Monday, June 22, 2020

Well folks another opinion day has come and gone at the US Supreme Court with no ruling yet on the big Barr v. AAPC challenge to the TCPA.

Traditionally the Supreme Court clears its April docket with rulings by the end of June. With a set Monday calendar to release opinions and a likely additional release date this Thursday, that leaves only TWO days left (the 25th and the 29th) for the Supremes to enter their final vote on the fate of the TCPA. If the traditional calendar sticks that is...

Truth is, with two (traditional) opinion dates left the Supreme Court is still sitting on fourteen (14!) unissued rulings so this may end up slipping into July (although I certainly hope not since I have a big webinar to discuss the ruling set up next Tuesday, June 30, 2020. Ha!) Notably, the Supremes seem to be issuing opinions in rough order of argument, which means there are still six cases “ahead” of AAPC on
the docket. Obviously, however, the Supreme Court can-and will-issue opinions in any order as they are finalized so this isn’t a first come first served (TCPA) world.

But since we are all waiting with baited breath, let’s go through a few possible outcomes here. As a refresher, the Supreme Court is reviewing the TCPA in AAPC on a challenge by a political consulting organization arguing that the TCPA’s government-backed debt exemption is unconstitutional. There are a number of permutations to the challenge—as was made clear at oral argument—and it is not entirely clear whether the Supremes will scrutinize only the exemption or the restriction itself.

Since TCPAWorld dwellers are becoming constitutional law scholars, let’s also recall a couple basics of First Amendment jurisprudence:

- The First Amendment forbids Congress from regulating protected speech, but Congress does it all the time anyway;
- Supreme Court precedent generally allows Congress to regulate speech (even protected speech) in the name of an important interest so long as it does so in a content-neutral (and certainly in a viewpoint neutral) sort of way;
- The TCPA (at least as interpreted by some courts) is the broadest restriction on protected speech in America’s history (by a long shot) but has historically been upheld as Constitutional because it was content neutral;
- In 2015 the government-backed debt amendment was added to the statute rendering it—for the first time—content specific (probably).

While there is no doubt that a content specific statute must meet strict scrutiny—a very high test—it is unclear whether that scrutiny is properly applied to the exemption in this case or to the restriction itself. The briefing of the parties below focused solely on the exemption but in the briefing on appeal to SCOTUS and in oral argument there has been noticeable creep toward arguments (for and against) applying scrutiny to the TCPA’s restrictions—a shift that may or may not be entirely attributable to my loud-mouthery.

So with all of this recalled, here are the possible outcomes in no particular order:

1. **The Supreme Court Finds the TCPA and its Government-Backed Debt Exemption Is Not Content Specific at All. (10% chance)**

RESULT: The TCPA survives scrutiny with no change.

*Why this might happen:* As Professor Epps explained in *Unprecedented 14* the doctrine of content neutrality has expanded greatly over the past few decades, arguably spiking to exhaustion in Reed. It is possible that the Supreme Court uses AAPC as a vehicle to roll back (perhaps significantly) on the application of strict scrutiny in First Amendment challenges and re-focuses its application solely to instances of viewpoint specificity. (Translation: the Supreme Court might use the TCPA as an opportunity to give Congress more power to regulate speech in a neutral manner.)
Why it shouldn’t/won’t happen: I mean, the TCPA is content-specific under existing case law so the Supreme Court would really have to depart from Reed in a clear and decisive way to get here. And judging by the questions of the Justices at oral argument, this just isn’t going to happen.

2. The Supreme Court Finds the TCPA’s Government-Backed Debt Exemption is Content Specific but Survives Strict Scrutiny. (5% chance)

RESULT: The TCPA survives scrutiny with no change.

Why this might happen: This would be a pretty weird outcome because it would require the Supreme Court to find collecting government-backed debt is a compelling governmental interest, which is “tacky” to say the least. Still some district courts have reached this conclusion so it is not impossible.

Why it shouldn’t/won’t happen: The Government did not even advance this argument and none of the Justices seemed slightly interested in it at oral argument. This seems like the most unlikely outcome.

3. The Supreme Court Finds the TCPA’s ATDS Restriction is Content Specific (due to the exemption) But Finds the Restriction Survives Strict Scrutiny (10% chance)

RESULT: The TCPA survives scrutiny (including the government-backed debt exemption) but with its ATDS definition narrowed.

Why this might happen: Really this is what should happen. The focus here would be on the restriction–i.e. the TCPA’s ban on the use of ATDS/pre-recorded voice messages to call cell phones–and not the exemption–i.e. the ability of government-debt collectors to make calls. This makes more analytic sense since the First Amendment prohibits restrictions on speech not permissions (is that a word?) on speech. Plus the TCPA really should survive even strict scrutiny if the TCPA’s ATDS restriction is read narrowly. So this approach allows for First Amendment doctrine to be logically applied AND for the TCPA to be upheld. I mean, feels like a win/win (since presumptively the Supreme Court does not want to strike down the “popular” statute.)

