

# POLITICAL ROBOCALLS: LET FREEDOM RING

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## INTRODUCTION

You are sitting at the dinner table when your cell phone begins to ring. The caller ID shows an unknown number, but you answer anyway. When you pick up and say hello a few times, you are surprised to hear that a political candidate is calling for your support, but you quickly realize it is a robocall. Annoyed, you hang up the phone. Yet, the next day, your phone rings again, but this call is a political poll. Searching for a way to peacefully eat dinner, you discover that political robocalls are banned by the Telephone Consumer Protection Act.

As every minute passes, an estimated 51,523 robocalls are made in the United States.<sup>1</sup> Robocalls are calls with a prerecorded message and are made using an autodialer.<sup>2</sup> An autodialer calls phones without a person actually entering the number; it can include dialing numbers from calling lists or from equipment that randomly generates phone numbers.<sup>3</sup> Because of the frequency and annoyance of robocalls, Congress banned robocalls made to cell phones by passing the Telephone Consumer Protection Act (TCPA).<sup>4</sup>

The TCPA may nobly aim to reduce annoyance, but its ban also applies to political campaigns and polls. As a country, we place the utmost value on political speech,<sup>5</sup> yet the TCPA robocall ban restrains it. This Note analyzes the constitutionality of the TCPA in light of the First Amendment's protection of political speech. Part I identifies the importance of political speech and defines the robocalls that the TCPA bans.<sup>6</sup> Part II explains the nuances of the TCPA robocall ban, including its

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1. Christopher Maynard, *Report Calculates that 2.3 Billion Robocalls Were Made in the U.S. in January Alone*, CONSUMER AFFAIRS (Feb. 19, 2016), <https://www.consumeraffairs.com/news/report-calculates-that-23-billion-robocalls-were-made-in-the-us-in-january-alone-021916.html> (“The YouMail National Robocall Index (YNRI) estimated that somewhere around 2.3 billion robocalls were made in the U.S. in the month of January [2016] alone.”).

2. *See* Maryland v. Universal Elections, Inc., 729 F.3d 370, 374 (4th Cir. 2013) (finding the TCPA requirement that robocallers disclose their identity does not violate the First Amendment).

3. *See* FCC Enforcement Advisory: Telephone Consumer Protection Act Robocall and Text Rules—Biennial Reminder for Political Campaigns About Robocall and Text Abuse, 31 FCC Rcd. 1940, 1945 (March 14, 2016).

4. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227 (2012); *see also* S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968.

5. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (holding that restrictions on individual campaign contributions do not violate the First Amendment but also holding that independent expenditure limits do violate the First Amendment), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, *as recognized in* McConnell v. Fed. Election Comm’n, 540 U.S. 93 (2003).

6. For simplicity, this Note will refer to the calls that the TCPA prohibits as “robocalls.” It is important to remember that the TCPA only bans auto dialed, prerecorded calls to cell phones, while these calls are allowed if made to landlines, subject to a few requirements. Similarly, this Note will refer only to “calls,” but calls under the TCPA also encompass text messages made to cell phones. *See infra* text accompanying note 39.

exemptions. Part III outlines past and pending judicial decisions relating to the TCPA. Finally, Part IV addresses the intersection between the TCPA and the First Amendment. This intersection involves both the caller's free speech interest and the recipient's privacy interest. Ultimately, this Note concludes that the TCPA ban on political robocalls violates the First Amendment because it fails to pass strict scrutiny. This Note seeks to illustrate the tension between political speech and personal privacy that regulations of political robocalls must balance. This Note suggests that political robocalls are a sound of democracy that should not be silenced, but instead, we should let robocalls ring.

## I. POLITICAL ROBOCALLS AND THE FIRST AMENDMENT

Political robocalls are protected as political speech under the First Amendment. Part A recognizes the importance of political speech, as demonstrated by the marketplace justification for the First Amendment. Part B defines a political robocall.

