

Robocalls Get The Boot

(07/22/20)

This case must be influenced by how aggravated people get about Robocalls. I am told that landlines and cell phones have been thrown through windows, down cliffs and into large bodies of water because of repeated, irritating, annoying, invasive robocalls.

Barr v. American Association of Political Consultants, 2020 U.S. LEXIS 3544 (July 6, 2020) Kavanaugh, J. and Gorsuch, J. JUSTICE KAVANAUGH announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE ALITO join, and in which JUSTICE THOMAS joins as to Parts I and II, addressed the free speech implications of robocalls.

Americans passionately disagree about many things. One thing they are united about is their disdain for robocalls. The Federal Government receives an overwhelming number of complaints about robocalls — 3.7 million complaints in 2019 alone. The States likewise field a constant barrage of complaints.

For nearly 30 years, the people's representatives in Congress have been fighting back. As relevant here, the Telephone Consumer Protection Act of 1991, known as the TCPA, generally prohibits robocalls to cell phones and home phones. A 2015 amendment to the TCPA allows robocalls that are made to collect debts owed to or guaranteed by the Federal Government, including robocalls made to collect many student loan and mortgage debts.

This case concerns robocalls to cell phones. Plaintiffs in this case are political and nonprofit organizations that want to make political robocalls to cell phones. Invoking the First Amendment, they argue that the 2015 government-debt exception unconstitutionally favors debt-collection speech over political and other speech. As relief from that unconstitutional law, they urge the United States Supreme Court to invalidate the entire 1991 robocall restriction, rather than simply invalidating the 2015 government-debt exception.

Six Members of the Court concluded that Congress impermissibly favored debt-collection speech over political and other speech in violation of the First Amendment. (SOTOMAYOR, J., concurring in judgment); GORSUCH, J., concurring in judgment in part and dissenting in part). Applying traditional severability principles, seven Members of the Court concluded that the entire 1991 robocall restriction should not be invalidated, but rather that the 2015 government-debt exception must be invalidated and severed from the remainder of the statute. (SOTOMAYOR, J., concurring in judgment); (BREYER, J., concurring in judgment with respect to severability and dissenting in part). As a result, plaintiffs still may not make political robocalls to cell phones, but their speech is now treated equally with debt-collection speech. The judgment of the U. S. Court of Appeals for the Fourth Circuit was affirmed.

Plaintiffs in this case were the American Association of Political Consultants and three other organizations that participate in the political system. Plaintiffs and their members make calls to citizens to discuss candidates and issues, solicit donations, conduct polls, and get out the vote. Plaintiffs believe that their political outreach would be more effective and efficient if they could make robocalls to cell phones. Plaintiffs are not in the business of collecting government debt, §227(b)(1)(A)(iii) prohibited them from making robocalls.

In short, the robocall restriction with the government debt exception is content-based. Under the Court's precedents, a "law that is content based" is "subject to strict scrutiny." *Reed*, 576 U. S., at 165. The Government conceded that it cannot satisfy strict scrutiny to justify the government-debt exception. The U.S. Supreme Court agreed. The Government's stated justification for the government-debt exception is collecting government debt. Although collecting government debt is no doubt a worthy goal, the Government conceded that it did not sufficiently justify the distinction between government-debt collection speech and other important categories of robocall speech, such as political speech, charitable fundraising, issue advocacy, commercial advertising, and the like.

Having concluded that the 2015 government-debt exception created an unconstitutional exception to the 1991 robocall restriction, the Court then had to decide whether to invalidate the entire 1991 robocall restriction, or instead to invalidate and sever the 2015 government-debt exception.

In sum, the text of the Communications Act's severability clause required that the Court sever the 2015 government-debt exception from the remainder of the statute. Even if the text of the severability clause did not apply here, the presumption of severability would require that the Court sever the 2015 government-debt exception from the remainder of the statute.

A generally applicable robocall restriction would be permissible under the First Amendment. The First Amendment does not tell the Court which way to cure the unequal treatment in this case. Therefore, the Court applied traditional severability principles. Severing the 2015 government-debt exception was said to have cured the unequal treatment and constituted the proper result under the Court's traditional severability principles. The correct result, opined the Court, was to sever the 2015 government-debt exception and leave in place the longstanding robocall restriction. Consumers can be heard cheering.

The judgment of the U. S. Court of Appeals for the Fourth Circuit was affirmed.

*Clifford A. Rieders, Esquire
Rieders, Travis, Humphrey,
Waters & Dohrmann
161 West Third Street
Williamsport, PA 17701
(570) 323-8711 (telephone)
(570) 323-4192 (facsimile)*

Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.