

No. 18-55667

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STEVE GALLION,
Plaintiff-Respondent,

and

UNITED STATES OF AMERICA,
Intervenor-Respondent,

v.

CHARTER COMMUNICATIONS, INC. AND SPECTRUM MANAGEMENT
HOLDING COMPANY, LLC,
Defendants-Petitioners,

ON PETITION FOR REVIEW FROM THE UNITED STATES DISTRICT
COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
Case No. 5:17-cv-01361-CAS-KKx

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*
AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC. IN
SUPPORT OF DEFENDANTS-PETITIONERS, AND FOR REVERSAL**

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Counsel for Amicus Curiae

American Association of Political Consultants (“AAPC”) has asked for the consent of all parties to the filing of an amicus brief. Counsel for Charter Communications, Inc., (“Charter”) consented to this brief. Counsel for Steve Gallion did not answer an email request for consent dated August 31, 2018, or return a phone call from William Raney to Adrian Bacon on September 5, 2018.

AAPC hereby moves for leave to file its amicus brief in this matter. The speech rights of its members could be affected by the outcome of this appeal, and it can provide the Court important perspective from speakers of fully-protected political speech regarding the effects of this appeal. The perspective of political speakers should be valuable to this Court.

This amicus brief argues that the Telephone Consumer Protection Act (“TCPA”), on its face, imposes an unconstitutional content-based restriction on speech.

WHEREFORE, AAPC moves for leave to file the attached proposed amicus brief.

Respectfully submitted this 7th day of September, 2018.

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CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

/s/ William E. Raney
William E. Raney

Counsel for Amicus Curiae

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Amicus Curiae American Association of Political Consultants, Inc. makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?

No.

2. Does party/amicus have any parent corporations? If yes, identify all parent corporations, including grandparent and great-grandparent corporations.

No.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? If yes, identify all such owners.

No.

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? If yes, identify entity and nature of interest.

No.

5. Is party a trade association? (amici curiae do not complete this question) If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

Not applicable as amici curiae do not complete this question.

6. Does this case arise out of a bankruptcy proceeding? If yes, identify any trustee and the members of any creditors' committee.

No.

Date: September 7, 2018

/s/ William E. Raney
William E. Raney
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STATEMENT OF IDENTITY OF AMICUS CURIAE

The American Association of Political Consultants (“AAPC”) is the largest association of political and public affairs professionals in the world, with over 1350 members. Members include campaign managers, political consultants, lobbyists, and many more, ranging from the local level to the white house, and all varying between Republican, Democrat, and Independent views. Although this association consists of a very diverse group, it has one goal, to improve democracy.

STATEMENT OF INTEREST OF AMICUS CURIAE

AAPC is interested in this case because the cell phone ban is having nationwide effects on campaign awareness, fundraising, and political information. AAPC has filed its own challenge to the TCPA cell phone call ban currently before the Fourth Circuit Court of Appeals. *Am. Ass'n. of Political Consultants v. Sessions*, 2017 U.S. Dist. LEXIS 36877 (E.D.N.C., Mar. 15, 2017), *appeal docketed*, No. 18-1588 (4th Cir.). With its members' thousands of combined years of political experience, AAPC is qualified to take the stances set forth in this brief, and feels its arguments of this ban in regards to political calling will benefit the court in making its decision.

STATEMENT OF INFORMATION REGARDING AMICUS CURIAE

No party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no other party – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The TCPA's cell phone ban, 47 U.S.C. § 227(B)(1)(a)(iii), infringes on the First Amendment's protection of speech, especially that of political speech, and is inconsistent with other courts' opinions that the government cannot favor commercial speech over that of noncommercial speech.

The cell phone ban infringes on the right of consumers to be informed. Because more than half of the population no longer own landlines, the cell phone call ban improperly shapes political debate, as it controls what consumers are able to hear.

Finally, cell phone ban is content-based, and cannot withstand strict scrutiny. This ban is not compelling a substantial government interest, it is not narrowly based, and there are less restrictive alternatives that will work better than the ban itself.

ARGUMENT

The cell phone call ban violates the First Amendment because it is content-based and cannot withstand strict scrutiny.