### *A. Importance of Political Speech*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.”<sup>7</sup> One justification for the First Amendment is that it protects a marketplace of ideas.<sup>8</sup> This marketplace justification “presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.”<sup>9</sup> By allowing the free and robust exchange of all speech, the marketplace fosters the ascertainment of truth because “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>10</sup> Accordingly, the protection of free speech recognizes that our democracy is furthered by allowing all voices to be heard, instead of having government suppression of speech.<sup>11</sup> This marketplace of ideas is illustrated by the First Amendment's protection of political speech.

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7. U.S. CONST. amend. I.

8. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (disagreeing that pamphlets advocating for communism presented a clear and imminent danger and instead arguing the First Amendment protects a free exchange of opinions).

9. *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring) (“To many [free speech] is, and always will be, folly; but we have staked upon it our all.”).

10. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“[F]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . .”); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 881 (1962).

11. See *Associated Press*, 326 U.S. at 28.

The First Amendment “has its fullest and most urgent application” to political speech.<sup>12</sup> There is “practically universal agreement that a major purpose of that Amendment was to protect” political speech.<sup>13</sup> The Framers saw the inherent value in open political discussion and feared suppression by silence.<sup>14</sup> Thus, the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”<sup>15</sup> The protection of a marketplace for political speech, irrespective of its message, is indispensable to a democracy. In a democracy, “the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”<sup>16</sup>

Accordingly, political speech must be defined broadly because of its importance in our democracy.<sup>17</sup> Political speech certainly includes “[d]iscussion of public issues and debate on the qualifications of candidates,”<sup>18</sup> but it does not have to focus on a particular candidate or campaign.<sup>19</sup> Instead, political speech more broadly protects discussion on the structure and form of government, the operation of government, and anything related to political processes.<sup>20</sup> Political speech even includes spending money on a campaign.<sup>21</sup> Because of the recognized importance of political speech, courts err on the side of protecting speech, rather than suppressing it.<sup>22</sup>

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12. *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); *see also id.* at 275, 277 (holding that newspaper printing that candidate was a “former small-time bootlegger” was relevant to candidate’s fitness for office for application of the “knowing falsehood or reckless disregard” libel rule).

13. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81, *as recognized in* *McConnell v. Fed. Election Comm’n*, 540 U.S. 93 (2003).

14. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“Believing in the power of reason as applied through public discussion, [the Framers] eschewed silence coerced by law—the argument of force in its worst form.”) (quoting *Whitney v. California* 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring)).

15. *Roth v. United States*, 354 U.S. 476, 484 (1957) (holding that punishing obscene mailings did not violate the First Amendment because obscenity is not constitutionally protected).

16. *Buckley*, 424 U.S. at 14–15.

17. *See id.* (defining political speech broadly to include campaign contributions as speech).

18. *See id.* at 14; *see also* *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971) (“[I]t can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.”).

19. *See McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (protecting the freedom to publish anonymously under the First Amendment).

20. *See Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (holding that penalizing a newspaper editorial urging people to vote a certain way on election day violates the First Amendment).

21. *See Buckley*, 424 U.S. at 14–15.

22. *See McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1451 (2014); *see also Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (“There is no room under our Constitution for a more restrictive view.”).

However, free political speech comes at a cost: public discord can result from its protection of speech.<sup>23</sup> But the First Amendment “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”<sup>24</sup> The First Amendment embodies our “profound national commitment to the principle that debate on public issues” should be protected, despite the price that must be paid.<sup>25</sup> Thus, the First Amendment’s broad protection of political speech allows the free exchange of ideas, regardless of the disturbance or annoyance of such speech. Despite the annoyance, political robocalls are political speech, and as such, they should be afforded the highest protection under the First Amendment.

### *B. Robocalls as Political Speech*

A robocall is a “telephone call from an automated source that delivers a prerecorded message to a large number of people.”<sup>26</sup> Unsolicited calls are not a new phenomenon. Live, unsolicited calls started in the 1930s “when war-era marketers had to adjust to a decreased sales force.”<sup>27</sup> The transition from live to autodialed robocalls resulted from the efficiency of an autodialer.<sup>28</sup> An autodialer is “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.”<sup>29</sup> Thus, an autodialer uses technology, instead of a person, to dial phone numbers, and it can do so at a rapid pace. While a live person can make about 63 calls in one day, a single autodialer can make 1,000 in one day.<sup>30</sup> Thus, the efficiency of robocalls makes them attractive tools to disseminate political messages.

