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Justices Search For Right Robocall Balance In TCPA Fight

By **Allison Grande**

Law360 (May 6, 2020, 11:24 PM EDT) -- The U.S. Supreme Court justices on Wednesday appeared generally in agreement that exempting robocalls to collect government-backed debt from the Telephone Consumer Protection Act's automated call ban was unconstitutional, but struggled with whether the proper remedy was to stop debt collectors from skirting the restriction or allow more businesses to make such calls.



The justices of the U.S. Supreme Court held arguments by teleconference Wednesday in a case about the Telephone Consumer Protection Act. (AP)

In teleconferenced oral arguments, the high court grappled with whether an exemption added to the TCPA in 2015 that allows automated calls to be made to collect federally backed debts violates the First Amendment and, if it does, whether the right fix is to sever the constitutionally flawed exemption or strike down the statute's broad prohibition on essentially any other company using an autodialer or prerecorded voice to contact consumers on their cellphones without consent.

Several justices appeared receptive to the argument pressed by the American Association of Political Consultants and other political groups that the government-backed debt exemption was a content-based restriction on speech that could not survive strict scrutiny review under the First Amendment. But they seemed divided on what to do with the exemption, with some expressing concerns that merely severing it from the statute would restrict more speech while failing to deliver the relief that the political groups are seeking and others worrying about the practical implications of taking the alternative route of eliminating the entire autodialer restriction, which has been in place for nearly 30 years and is overwhelmingly popular with consumers.

"I think the government-debt exception is almost certainly content-based, at least for me," Justice Brett Kavanaugh said in questioning Deputy Solicitor General Malcolm L. Stewart, who was arguing on behalf of the federal government in defense of the statute's constitutionality.

That finding, coupled with the government's concession that the government debt exemption wouldn't be able to survive strict scrutiny review, "make this for me at least a case about severability and leveling up or leveling down," Justice Kavanaugh said.

Stewart kicked off the session by arguing that the government debt exemption added to the TCPA five years ago didn't introduce any "constitutional infirmity" into the statute, whose general prohibition on autodialed calls to cellphones has been in place since the law was passed in 1991. He also contended that the exemption covers only "a narrow category of calls that intrude less severely on consumer privacy than does the typical automated call" and serves the "important countervailing interest in protecting the federal fisc."

But the stance was met with immediate resistance by Chief Justice John Roberts, who interrupted Stewart's opening remarks to say he didn't see how the government's position that the exemption turns on the economic activity in which the caller is engaged rather than the content of the communications "gets you out of the content category."

"You still have to look carefully at what's being said before you can decide whether the phone call is covered by the provision or not," the chief justice said.

Most of the justices focused their inquiries on what to do if they were to conclude that the government-backed debt provision couldn't survive First Amendment muster.

Justice Kavanaugh remarked there was no precedent for the court to follow with respect to a situation where "the First Amendment problem is created by an exception to a ban on speech, rather than the First Amendment problem being created by the underlying ban without the exception."

Some justices raised concerns about how affirming the Fourth Circuit's decision to sever the exemption from the rest of the statute would result in limiting more constitutionally protected speech. Justice Neil Gorsuch in particular pointed out "the irony of a First Amendment challenge leading to the suppression of more speech as a remedy," given the purpose of the First Amendment to promote as much speech as possible.

Justice Clarence Thomas, who has seized on the new teleconference format to buck his **well-known preference** for remaining silent during arguments, commented that "it would seem a bit odd" for the court to sever the exception since that remedy wouldn't "give anything" to the political groups that want to see the automated call ban fall.

"It doesn't add any more speech for that for the respondent," Justice Thomas said. "And it seems to be taking speech actually away from someone who's not in this case."

Justice Ruth Bader Ginsburg, who was **calling in from the hospital** while recovering from gallbladder treatment, also acknowledged that striking down only the exemption would mean that the political groups would "lose at the end of the day" and wondered whether that would make the groups and others like them question why they should "bother with a First Amendment claim when it will be unsuccessful at the severance stage."

Stewart countered that there would be "a tail wagging the dog quality" to granting the groups' request to strike down the entire autodialer restriction, given that it "has been in place for nearly 30 years, has been popular with consumers [and] has protected a vast array of people." He also contended that it would be "natural" to scrap just the 2015 exemption since the rest of the TCPA had survived for years without it.