I. The cell phone call ban silences fully-protected political speech.

Plaintiff AAPC is a bipartisan, nonprofit association of political professionals located in McLean, Virginia and organized under § 501(c)(6) of the Internal Revenue Code (“IRC”). AAPC provides education for its members and advocates for the protection of political free speech. AAPC members include political fundraisers, organizers, and persons who conduct and analyze political polls, i.e. political pollsters and opinion researchers. AAPC members make calls to persons on their cell phones to solicit political donations and to advise on political and governmental issues. AAPC members would make these calls to persons who did not provide prior express consent to them using an automatic telephone dialing system (“ATDS”), artificial or prerecorded voice but for the cell phone call ban and the credible threat and potential for prosecution by the federal government, states, or private persons or classes of persons¹.

A. The TCPA’s cell phone call ban and its content-based exemptions.

¹ Our sitting President and our past President’s campaign organization have been defendants in TCPA lawsuits seeking class action status. *Thorne v. Donald J. Trump for President, Inc.*, No. 1:16-cv-4603 (N.D. Ill. Apr. 25, 2016); *Shamblin v. Obama for Am.*, No. 8:13-cv-2428, 2015 U.S. Dist. Lexis 54849, *18 (M.D. Fla. Apr. 27, 2015).

Congress passed the TCPA in 1991 as Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227) to protect telephone subscribers' privacy rights in connection with commercial telephone solicitations.

Congress instructed the FCC to account for the “free speech protections embodied in the First Amendment of the Constitution” when considering the impact of any restrictions on noncommercial communications. TCPA, Pub. L. 102-243, § 2(13).

The TCPA states:

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

...

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii) (the “cell phone call ban”).

The TCPA defines “automatic telephone dialing system” (“ATDS”) as “equipment which has the capacity to store or produce telephone numbers to be

called, using a random or sequential number generator; and to dial such numbers.”
47 U.S.C. § 227(a)(1).

Since 1992, the FCC and Congress have passed at least six exemptions to the cell phone call ban which apply based on the identity of the caller and/or the content of the exempted calls.

In 2012, the FCC exempted from the cell phone call ban “autodialed or prerecorded message calls by a wireless carrier to its customer when the customer is not charged.” 77 Fed. Reg. 34233, 34235 (June 11, 2012) (hereinafter referred to as the “wireless exemption”).

In 2014, the FCC exempted from the cell phone call ban prerecorded and ATDS calls for “package delivery notifications to consumers’ wireless phones either by voice or text ... so long as those calls are not charged to the consumer recipient, including not being counted against the consumer’s plan limits on minutes or texts, and comply with the conditions” *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3432, 3439 (Mar. 27, 2014) (hereinafter referred to as the “package delivery exemption”).

In 2014, the FCC exempted from the cell phone call ban prerecorded and ATDS “non-telemarketing voice calls or text messages to wireless numbers ... [that] rely on a representation from an intermediary that they have obtained the requisite consent from the consumer.” *In the Matter of GroupMe, Inc. / Skype*

Communications S.A.R.L., 29 FCC Rcd 3442, 3444 (Mar. 27, 2014) (hereinafter referred to as the “intermediary consent exemption”).

In 2015, the FCC exempted from the cell phone call ban prerecorded and ATDS “non-telemarketing, healthcare calls that are not charged to the called party” and “for which there is exigency and that have a healthcare treatment purpose” *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 et al.*, 30 FCC Rcd 7961, 8930-31 (July 10, 2015) (hereinafter referred to as the “HIPAA exemption”).

In 2015, the FCC exempted from the cell phone call ban prerecorded and ATDS calls regarding “(1) ‘transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers’ personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers.’” *Id.* at 8023 (hereinafter referred to as the “bank and financial exemption”).

In 2015, Congress exempted from the cell phone call ban prerecorded and ATDS calls “made solely to collect a debt owed to or guaranteed by the United States”. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, tit. 3, § 301(a), 129 Stat. 584, 588 (2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)) (hereinafter referred to as the “debt collection exemption”).

In 2016, the FCC exempted from the cell phone call ban prerecorded and ATDS calls from federal government officials conducting official business. *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 et al.*, CG Docket No. 02-278, July 5, 2016 at ¶ 12 (hereinafter referred to as the “official federal government business exemption2”).