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23. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that free speech may allow “vehement, caustic, and sometimes unpleasantly sharp attacks”).

24. *Texas v. Johnson*, 491 U.S. 397, 408–09 (1989) (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). See also *Cox*, 379 U.S. at 552 (agreeing that “[s]peech is often provocative and challenging” but this is why “freedom of speech is protected”).

25. *Sullivan*, 376 U.S. at 270. See also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas.”).

26. *Robocall*, MERRIAM-WEBSTER ONLINE DICTIONARY (2018), <https://www.merriam-webster.com/dictionary/robocall>.

27. Consuelo Lauda Kertz & Lisa Boardman Burnette, *Telemarketing Tug-of-War: Balancing Telephone Information Technology and the First Amendment with Consumer Protection and Privacy*, 43 SYRACUSE L. REV. 1029, 1055 (1992) (analyzing various telemarketing practices and their effect on privacy).

28. See *id.* at 1055–56.

29. 47 U.S.C. § 227(a)(1) (2012).

30. See Kertz & Burnette, *supra* note 27, at 1055–56.

Political robocalls include a variety of messages.<sup>31</sup> Some calls are from a political candidate, trying to garner support both from votes and fundraising. Other calls are from political pollsters. Pollsters ask callers their current opinion on certain political issues or particular candidates to measure the public's thought.<sup>32</sup> The line between these types of messages is sometimes blurred. Some candidates use "push" polls, which are calls poised as political surveys but are designed to influence voter opinion on a certain candidate or issue.<sup>33</sup> Regardless of the type of message, political robocalls are political speech because they involve discussion of our government and policies. Congress suppressed this form of political speech when it passed the Telephone Consumer Protection Act.

## II. THE TELEPHONE CONSUMER PROTECTION ACT

As cell phones became an item no person leaves home without, problems arose with how society would use this new technology. One such problem was the sharp increase in telemarketing calls that disturbed American households and businesses. As technology advanced, mass call campaigns became both cost-effective and efficient.<sup>34</sup> After a rise in consumer complaints about these unwanted calls, bipartisan support led Congress to pass the Telephone Consumer Protection Act in 1991.<sup>35</sup> The purpose of the TCPA was "to protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls."<sup>36</sup> Although much has changed in the 25 years since 1991, the TCPA has not. Part A explains the nuances of what the TCPA prohibits, while Part B explains the exemptions to the TCPA.

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31. See Matthew Philips, *Do Robo-calls Work?*, NEWSWEEK (Oct. 30, 2008, 8:00 PM), <http://www.newsweek.com/politics-do-robo-calls-work-91491> (analyzing whether robocalls are effective at changing opinions).

32. See Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or A Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213 (2009) (analyzing the good, bad, and ugly of robocalls and concluding that robocalls are the sound of democracy in action).

33. *Id.* at 234. See, e.g., Cahaly v. LaRosa, 796 F.3d 399, 403 (4th Cir. 2015). Here is a push poll used for the 2010 election cycle:

As you may have heard, Speaker of the House Nancy Pelosi is coming to South Carolina. Do you think incumbent Democrat Anne Peterson Hutto should invite her fellow Democrat Nancy Pelosi to come campaign for her?

*Id.*

34. See S. REP. NO. 102-178, at 2 (1991), reprinted in 1991 U.S.C.A.N. 1968, 1969 ("The growth of consumer complaints about these calls has two sources: the increasing number of telemarketing firms in the business of placing telephone calls, and the advance of technology which makes automated phone calls more cost-effective.").

