

Ninth Circuit ends prohibition on political robocalls

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The Ninth Circuit phrased the question in *Victory Processing v. Fox* succinctly: “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—violates the First Amendment.” The court answered this question in the affirmative, following the Fourth Circuit’s ruling on a similar statute in South Carolina.

The court acknowledged that it has upheld numerous robocall laws, but these previous cases focused on whether the robocall regulations were reasonable time, place and manner restrictions. This was the first case challenging the constitutionality of a law that focused on the content of the robocall.

Montana’s statute provides that a person cannot use an automated telephone system “for the purpose of: (a) offering goods or services for sale; (b) conveying information on goods or services in soliciting sales or purchases; (c) soliciting information; (d) gathering data or statistics; or (e) promoting a political campaign or any use related to a political campaign.” The court ruled that this statute was a content-based restriction on speech; content-based restrictions are presumptively unconstitutional under the First Amendment and constitutional only if the government proves that they are narrowly tailored to serve compelling state interests.

The court first held that Montana had a compelling state interest in protecting a person’s personal privacy from robocalls. Yet the statute was not narrowly tailored to advance this interest. Robocalls’ disruption of phone lines and answering machines relates to the effects of robocalls rather than their content. And singling out only five topics of robocalling permits the unlimited proliferation of robocalls on other topics. Accordingly, regulating robocalls based on their content—here political—does not address Montana’s expressed concerns, and the statute is unconstitutional.

In the immediate aftermath, Montana’s voters may receive more automated election calls. However, Montana legislators may choose to enact more sweeping regulations in upcoming years that target the method of robocalls rather than their content. Further, many states have similar statutes that purport to regulate specific types of speech, so it will be interesting to follow the fate of those statutes as challenges proceed through the courts.

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