysis necessarily restricts their reasoning to this one specific context. Both courts relied on congressional intent – a nebulous proposition to begin with – and the TCPA's severability provision. But severability provisions are common, and every statute that prohibits speech will obviously have a congressional intent to prohibit speech. So it could prove difficult to cabin the severability holdings of both opinions to the government-backed debt exemption.

The end result is that litigants seeking to enforce prohibitions on speech now have two opinions at their disposal to sever content-based prohibitions while maintain overly broad prohibitions on constitutionally protected speech.

Stay tuned, folks. We at TCPAWorld are actively monitoring *all* First Amendment challenges to the TCPA to, including any potential petitions for certiorari.

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