35. See *id.* at 1. The TCPA was co-sponsored by both Republicans and Democrats.

36. *Id.*

### A. *The Robocall Ban*

The TCPA makes it unlawful for a person “to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice.”<sup>37</sup> Simply put, the TCPA bans unsolicited calls and text messages<sup>38</sup> made to cell phones using an autodialer or a prerecorded message.<sup>39</sup> Thus, the TCPA does not ban calls that are both made by a person manually dialing each phone number and have a live operator talking to the recipient. While the TCPA bans robocalls made to cell phones, it does not prohibit those made to landlines, subject to a few requirements.<sup>40</sup> Additionally, the TCPA does not ban robocalls where the recipient has given prior consent to receive them.<sup>41</sup> The TCPA has been recognized as a statutory oddity: Chief Justice Roberts has called the TCPA “the strangest statute I’ve ever seen.”<sup>42</sup>

The TCPA imposes steep penalties for violations.<sup>43</sup> It allows both states and private persons to sue, including combining claims into class action litigation.<sup>44</sup> Successful plaintiffs win damages for their actual monetary loss or \$500 per call, whichever amount is greater.<sup>45</sup> If the defendant does not hold a license or authorization from the FCC, the damages can jump to as high as \$16,000 per call.<sup>46</sup> Furthermore, if the defendant willfully or knowingly violated the TCPA ban, the damages can be tripled.<sup>47</sup> Thus, the TCPA creates the potential for huge monetary awards, and this potential exposes any person who violates the TCPA to vast liability.<sup>48</sup>

When the TCPA was first passed, Congress foresaw its tension with the First Amendment’s free speech protection.<sup>49</sup> However, Congress suggested that the TCPA was a content-neutral time, place, and manner restriction on

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37. 47 U.S.C. § 227(b)(1)(A) (2012).

38. The TCPA’s reference to “calls” has been found to also include text messages. *See* Press Release, Federal Communications Commission, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts, 2015 WL 3819270, at \*1 (June 18, 2015) (“The Commission reaffirmed that consumers are entitled to the same consent-based protections for texts as they are for voice calls to wireless numbers.”).

39. *See* 47 U.S.C. § 227(b)(1)(A)(iii).

40. *See* FCC Enforcement Advisory No. 2012-06: Telephone Consumer Protection Act Robocall Rules Political Campaigns and Promoters are Reminded of Restrictions on Autodialed and Prerecorded Calls, 27 FCC Rcd. 11017, 11018 (Sept. 11, 2012) [hereinafter Enforcement Advisory No. 2012-06].

41. *See* 47 U.S.C. § 227(b)(1)(A).

42. Transcript of Oral Argument at 51, *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368 (2012) (No. 10-1195).

43. *See* 47 U.S.C. § 227(b)(3).

44. 47 U.S.C. § 227(b)(3)(C).

45. *Id.*

46. *See* Enforcement Advisory No. 2012-06, *supra* note 40.

47. 47 U.S.C. § 227(b)(3)(C).

48. *The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. 112 (2016).

49. *See* S. REP. NO. 102-178, at 4 (1991), *reprinted at* 1991 U.S.C.C.A.N. 1968, 1971–72.

free speech, and as such, was constitutional.<sup>50</sup> Congress assumed the TCPA is a time, place, and manner restriction because it regulates the manner of speech: the use of an autodialer.<sup>51</sup> More specifically, Congress purported that the TCPA is content-neutral because the ban “applies equally whether the automated message is made for commercial, political, charitable or other purposes.”<sup>52</sup> While this may have been true with its original passage, the TCPA has since been riddled with exemptions that destroy its content-neutrality.<sup>53</sup> Additionally, this Note suggests that the time, place, and manner framework is not the proper analysis for a challenge to the TCPA ban based on political speech grounds.<sup>54</sup>

### B. Exemptions to the Robocall Ban

As originally passed, the TCPA did not distinguish between different types of speech, but rather banned all robocalls. However, since that time, exemptions have been added for certain messages and for certain speakers. Most exemptions have been created by regulations of the Federal Communications Commission, not statutory amendment by Congress. The Federal Communications Commission (FCC) is charged with implementing the TCPA, including by prescribing regulations.<sup>55</sup> The FCC must account for “free speech protections embodied in the First Amendment” when prescribing these regulations.<sup>56</sup>