B. The ban favors commercial speech over political speech.

The First Amendment reflects a “profound national commitment” to the principle that “debate on public issues should be uninhibited, robust, and wide-open,” and has “consistently commented on the central importance of protecting speech on public issues.” *Boos v. Barry*, 485 U.S. 312, 318 (1998).

“[P]olitical speech is at the very core of the First Amendment.” *Carey v. Fed. Elec. Comm’n.*, 791 F. Supp. 2d 121, 133-34 (D.D.C. 2011) (citing *Buckley v. Valeo*, 424 U.S. 1, 39 (1976)). “The First Amendment affords the broadest protection to such political expression in order ‘to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by people.’” *McIntyre v. Ohio Elec. Comm’n.*, 514 U.S. 334, 346 (1995).

It is well-settled that government cannot favor lesser protected commercial speech, e.g. debt collection, over fully protected speech, e.g. political speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981).

As is obvious on its face, the cell phone call ban does just that.

II. The cell phone call ban infringes on the consumer's right to be informed concerning political issues.

By restricting AAPC and other political calls and favoring government debt collection calls, the cell phone call ban infringes upon consumers' right to be informed.

Currently, 50.8 percent of the population only use a cell phone and this proportion is rising². This statistic comes from the Centers Disease Control Prevention ("CDC"). It is obvious that this agency would need to know this percentage for emergency purposes.

Its relevance to political speech and an informed populous is also obvious. The same CDC data concluded that young adults in rented housing are more than likely to be wireless only, as are people with lower incomes. *Id.*

Thus, a get out the vote call by a political candidate to landlines, allowed by the cell phone call ban, would reach a different demographic than the same call, banned by the cell phone call ban, to cell phones.

The cell phone call ban thus influences whether wealthy or poor, old or young, or home owner or renter voters receive political messages. By applying a thumb to

² See National Public Radio, *The Daredevils Without Landlines – And Why Health Experts Are Tracking Them*, ALL TECH CONSIDERED (May 4, 2017, 12:01 AM), <https://www.npr.org/sections/alltechconsidered/2015/12/03/458225197/the-daredevils-without-landlines-and-why-health-experts-are-tracking-them>.

this scale of information receipt, the cell phone call ban improperly infringes upon political speech and the right of citizens to be informed.

III. The cell phone call ban is content-based and cannot withstand strict scrutiny.

Courts must apply strict scrutiny to determine the constitutionality of content-based restrictions of speech. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010). This requires “the government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” *Id.* (citing *Fed. Election Comm’n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2000)); *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015). Strict scrutiny requires that the government use the “least restrictive means” available among effective alternatives to accomplish its legitimate goal. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). If there are plausible less restrictive alternatives available, then the statute cannot withstand strict scrutiny. *Cahaly*, 796 F.3d at 405. Further, the ameliorative actions of the FCC and Congress cannot cure the unconstitutionality of the cell phone call ban.

A. The cell phone call ban does not further a compelling governmental interest.

The protection of residential privacy is undoubtedly a compelling governmental interest. *Carey v. Brown*, 447 U.S. 455, 471 (1980). But the cell phone call ban does not further this compelling governmental interest.

The exemptions carved out of the cell phone call ban demonstrate that protection of residential privacy was not the FCC or Congress' purpose when they created multiple exemptions to the cell phone call ban. *See* 105 Stat. 2394. There must have been some other purpose, as debt collection calls can have no less deleterious effect on privacy than calls made by the AAPC's members. Commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors are permitted to make autodialed or prerecorded calls with fewer restrictions than imposed on calls made by the AAPC's members engaging in political speech.

These commercial entities are precisely the sources of calls from whom the Court states the "unwilling listener" might want to be protected. There is no explanation for why calls from such commercial entities, the government or its for-profit debt collectors are any less intrusive or less unwelcome than calls made by AAPC members that deliver constitutionally protected political messages.

The cell phone call ban has become a way for the FCC and Congress to favor certain speakers and content rather than protect telephone subscribers' residential privacy. The intrusion into residential privacy is not lessened merely by the fact that autodialed or prerecorded calls to collect debt are made on behalf of the United States as opposed to on behalf of a private actor. The cell phone call ban fails to further a compelling governmental interest as demonstrated by the exemptions.

