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ALERT

Ninth Circuit Strikes Down State Ban on Political Robocalls

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On September 10, the United States Court of Appeals for the Ninth Circuit issued an opinion in *Victory Processing LLC et al. v. Tim Fox* (18-35163), concluding that a Montana law banning political robocalls "strikes at the heart of the First Amendment" and disproportionately impacted candidates with fewer resources. The court overturned a 2018 district court decision that found the law constitutional. [1]

Addressing robocalls has been a high-priority issue for federal and state lawmakers and regulators in recent years. This is no surprise, as such calls have consistently topped the list of consumer complaints at both the Federal Trade Commission and the Federal Communications Commission for several years running. The recent decision out of the Ninth Circuit suggests that courts will continue to closely scrutinize these efforts that seek to curtail the delivery of robocalls, particularly when those efforts focus on the content of particular calls.

Below is a summary of the Ninth Circuit's decision, as well as a reminder about how federal law under the Telephone Consumer Protection Act (TCPA) deals with political robocalls.

Ninth Circuit Decision

The court's opinion addressed whether Montana Code section 45-8-216(1)(e), which restricts automated telephone calls promoting a political campaign or any use related to a political campaign, violated the First Amendment. The Appellant in the case, Victory Processing, LLC, utilized automated telephone calls (*i.e.*, robocalls) to communicate political messages and collect public opinion data for both its clients and its own use. Although it desired to deliver such

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robocalls in Montana, Victory Processing refrained from doing so on advice of counsel since its activities would violate the 1991 state law.

Given the First Amendment implications, the court applied the traditional strict scrutiny standard since the Montana statute at issue was "plainly content-based" (*i.e.*, political robocalls). [2] Under the strict scrutiny standard, content-based laws are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests. [3] Although the court concluded that Montana had demonstrated a compelling state interest in regulating robocalls, it found that the statute was not narrowly tailored to further the state's interest in protecting privacy.

The court concluded that the statute failed the strict scrutiny standard since it was both underinclusive and overinclusive. In reaching its conclusion, the court cited to a recent decision by the Court of Appeals for the Fourth Circuit, which overturned a similar state law that prohibited all consumer and political robocalls. [4] Taking a similar approach in its review, the Ninth Circuit reasoned that "by singling out only five topics of robocalling for regulation—including messages related to political campaigns—the [Montana statute] leaves consumers open to an 'unlimited proliferation' of robocalls on other topics."

The court also found that the statute was overinclusive because robocalls related to political campaigns had not been shown to pose a greater threat to individual privacy. It emphasized recent research suggesting that "robocall scams pose one of the biggest threats to consumers, constituting 40% of all robocalls." [5] In contrast, the court concluded that political robocalls had not been shown to pose a threat to individual privacy. The court ultimately concluded that by regulating categories of robocalling that have not been shown to pose a threat, the statute was "overinclusive in its efforts to further Montana's compelling interest in protecting privacy."

In sum, the decision out of the Ninth Circuit suggests that courts will closely scrutinize government efforts to curtail robocalls, particularly when they focus on the content of particular calls. While the Fourth Circuit and Ninth Circuit have recently overturned such laws, a 2017 decision out of the United States Court of Appeals for the Seventh Circuit upheld an Indiana anti-robocall law. [6] In that case, however, the court ruled Indiana's statute did not discriminate by content, and instead regulated who may be called, as opposed to the content of the message.

Political Robocalls Under the TCPA

The TCPA treats political robocalls—that is political calls made using an autodialer or with an artificial or prerecorded voice—differently depending on what type of number is dialed. If these calls are placed to a wireless number, then they are generally prohibited unless the caller first obtains prior express consent. However, no prior express consent is required if these calls are placed to landlines. These same rules apply to political robo-texts, as well. Further, there are other requirements imposed on these calls under the TCPA, including that a caller placing a prerecorded call must identify itself at the beginning of each call.

The TCPA rules are complex and nuanced, and the stakes of a misstep are high. For more detailed information about how political calls and texts are handled under the TCPA, see our earlier post here, or reach out with specific questions.

[1] *Victory Processing, LLC v. Fox*, 307 F. Supp. 3d 1109, 1121 (D. Mont. 2018).

[2] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015).

[3] *Id.* at 2226.

[4] *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015).

[5] *See* Kate Fazzini, *Robocalls Jumped 60 Percent in the U.S. Last Year and Scammers Are Finding More Ways to Make Money*, CNBC, Jan. 4, 2019, https://www.cnbc.com/2019/01/02/as-robo-calling-ramps-up-consumers-increasingly-wonder-why-carriers-cant-stop-scammers-from-spoofing-their-phone-numbers.html (last visited September 11, 2019).

[6] *Patriotic Veterans, Inc. v. Zoeller*, 845 F. 3d 303 (2017).