The FCC created five exemptions to the TCPA ban based on the type of speech or the type of speaker. First, the FCC exempted certain robocalls based on the type of speech. For example, the FCC exempted robocalls that are package delivery notifications.<sup>57</sup> Additionally, the FCC exempted robocalls that are non-telemarketing and “rely on a representation from an intermediary that they have obtained the requisite consent from the consumer.”<sup>58</sup> The FCC also exempted robocalls related to bank fraud or security issues.<sup>59</sup> Second, the FCC exempted certain robocalls based on the type of speaker, as long as the recipient is not charged for the call—for

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50. *Id.*

51. *Id.*

52. *Id.* (suggesting that the TCPA “does not discriminate based on the content of the message”).

53. See discussion *infra* Part IV.A.

54. See discussion *infra* Part IV.

55. 47 U.S.C. § 227(b)(2) (2012).

56. Telephone Consumer Protection Act of 1991, Pub. L. 102-243 § 2(13), 105 Stat. 2394 (1991).

57. Package delivery notifications are allowed as long as the recipient is not charged for the notification. See Cargo Airline Ass’n Order, 29 FCC Rcd. 3432, 3439 (Mar. 27, 2014).

58. GroupMe, Inc. Declaratory Ruling, 29 FCC Rcd. 3442, 3444 (Mar. 27, 2014).

59. American Ass’n of Healthcare Admin. Mgmt. Declaratory Ruling, 30 FCC Rcd. 7961, 8930–31 (July 10, 2015).

example, the FCC exempted robocalls made by a wireless carrier.<sup>60</sup> Additionally, the FCC exempted robocalls made by a healthcare provider in the case of emergency.<sup>61</sup> In addition to the FCC exemptions, Congress created another exemption by allowing robocalls to collect debts owed to the United States.<sup>62</sup> Significantly, these exemptions render the TCPA content-based because whether a robocall falls within the ban now depends on its message or speaker.<sup>63</sup> These exemptions erode the TCPA's intended protection of consumers from unwanted calls, but they are not the only problems associated with the TCPA.

### *C. Pitfalls of the TCPA*

While the TCPA may have the noble intention of protecting citizens from unwanted calls, its implementation has resulted in two major pitfalls: huge class action penalties and ineffectiveness. First, the TCPA has led to excessive amounts of class actions that result in judgments of millions of dollars. The Act's sponsor Senator Ernest Hollings contemplated that TCPA claims would be brought pro se in small claims court.<sup>64</sup> However, the TCPA has proven to be primed for class action litigation. TCPA claims are filed in astonishing numbers: over 3,700 TCPA cases were filed in 2015 alone.<sup>65</sup> Additionally, TCPA cases have resulted in huge penalties. For example, the FCC fined Dialing Services nearly \$3,000,000 for only 184 robocalls made on behalf of political campaigns.<sup>66</sup> Thus, the TCPA "has the potential for massive verdicts for plaintiffs and can have devastating consequences for defendants that violate it."<sup>67</sup> This potential for massive

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60. Telephone Consumer Protection Act of 1991, 77 Fed. Reg. 34233, 34235 (June 11, 2012) (to be codified at 47 C.F.R. pt. 64).

61. *American Ass'n*, 30 FCC Rcd. at 8023, 8031–32.

62. Telephone Consumer Protection Act of 1991, Pub. L. No. 114-74, § 301(a), 129 Stat. 584, 588 (2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii)); FCC Delivery Restrictions, 47 C.F.R. § 64.1200 (2013), *held invalid* by *Bais Yaakov of Spring Valley v. FCC*, 852 F.3d 1078 (2017).

63. See discussion *infra* Part IV.A.

64. Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 NEB. L. REV. 70, 104 n.229 (2011).

65. *What Happened in 1991, The Year the TCPA Was Passed?*, U.S. CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM (Jan. 26, 2016), <http://www.instituteforlegalreform.com/resource/what-happened-in-1991-the-year-the-tcpa-was-passed>.

