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First Amendment Protects Automated Calls Made for Political Campaigns in Arkansas

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As we've previously discussed, while First Amendment challenges to the TCPA have largely been unsuccessful, First Amendment challenges to restrictions on calls or texts made in connection with political campaigns may fare differently. Further evidence of this distinction came last week, when a district court in the Eastern District of Arkansas declared Arkansas's restriction on using automated or prerecorded telephone calls to "'solicit[] information, gather[] data, or for any other purpose in connection with a political campaign'" unconstitutional as "a content-based regulation that does not survive strict scrutiny." *Gresham v. Rutledge*, No. 16cv241, 2016 U.S. Dist. LEXIS 97964, at *2-3 (E.D. Ark. July 27, 2016) (quoting Ark. Code Ann. § 5-63-204(a)(1)).

The Plaintiffs in *Gresham*, a political consultant based in Virginia and his communications agency, brought an action in May 2016 against Arkansas Attorney General Leslie Rutledge in her official capacity under 42 U.S.C. § 1983 to challenge Arkansas Code Annotated § 5-63-204(a)(1), alleging that they planned to make automated and prerecorded telephone calls in Arkansas in connection with political campaigns and the statute impermissibly chilled and restrained their speech. *Id.* at *1.

The Court agreed, noting that "[t]he statute at issue here is a restriction on political

speech which, 'is, and has always been, at the core of the protection afforded by the First Amendment.'" *Id.* at *7. The parties agreed that the statute was a content-based restriction on speech and therefore subject to strict scrutiny, requiring Arkansas to show that the statute advances a compelling state interest and is narrowly tailored to serve that interest. *Id.* at *7-8.

Arkansas argued that the statute advanced the state's compelling interest in furthering residential privacy and public safety. *Id.* at *8. The Court found that the residential privacy interest was substantial, but not compelling, and then held that even if the state's interests in residential privacy and public safety were compelling, the statute was not sufficiently narrowly tailored. *Id.* at *9.

Relying heavily on the Fourth Circuit's decision in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015) (discussed here), the Court found that the statute, which only restricts automated or prerecorded calls made for commercial purposes or in connection with a political campaign, was underinclusive because Arkansas had failed to explain why other automated calls did not also "trample upon the state's interest in residential privacy and public safety." *Id.* at *11. The Court held:

> If the interests of privacy and safety warrant restriction of automated calls made for a commercial purpose or in connection with a political campaign, they also warrant restriction of other types of automated calls. The statute is underinclusive. Banning calls made through an automated telephone system in connection with a political campaign cannot be justified by saying that the ban is needed to [protect] residential privacy and public safety when no limit is placed on other types of political calls that also may intrude on residential privacy or seize telephone lines.

Id. at *14. Moreover, the Court found that Arkansas had failed to show that the statute was the "least restrictive alternative to achieve the state's interests in residential privacy and public safety," pointing to plaintiffs' showing that other states had implemented less restrictive requirements to regulate automated calls, including time-of-day restrictions, requirements that automated calls disconnect after a certain number of seconds, and prohibitions on any calls to emergency lines. *Id.* at *14-16.

Gresham and *Cahaly* thus offer roadmaps for plaintiffs seeking to challenge the TCPA and similar state statutes on First Amendment grounds. It remains to be seen whether courts will follow a similar approach in cases challenging the TCPA such as *American Association of Political Consultants, Inc. v. Lynch,* No. 16cv252 (E.D.N.C. filed May 12, 2016) (discussed here), which the government recently moved to dismiss, arguing that the plaintiffs lacked standing and the court lacked subject matter jurisdiction, and *Thorne v. Donald J. Trump for President, Inc.*, No. 16cv4603 (N.D. Ill. filed Apr. 25, 2016) (discussed here and here), which defendant last week moved to dismiss, arguing that the complaint should be dismissed in part because the TCPA violates the First Amendment.