One of the most frequent questions I receive when discussing the TCPA and the First Amendment is, “why can’t the Court just sever the government-backed debt exemption”? The answer is surprisingly straightforward and consists of two components.

First, the government-backed debt exemption, standing alone, is not unconstitutional. It only becomes unconstitutional when it is incorporated into the broader TCPA.

Second, severing the exemption would result in federal courts prohibiting speech Congress expressly permitted. That simply does not happen.

Let’s break this down further, starting with the first point. The severability doctrine typically applies when one particular provision of a statute is unconstitutional, but the remainder of the statute is perfectly fine. The severability provision of the TCPA itself is illustrative: if any part of the statute “is held invalid, the remainder ... shall not be affected.” 47 U.S.C. § 608. The statute plainly envisions one particular provision being held unconstitutional when viewed in isolation. And, not surprisingly, the Fourth and Ninth Circuits rested their severability decision on its finding that the government-backed debt exemption was unconstitutional.
But here’s the thing. Nothing in the government-backed debt exemption, standing alone, is unconstitutional. Read in isolation, all it does is state that individuals are allowed to use an autodialer to collect government-backed debt. That is perfectly permissible. The constitutional violation only occurs because Congress prohibited calls that contain other types of content. That differential treatment – not the government-backed debt exemption itself – is what renders the statute unconstitutional. And that constitutional infirmity can be just as easily remedied by striking the prohibition on speech as striking the express permission for speech.

Which brings us to the second point.

Severability is often framed incorrectly as preserving a prohibition on speech Congress intended to prohibit. But that’s not what is actually happening. Instead, by severing the government-backed debt exemption, a court is actually banning speech Congress expressly allowed.

And that, my friends, is not how First Amendment jurisprudence works. Until Duguid and AAPC, federal courts were not in the habit of prohibiting speech the House, Senate, and President all said should be permitted. U.S. courts simply do not do that. Instead, their role is to make permissible speech that Congress or a state unconstitutionally prohibited. For example, in Reed v. Town of Gilbert, the Supreme Court did not fix the constitutional infirmity by banning all road signs – including those the local government decided should be permissible. But that is precisely what the government is asking the Supreme Court to do in AAPC – prohibit all speech broadcast through certain modes, even though Congress plainly intended to permit some speech.

When framed properly, it is difficult to see the Supreme Court severing the government-backed debt exemption. But I have been wrong before, so stay tuned!

© Copyright 2020 Squire Patton Boggs (US) LLP