B. The cell phone call ban is not narrowly tailored to further a compelling governmental interest.

Content-based restrictions that serve compelling governmental interests must be narrowly tailored to meet those interests. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). While narrow tailoring does not require perfect tailoring, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015), the restriction cannot be underinclusive or overinclusive in the speech that it restricts. *Cahaly*, 796 F.3d at 405. Contrary to the district court's finding, the cell phone call ban is both.

In *Cahaly*, the Fourth Circuit held the South Carolina robocall ban was (1) underinclusive because it restricted political and consumer robocalls but permitted the "unlimited proliferation" of other types of calls causing the same problem; and (2) overinclusive because it targeted political calls when consumer complaints overwhelmingly involve commercial calls. *Cahaly*, 796 F.3d at 406. The court held the South Carolina robocall ban was not narrowly tailored to further the assumed compelling interest of residential privacy. *Id.*

Likewise, the cell phone call ban is underinclusive because it restricts autodialed or prerecorded political calls but permits the less protected speech of commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors.

The cell phone call ban sets no limitation on what type of calls can be made as long as the calls are to collect a debt owed to or guaranteed by the United States government. 47 U.S.C. § 227(b)(1)(A)(iii). The FCC and Congress cannot prohibit autodialed or prerecorded political calls based on the compelling state interest of protecting “residential privacy and tranquility from unwanted and intrusive robocalls”, but then do an about-face and allow *commercial* robocalls to collect a debt owed to or guaranteed by the United States. *Cahaly*, 796 F.3d at 405. Permitting political calls not only would be in keeping with the spirit of the First Amendment, but it would do no appreciable damage to the privacy interests underlying the TCPA. *See, e.g., Gallion*, 287 F. Supp. 3d at 930; *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1048 (N.D. Cal. 2017).

Furthermore, restrictions on speech cannot be “overinclusive by unnecessarily circumscribing protected expression.” *Cahaly*, 796 F.3d at 405 (internal quotation marks omitted). But the cell phone call ban does just that. It is overinclusive because it prohibits autodialed or prerecorded calls consumers desire, expect, or benefit from, including calls made by AAPC members that contain fully-protected speech such as “get out the vote” calls, survey and other important informational calls, and voter registration drives.

Thus, like the South Carolina statute in *Cahaly*, the cell phone call ban is not narrowly tailored to further a compelling governmental interest. It is underinclusive

because it permits calls from certain exempted commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors. *See Cahaly*, 796 F.3d at 406. These calls have the same – if not worse – effect on telephone subscribers’ residential privacy. The cell phone call ban is similarly overinclusive because it restricts the fully-protected political speech of the AAPC.

C. There are less restrictive alternatives than enforcement of the cell phone call ban to achieve the government’s purpose.

Strict scrutiny requires that the cell phone call ban use the least restrictive means available to achieve the FCC and Congress’ purported interest in residential privacy. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000); *Cahaly*, 796 F.3d at 405.

In *Cahaly*, this Court held a South Carolina robocall statute unconstitutional as it banned unsolicited prerecorded calls including “automatically announced calls of a political nature including, but not limited to, calls relating to political campaigns,” but there were other plausible less restrictive alternatives including time-of-day limitations, mandatory disclosure of the caller’s identity, or do-not-call lists. *Cahaly*, 796 F.3d at 405.

Granting Appellant the relief requested would not leave telephone subscribers' residential privacy unprotected as the National Do-Not-Call Registry and state do-not-call laws would remain in place, as well as the rest of the TCPA, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, the Telemarketing Sales Rule, 16 C.F.R. § 310 *et seq.*, and similar state and federal election, consumer protection, and unfair trade practices laws.

CONCLUSION

For the foregoing reasons, Amicus AAPC prays this court grant Appellant the relief it requests and such other relief as it deems just and proper.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-volume limitations of Rule 32(a)(7)(B). The brief contains 2,948 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

CERTIFICATE OF SERVICE

I certify that on the 7th day of September, 2018, I filed the foregoing document with the Clerk of the Court using the CM/ECF system that will automatically serve electronic copies upon all counsel of record.

/s/ William E. Raney
William E. Raney

Counsel for Amicus Curiae