July 7, 2020

Supreme Court Declines to Invalidate the TCPA Cell Phone Calling Restrictions

On July 6, the Supreme Court decided *Barr v. American Association of Political Consultants, Inc.* (*AAPC*), a case at the intersection of the federal Telephone Consumer Protection Act (TCPA) and the First Amendment's prohibition of certain content-based government restrictions on speech. Congress enacted the TCPA in 1991 in response to complaints about the use of automated dialing equipment to call consumers, particularly for telemarketing purposes. The TCPA imposes various restrictions on calls using automatic telephone dialing systems and artificial/prerecorded voice messages. One such restriction prohibits use of that technology to place certain types of calls to cell phones. 47 U.S.C. 227(b)(1)(A)(iii). There are several exceptions to liability under the TCPA for cell phone calling, including one added by Congress in 2015 for calls "made solely to collect a debt owed to or guaranteed to the United States."

The American Association of Political Consultants is an organization that intends to use automated technology to call voters to solicit donations and discuss political issues. In 2016, along with several other similar plaintiffs, it sought a declaratory judgment that the TCPA government-debt exception is an impermissible content-based restriction that violates the First Amendment and to enjoin the statute's enforcement against the plaintiffs. The district court agreed that the government-debt exception was a content-based restriction but held that it did not violate the First Amendment, as the exception furthers a compelling interest (collecting on government debt) and is narrowly tailored to protect "consumer privacy" interests. On appeal, the U.S. Court of Appeals for the Fourth Circuit disagreed. It held that the government-debt exception runs counter to the TCPA's purpose to protect consumer privacy and thus violated the First Amendment. The Fourth Circuit remedied the constitutional violation by severing that exception from the statute, thereby making automated calling to cell phones for government debt collection also subject to the TCPA.

In *AAPC,* the Supreme Court affirmed the appellate court's decision. Across three opinions, six of the nine justices concluded that the TCPA's government-debt exception was a content-based restriction that violated the First Amendment. All but two justices agreed that the appropriate remedy for this First Amendment violation is to sever the government-debt exception rather than invalidate all of the cell phone calling restrictions or enjoin enforcement of the TCPA against the plaintiffs. Those seven justices relied on the severability clause in the Communications Act and the fact that the TCPA would be fully operative even after severance of the unconstitutional amendment added in 2015. The Court majority on this issue noted that severance remedied the AAPC's complaint about unequal treatment, even though that remedy leaves the plaintiffs still potentially liable for robocalls under the TCPA. Two of the justices would have granted the relief sought by plaintiffs by enjoining enforcement of the TCPA cell phone calling provision against them.

The Supreme Court's decision in *AAPC* has little effect on enforcement of the TCPA, except against those involved in automated calling to collect government debts.

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