66. Press Release, Federal Communications Commission, FCC Plans \$2.9 Million Fine Against Online Company for Making Political Robocalls to Cell Phones, 2014 WL 1871104, at \*1 (May 8, 2014). While assigning the maximum penalty for this 2013 call campaign, the FCC gave Dialing Services a citation for 4.7 million robocalls made during the 2012 election cycle. *Id.*

67. John R. Chiles & Zachary D. Miller, *A Repurposed Consumer Protection Statute—2013 Survey of TCPA Developments*, 69 BUS. LAW. 633, 633 (2014); see also *id.* at 634–45 (analyzing various consumer litigation issues).

verdicts has also been used to coerce huge settlements.<sup>68</sup> For example, the Los Angeles Lakers settled a TCPA class action brought by one season ticket holder who received an unsolicited “thank you” text from the team.<sup>69</sup>

While class actions may force compliance with the TCPA, they fail to provide a sufficient remedy to the recipients of the unwanted calls. Instead, TCPA class actions have enriched plaintiff lawyers while providing pennies to the class members.<sup>70</sup> Congress has recognized this pitfall of the TCPA and noted that the “average attorneys’ fees awarded in a TCPA class action was \$2.4 million, while the average class member’s award [was] \$4.12.”<sup>71</sup> These class actions are especially appealing to lawyers because the TCPA measures damages per call and provides for the possibility of treble damages.<sup>72</sup> Because most autodialer schemes result in a high volume of calls, million-dollar judgments can be earned with minimal work.<sup>73</sup> For example, a law firm pressured a fax-blaster company to provide a list of clients who sent unsolicited faxes, in violation of the TCPA.<sup>74</sup> The firm then used this list to begin TCPA class actions against each of those clients, receiving huge judgments in the process.<sup>75</sup>

Second, the TCPA has proven ineffective in stopping unwanted robocalls. The TCPA’s statutory scheme itself shows its ineffectiveness: the many exemptions allow a host of unwanted robocalls.<sup>76</sup> In addition to the exempted robocalls, the TCPA continually fails to stop banned robocalls; unwanted robocalls remain the number one source of consumer complaints made to the FCC.<sup>77</sup> Additionally, the TCPA does not stop

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68. Ralph Wutscher et. al., *Regulation of Calls Under the TCPA: A Fog of Uncertainty Remains*, 70 BUS. LAW. 563, 563 (2015) (noting that one TCPA class action resulted in a settlement of more than \$75 million).

69. See *Emanuel v. Los Angeles Lakers, Inc.*, No. CV 12-9936-GW(SHx), 2013 WL 1719035, at \*1 (C.D. Cal. Apr. 18, 2013) (dismissing the case at the trial court level, only to be settled after plaintiff was granted review by the Ninth Circuit).

70. *The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. (2016).

71. *Id.* at 8.

72. 47 U.S.C. § 227(b)(3)(C) (2012).

73. Mary Gail Gearnsal, *Trends in Class Action Litigation: Class Action Filings, Certification, Settlement, and Waivers*, ASPATORE, July 2015, 2015 WL 4967446, at \*9. TCPA class actions require minimal work because the plaintiff must only show that he received an unsolicited robocall. This can be accomplished easily with access to phone records and the use of discovery to prove that the defendant used an autodialer or pre-recorded message. See *id.*

74. See *Avio, Inc. v. Alfocino, Inc.*, 311 F.R.D. 434, 437 (E.D. Mich. 2015).

75. See *id.*

76. Spencer W. Waller et al., *The Telephone Consumer Protection Act of 1991: Adapting Consumer Protection to Changing Technology*, 26 LOY. CONSUMER L. REV. 343, 356 (2014) (noting that the provision allowing exemptions has proven “counterproductive” to the aims of the TCPA).

