SUPREME COURT RULES THAT NO ONE HAS THE RIGHT TO ROBOCALL YOU WITHOUT YOUR PERMISSION, EVEN THE GOVERNMENT

Hodgson Russ Media & First Amendment Alert
July 9, 2020

Political and polling organizations do not have a First Amendment right to robocall your cell phone without your permission, according to a new ruling from the United States Supreme Court. The court upheld a ban on robocalls, while also ruling that the government did not have the right to exempt itself from the ban.

The Court's July 6, 2020 decision in *Barr v. American Association of Political Consultants, Inc.*, reflects the near universal disdain that American's have for robocalls.

The dispute involved the Telephone Consumer Protection Act of 1991 (TCPA). The TCPA was passed in response to overwhelming consumer complaints of unauthorized calls to their cell phones and home phones. As relevant to this decision, the statute prohibited almost all robocalls, or autodialed calls, to cell phones. 47 U.S.C. § 227(b)(1)(A)(iii). In 2015, Congress amended the robocall restriction, carving out a new government-debt exception that allowed robocalls made solely to collect a debt owed to or guaranteed by the United States. The petitioners, non-profit political and polling organizations, filed suit seeking a declaration that the robocall prohibition was invalid because it violated their First Amendment right to free speech. Specifically, they argued that the 2015 carve-out permitting robocalls for collection of government debt, but prohibiting such calls for all other purposes, was an impermissible content-based restriction on speech. The petitioners wanted the entire robocall restriction struck down, not just the 2015 amendment.

The District Court agreed that the 2015 amendment was a content-based restriction, but passed muster under a strict scrutiny review because there was a compelling governmental interest in collecting on such debt. On appeal, the Fourth Circuit Court of Appeals struck down the 2015 amendment as unconstitutional because it did not pass strict scrutiny review. The Supreme Court then took up the case, and invalidated the exception for government-debt calls as unconstitutional. But it refused to go any further, and held that the remainder of the ban was valid, dealing a blow to the pollsters and political organizations who brought the case and had hoped to invalidate the entire TCPA.

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Noting that while the country is divided about many things, Justice Kavanaugh writing for the majority repeated that most everyone is united behind their disdain of robocalls. He began his analysis with the First Amendment itself, which provides that the government generally "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). For years, the Supreme Court has held that content-based laws are subject to strict scrutiny. And Section 227(b)(1)(A)(iii)'s robocall restriction, with the government-debt exception, is content based because it favors speech made for the purpose of collecting government debt over political and other speech. The Court specifically rejected the government's arguments that the restriction was content-neutral but rather focused on the speaker, that the restriction was aimed at a particular economic activity (and therefore any incidental burden on speech was permissible), and that if such a statute were content based then other statutes regulating debt collection would also be unconstitutional.

The government conceded that the 2015 amendment did not pass strict scrutiny because Congress had done nothing to differentiate government-debt collection speech from other types of speech such as political speech, charitable fundraising, issue awareness, and the like.

The last question for the Court was whether the entire robocall prohibition should be struck down, or whether just the 2015 amendment carving out government-debt collection robocalls should be struck. After reciting two hundred years of legal precedent for the general proposition that unconstitutional provisions of a statute shall be, whenever possible, severed from the remaining provisions of an otherwise constitutional statute, the Court focused on the fact that Congress has specifically included a severability provision in the 1934 Federal Communications Act, which was amended by the TCPA in 1991 and again in 2015. The severability provision applied to the 2015 amendment and, therefore, because the statute could be fully enforced and implemented without the 2015 amendment, it would not be struck down in its entirety.

Justice Breyer, joined by Justices Ginsburg and Kagan, wrote a partial dissent and would have found that the government-debt exception did not violate the First Amendment. Specifically, the dissent argued that the 2015 amendment was directed at regulating a commercial activity, debt collection, not speech. As such, the dissent disagreed with the majority's view that strict scrutiny applied to determine the constitutionality of the amendment. Justice Breyer argued that other regulatory enforcement schemes would similarly be considered content-based regulation of speech subject to such scrutiny and presumption of being unconstitutional: "for example, the regulation of securities sales, drug labeling, food labeling, false advertising, workplace safety warnings, automobile airbag instructions, consumer electronic labels, tax forms, debt collection, and so on. All of those regulations necessarily involve content-based speech distinctions." Rather, the dissent argued for a contextual evaluation of the restricted speech and application of an intermediate level of scrutiny. In the dissent's view, the 2015 amendment passes intermediate scrutiny. Justice Sotomayor agreed that intermediate scrutiny applied, but found that the amendment did not pass muster under that analysis.

The Takeaway

When the government regulates speech based on its content, courts will subject the regulation to strict scrutiny, which is often hard to meet. Nor can the government simply exempt itself from restrictions on speech without passing this test.

Practically speaking, any such restrictions will be presumed unconstitutional and the governmental entity that adopted the restrictions will be obligated to demonstrate three things for it to be upheld: (1) the law/policy must be justified by a compelling governmental interest, (2) it must be narrowly tailored to achieve that goal or interest, and (3) it must be the least restrictive means for achieving that interest: there must not be a less restrictive way to effectively achieve the compelling government interest. Any governmental entity considering content-based restrictions on speech is best served by focusing on these three requirements and addressing them in the public record before enacting any such laws or policies.

For any questions you have regarding if this recent decision impacts any of your organization's activities, please contact Ryan Cummings (716.848.1665) or Aaron Saykin (716.848.1345).

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