Why this shouldn’t/won’t happen: No one else thought of it but me? This actually seems to be the “right” answer here, but it simply wasn’t briefed or argued and none of the Justices asked any questions about it from the bench. Right or wrong, the focus in AAPC seems to be primarily on applying scrutiny to the exemption and not the restriction and the assumption seems to be–for whatever reason—that the level of scrutiny to be applied to the restriction would be lower “intermediate” scrutiny because the content-specificity arises in the exemption and not the restriction itself. (Translation: everyone is elevating form over substance for some reason and it doesn’t seem like that’s going to change now.)
4. The Supreme Court finds the Government-Backed Debt Exemption Does not Survive Strict Scrutiny and Severs it (20% chance)

RESULT: The TCPA survives strict scrutiny but the government-backed debt exemption is dead

Why this might happen: Well, this is what the two courts of appeals below did so why wouldn’t the Supreme court just do the same thing? This seems to be the odds on favorite for most observers– but I think it is relatively unlikely (as I explain below). But the ruling here would come down to Congressional intent– the TCPA includes a severance provision suggesting that Congress intended the exemption to be cast aside if it was unconstitutional. So the Court should do what Congress intended, right? But really this is the easiest way for the Supreme Court to uphold the “popular” TCPA– it is effectively a “punt.”

Why this shouldn’t/won’t happen: There are a bunch of problems with it. First, it applies scrutiny to the exemption rather than the restriction which is just flat the wrong analysis in a First Amendment case as opposed– for instance–to an Equal Protection challenge. Second, it would result in the Supreme Court expanding a restriction to cover more speech, in a manner that it has never done before. Third, it would impact the substantive speech rights of non-parties to the case without notice or an opportunity to be heard. Fourth, it would afford a “remedy” to the Plaintiff that it did not seek and lacked standing to seek. Fifth, it would deny any remedy to a successful Plaintiff challenging a statute on First Amendment grounds. Sixth, there is nothing wrong with the exemption standing alone– against the First Amendment does not ban permissions on speech it bans restrictions– so striking it makes no logical sense. Setting all of that aside, it just doesn’t make sense that the Supremes would grant cert. on this issue when there was no split of authority below. There was a reason cert. was granted here and it wasn’t just to rubber stamp what the appellate courts did.

5. The Supreme Court finds the Government-Backed Debt Exemption Does not Survive Strict Scrutiny and Strikes Down the TCPA’s ATDS and prerecorded voice call restrictions (25% chance)

RESULT: Section 227(b) of the TCPA is dead but the rest of the statute lives on

Why this might happen: If the Supreme Court applies scrutiny to the exemption this is the result that makes the most doctrinal sense. The restriction is being applied unevenly by virtue of the exemption. Striking the exemption works violence to logic and law (see above) so there is really no other course–the restriction must fall.

Why this shouldn’t/won’t happen: The TCPA is a popular statute and the Supreme Court doesn’t want to allow a bunch of robocalls. There really is no doctrinal hold up here– it is the “right” thing to do, assuming scrutiny is applied to the exemption that
6. The Supreme Court finds the Government-Backed Debt Exemption Does not Survive Strict Scrutiny and Strikes Down the Entire Dang TCPA (20% chance)

RESULT: The TCPA is entirely dead

Why this might happen: This is likely for the same reasons as 5. given that no one has raised the fact that certain provisions in the TCPA are not effected by the government-backed debt exemption and the issues of content-specificity it creates. Plus the entire dang statute is riddled with content specificity issues- the FCC has created a number of content-specific exemptions and provisions like the DNC restrictions on marketing plainly limit speech based on the content of the message.

Why this shouldn’t/won’t happen: Here is where the doctrine of severance properly comes into play. Plaintiffs below did not challenge any other content-specific provision of the TCPA other than the government-backed debt exemption. So only those restrictions of the TCPA impacted by that exemption should be struck down and severed from the statute. If folks have problems with the rest of the statute they’ll just have to bring their own Supreme Court appeal. Still though, it is a little odd that this was never briefed or argued leading to a surprisingly high (15%) chance that the entire statute is gone.

7. The Supreme Court Does Something Wild and Unpredictable (10% chance)

RESULT: Who knows

Why this might happen: None of the other results are all that satisfying. Perhaps we see a carve out for political speech. Perhaps we see a remand for further fact-finding on the impact of robocalls. Perhaps there is further information needed on government-backed debt. Perhaps Justice Breyer’s approach of “all law is speech and what’s the First Amendment anyway?” (not a real quote) is accepted and the TCPA brings down the freedom of speech entirely. Who knows.

Why this won’t happen: Not sure why it would. The Supreme Court generally doesn’t go off the rails where it doesn’t have to and there was very little discussion of “middle ground” approaches at oral argument. Not much reason to suspect a screwball here, but you never know.

So adding it all up:

- 45% chance TCPA’s ATDS restrictions (or more) are dead.
- 35% chance the TCPA is alive and kicking as we mostly know it today.
- 10% chance the TCPA lives on with a narrowed ATDS definition.
- 10% chance of something really weird happening.

Oh and in case you missed our great coverage—or just want to re-live anything— our
LIVE feeds of the oral argument are here and here. Our definitive analysis of the oral argument is here.

Stay tuned.

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