Justice Gorsuch said that the government's call for the court to strike down the exemption and go back to the "status quo" had "intuitive appeal," while Justice Roberts called Stewart's points in favor of severability "very strong." In questioning Roman Martinez of Latham & Watkins LLP, who argued on behalf of the political groups, Justice Roberts said that it "seems pretty obvious" that the way that Congress would solve "the problem we have today" is to "get rid" of the "pretty discrete" debt collection exemption it added to the statute in 2015.

"It's an extremely popular law. Nobody wants to get robocalls on their cellphone," Justice Roberts said. "The idea that Congress would embrace [ending the autodialer restriction] simply to save this government debt collection, they'd have to be very anxious to be more unpopular than they otherwise would be."

The importance of maintaining the consumer protections provided by the robocall ban was stressed

in **several amicus briefs** filed in the case, including one by Sen. Ed Markey, D-Mass., who led the passage of the TCPA in 1991, and more than a dozen of his congressional colleagues.

Markey and Rep. Anna Eshoo, D-Calif., issued a statement Wednesday stressing that the arguments "made clear that the TCPA is now, more than ever, an essential law that protects consumers from countless unwanted robocalls every year."

"Without such protections, these calls would intrude on Americans' privacy, put them at risk of costly scams, and undermine confidence in the nation's telephone networks," the lawmakers said. "If the Supreme Court were to invalidate the TCPA, Americans would experience a tsunami of robocalls and constant bombardment of their mobile devices that could render them effectively useless. After hearing today's arguments, we are confident the court will uphold this important statute."

In opposing those arguments, Martinez contended that the restriction, and not just the exemption, should be what falls due to Congress' decision not only to elevate calls to collect government debt above other types of communications but also to permit certain autodialed calls that are not for commercial or telemarketing purposes, including political calls, to be made to landlines but not to cellphones.

"In this case, we have not only the differential treatment of residential calls, but we also have the evidence provided by the 2015 exception, which shows that [Congress is] willing to trade off privacy for money, even though everyone would agree that collecting more money is not a compelling interest," Martinez said.

Justice Sonia Sotomayor suggested the possibility of a middle ground, asking Martinez that "assuming that there is a part of the restriction that could survive strict scrutiny under your claim, why shouldn't we limit any remedy, striking down this provision, simply to permit the types of calls that your clients make?"

Martinez answered that while his clients "would welcome the kind of relief that you've hypothesized," they continued to believe that the "appropriate relief" is to strike down the restriction in its entirety, especially since the government has "completely failed" to meet its burden of proving that the whole autodialer restriction would survive strict scrutiny review.

"They're trying to turn strict scrutiny into a rubber stamp," Martinez said. "And I think the best thing to do in these circumstances is hold the government to its burden of proof, invalidate the restriction, and then Congress can come back and act and legislate in a way that's rational in light of the court's decision."

Baker & McKenzie LLP partner Perrie M. Weiner, who has handled dozens of TCPA class actions but was not involved in Wednesday's case, told Law360 that following the arguments, he and his team estimated that there was a 60% chance that the justices would find the government debt collector exemption to be unconstitutional and sever it from the rest of the statute, a 30% chance that the autodialer ban would also be ruled unconstitutional and fall, and a slim 10% chance that the statute, including the government debt exemption, would remain intact.

Attorney General William Barr and the Federal Communications Commission, who are named as the government defendants in the case, are represented by Noel J. Francisco, Malcolm L. Stewart and Frederick Liu of the U.S. Solicitor General's Office and Joseph H. Hunt, Mark B. Stern, Michael S. Raab and Lindsey Powell of the U.S. Department of Justice's Civil Division.

The political groups are represented by Roman Martinez, Andy Clubok, Susan Engel, Tyce Walters, Samir Deger-Sen and Greg in den Berken of Latham & Watkins LLP, and William E. Raney and Kellie Mitchell Buber of Copilevitz Lam & Raney LLC.

The case is William P. Barr et al. v. American Association of Political Consultants Inc. et al., case number 19-631, in the U.S. Supreme Court.

--Editing by Bruce Goldman.

