
SCOTUS Severs and Removes Government Debt Exception to TCPA's Restriction on Robocalling

By Alexander R. Green, Joann Needleman / Jul 09, 2020

The Telephone Consumer Protection Act (TCPA) was enacted in 1991 in response to a surge in consumer complaints regarding intrusive robocalls. As noted in the legislative history, consumers were “outraged” and considered robocalls an invasion of privacy “regardless of the content or the initiator of the message.” In 2015, Congress had somewhat of a change of heart. A 2015 amendment to the TCPA allowed robocalls that are made to collect debts owed to or guaranteed by the Government, including robocalls made to collect pre-2010 federally guaranteed student loans and post-2010 federal student loans under the William D. Ford Federal Direct Loan Program, as well as federally guaranteed mortgage loans. For years, the unequal treatment of government debt under the TCPA has drawn criticism from the financial services industry as well as debt collectors and political organizations alike.

Before Reaching the Supreme Court

Plaintiffs in the underlying case were three nonprofit organizations that actively participate in the country's political system. As part of their activities, plaintiffs and their members make calls to citizens to discuss political candidates and issues, solicit donations, conduct polls, and encourage citizens to vote. Although they believe their political outreach would be “more effective and efficient” if they were permitted to make robocalls, the TCPA prohibits them from making those robocalls because plaintiffs are not in the business of collecting government debt. To challenge their unequal treatment under the TCPA, plaintiffs filed a declaratory judgment action, arguing that the TCPA's statutory structure violated the First Amendment.

The U. S. District Court disagreed. It reasoned that the robocall restriction with the government debt exception was a “content-based” regulation on speech, and should thereby be subject to “strict scrutiny.” However, the court concluded that the Government had a compelling enough interest in collecting its own debts law to survive the court's strict scrutiny.

On appeal, the U.S. Court of Appeal for the Fourth Circuit vacated the lower court's decision because it determined that the robocall restriction with the government debt exception did not pass the “strict scrutiny” standard. However, rather than lift the restriction on plaintiffs, the Fourth Circuit severed and struck the government debt exception.

The Supreme Court's Opinions

The Supreme Court agreed to hear the case and in a 6-3 vote affirmed the judgment of the Fourth Circuit. The Court found that the TCPA impermissibly favored government debt collection speech over political and other forms of speech. By a vote of 7-2, the Court agreed that the appropriate remedy is to sever and strike the government debt exception to the TCPA's robocalling restriction. Although a majority of the justices agreed on the result, they largely disagreed on the reasons for their decision – resulting in no majority opinion.

Kavanaugh's Opinion

Justice Kavanaugh wrote the plurality opinion, joined by Chief Justice Roberts, and Justices Alito and Thomas (Justice Thomas did not, however, join the opinion as it relates to severability). The plurality of justices quickly concluded that the robocall restriction with the government debt exception was a “content-based” restriction and therefore should be reviewed with “strict scrutiny.” In reaching this conclusion, the plurality reasoned simply:

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.

From there, the plurality also quickly concluded that the restriction failed to satisfy this “strict scrutiny” standard – an issue that the Government conceded.

A large portion of the plurality opinion discussed the issue of severability. Kavanaugh explained that the 1934 Communications Act – which was later amended by the TCPA – did contain a severability clause that requires the Court to apply. Moreover, Kavanaugh also explained the Court's longstanding presumption in favor of severing provisions of an act that are unconstitutional, rather than the entire act. Applying either of these principles, the plurality concluded that the appropriate remedy is to sever the government debt exception, meaning that the robocall restriction applies equally to private and government debt collectors, as well as political consultants.

Breyer's Dissent

Justice Breyer dissented from the majority's judgment but did join with the majority on the issue of severability. Joined by Justices Ginsburg and Kagan, Justice Breyer disagreed with applying a “strict scrutiny” standard, instead advocating for the less exacting “intermediate scrutiny” standard.

Sotomayor's Concurrence

Surprisingly, Justice Sotomayor concurred in the majority's judgment, albeit for different reasons. Although Justice Sotomayor agreed with Justice Breyer that the Court should apply an “intermediate scrutiny” approach, she believed that the Government has failed to survive even this lesser lever of scrutiny – explaining that “[t]he Government could have employed far less restrictive means to further its interest in collecting debt...”

Gorsuch's Concurrence and Dissent

Departing from the other more conservative justices, Justice Gorsuch, joined by Justice Thomas, wrote separately. Rather than focus on the government debt exception, Justice Gorsuch considered the statutory structure as a whole to be unconstitutional. With the government debt exception, the TCPA “allow[ed] a seemingly infinite number of robocalls of the type consumers appear to find most invasive.” As the Government offered no compelling reason to permit these calls but prohibit plaintiffs’ political speech, the TCPA violates the First Amendment.

On the issue of severability, Justices Gorsuch disagrees more pronouncedly. Rather than sever a provision of the TCPA, Justices Gorsuch would impose an injunction against enforcement of the TCPA against plaintiffs. Highlighting the peculiarity of plaintiffs challenging an exception that did not even apply to them, Justices Gorsuch reasoned that “[a] severance remedy not only fails to help the plaintiffs, it harms strangers to this suit.”

The Takeaway

The Supreme Court’s decision to sever and strike the government debt exception to the TCPA’s robocalling restriction could have a significant impact on the debt collection industry. Government debt includes many student loans and mortgage debts owed by millions across the country. And many collectors of government debt have readily used robocalling as a means to collect.

As federal agencies feel the financial stress of the Court’s decision, they may begin to pressure lawmakers into an overhaul of the TCPA’s restrictions. However, given the precedent the Court has laid in cases such as this one, it is unlikely that Congress could create another government debt exception to the TCPA’s robocalling restriction. As made clear this week by the Supreme Court, if the Government wishes to employ robocalling in the collection of its own debts, it must allow others to do the same.

Clark Hill’s Financial Services Regulatory and Compliance Practice Group will continue to analyze the impact of the Barr decision upon our clients. For more information please contact Joann Needleman (jneedleman@clarkhill.com).