77. Tom Wheeler, *Cutting Off Robocalls*, FCC BLOG (July 22, 2016, 10:30 AM), <https://www.fcc.gov/news-events/blog/2016/07/22/cutting-robocalls> (noting the FCC will use any power it is given to its fullest extent to limit robocalls).

robocalls that are generated overseas, which has become an increasing problem and created a loophole for callers to avoid liability.<sup>78</sup>

Finally, the TCPA is ineffective because it is outdated. The TCPA was partly designed to stop unsolicited faxes, but unsolicited faxes are an increasingly rare occurrence and minimal problem today. Additionally, one of the main concerns of Congress in 1991 was the cost-shifting of these unsolicited calls. However, the costs of unsolicited calls and texts are minimal today.

These problems illustrate why the TCPA is not remedying citizens' frustrations with robocalls.<sup>79</sup> Not only does the TCPA have pitfalls in practice, but the TCPA ban and its exemptions have also placed a burden on free speech by banning robocalls. Political robocalls create a tension between the protection of free speech and the protection of consumers' privacy. The TCPA tips the balance in favor of consumer privacy while burdening free speech, but the constitutionality of this weighing remains doubtful.

### III. JUDICIAL TREATMENT OF THE TCPA

First Amendment challenges to the TCPA have been numerous but traditionally unsuccessful. In *Moser v. FCC*, a telemarketing association challenged the TCPA on First Amendment grounds.<sup>80</sup> The Ninth Circuit found that the TCPA was a permissible content-neutral time, place, and manner restriction on commercial speech.<sup>81</sup> Specifically, the Court found that the TCPA ban was narrowly tailored to serve the significant governmental interest of protecting privacy and that it left alternative channels of communication open by allowing live unsolicited calls.<sup>82</sup> However, the Ninth Circuit missed an important step in the analysis: it failed to identify the forum. If the Ninth Circuit had tried to identify the forum, it would have realized that cell phone calls do not fit into the traditional categories of fora.<sup>83</sup> Thus, the time, place, and manner

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78. *The Telephone Consumer Protection Act at 25: Effects on Consumers and Business: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 114th Cong. 62 (2016) (statement of Sen. Roy Blunt).

79. *See Frankel v. United States*, 842 F.3d 1246, 1248 (noting that the FTC conducted a \$50,000 prize competition for solutions to block illegal robocalls).

80. *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995).

81. *Id.* at 975.

82. *Id.*

83. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1552–53 (8th Cir. 1995) (stating telephone system is private forum because it is “a privately-created, -owned, and -operated entity”). Cell phones are not a traditional public forum because they are not historically reserved for communications like parks or sidewalks. Cell phones are not even public; they are privately owned. Cell phones are not a limited public forum because the government has not designated them for expressive activity.

framework was not proper for analyzing the TCPA because cell phones would not fit into the forum-specific rules. Additionally, the Ninth Circuit found that the TCPA was content-neutral.<sup>84</sup> Importantly, however, *Moser* was decided before the FCC had created any of its exemptions, which led to a new wave of First Amendment challenges to the TCPA.<sup>85</sup>

Significantly, the Fourth Circuit recently struck down a state law version of the TCPA as unconstitutional on First Amendment grounds.<sup>86</sup> In *Cahaly v. LaRosa*, a political consultant was arrested for making robocalls under South Carolina's TCPA statute.<sup>87</sup> The Fourth Circuit found that the statute was an impermissible content-based restriction that was not narrowly tailored.<sup>88</sup> This decision informs the analysis of the federal TCPA in three respects. First, the similarity in the bans between the federal TCPA and this state version suggests that the federal TCPA could also be unconstitutional under the First Amendment. Second, unlike earlier courts, the Fourth Circuit found the robocall ban to be content-based, which subjected it to a higher standard of review.<sup>89</sup> Third, the challenge was based on political speech, unlike earlier decisions which were based on the less-protected commercial speech.<sup>90</sup>

There are currently cases pending that have challenged the TCPA's constitutionality specifically based on political speech grounds. In a rare instance of bipartisanship, the robocall ban has united Republicans and Democrats.<sup>91</sup> In *American Association of Political Consultants*, Republican and Democratic political action groups have joined forces to argue that the TCPA ban is an impermissible content-based regulation of speech.<sup>92</sup> Similarly, in *Roberts*, a disgruntled recipient of an unsolicited text message from the Donald Trump campaign brought a TCPA class action lawsuit

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84. *Moser*, 46 F.3d at 973.

85. *See, e.g.*, Amended Petition for Review at 3, *ACA Int'l v. FCC*, 885 F.3d 687 (D.C. Cir. Jul. 10, 2015) (No. 15-01211) (challenging FCC's 2015 declaratory order because of its expansive reading of TCPA liability).

86. *See Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015); *see also Gresham v. Rutledge*, 198 F. Supp. 3d 965, 970–71 (E.D. Ark. 2016) (holding that state TCPA was unconstitutional on First Amendment grounds).

87. *See Cahaly*, 796 F.3d at 402.

88. *Id.* at 405.

89. *Compare Moser*, 46 F.3d 970 (using intermediate scrutiny for TCPA) *with Cahaly*, 796 F.3d 399 (using strict scrutiny for state TCPA).

90. *Compare Moser*, 46 F.3d 970 (challenge brought by telemarketing association based on commercial speech) *with Cahaly*, 796 F.3d 399 (challenge brought by political consultant based on political speech).

91. *See Complaint, American Ass'n of Political Consultants v. Sessions*, No. 5:16-cv-00252 (E.D.N.C. May 12, 2016).

92. *See id.*

against the campaign.<sup>93</sup> The Donald Trump campaign has argued that the claim should be dismissed based on the TCPA's violation of the First Amendment.<sup>94</sup> These cases show that the constitutionality of the TCPA on First Amendment grounds is far from settled.

#### IV. THE INTERSECTION OF THE TCPA AND THE FIRST AMENDMENT

The balance between political speech and consumer privacy creates an intersection between the TCPA's ban on political robocalls and the First Amendment because "[e]ven protected speech is not equally permissible in all places and at all times," some restrictions on speech will not violate the First Amendment.<sup>95</sup> To decide whether the TCPA ban violates the First Amendment, Part A explains the proper standard of review for challenge based on political speech. Part B discusses the two interests at stake: the caller's free speech and the recipient's privacy. Part C discusses the relationship of these interests under the strict scrutiny framework.

##### *A. Standard of Review*

Political speech is at the core of the First Amendment.<sup>96</sup> Therefore, a burden on political speech is subject to "the most exacting scrutiny."<sup>97</sup> Accordingly, a TCPA challenge based on a political robocall should be subject to strict scrutiny.<sup>98</sup> Strict scrutiny requires that the regulation is necessary to serve a compelling state interest and is narrowly tailored to achieve that end.<sup>99</sup> Both prongs must be met for a regulation to pass muster. Under this framework, the TCPA robocall is presumptively invalid, and the

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93. See Complaint, *Roberts v. Donald J. Trump for President, Inc.*, No. 1:16-cv-04676 (N.D. Ill. Apr. 26, 2016); Complaint, *Thorne v. Donald J. Trump for President, Inc.*, No. 1:16-cv-04603 (N.D. Ill. Apr. 25, 2016).

94. See Motion to Dismiss, *Thorne v. Donald J. Trump For President, Inc.*, No. 1:16-cv-04603 (N.D. Ill. July 29, 2016).

95. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) (holding that government does not violate the First Amendment by limiting participation in a charity drive).

96. ERWIN CHERMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1103 (4th ed. 2011) ("If there is a hierarchy of protected speech, political speech occupies the top rung.")

97. *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)) (holding that flag burning is speech protected under the First Amendment and finding that the flag's symbolism does not justify prosecution for flag burning).

98. See *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982) ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.")

99. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (outlining the various standards of review for different categories of forums).

burden is placed on the government to show that it passes strict scrutiny.<sup>100</sup> Under strict scrutiny, it is unlikely that the TCPA is constitutional.<sup>101</sup>

Although a regulation does not have to be content-based to fail strict scrutiny, the Supreme Court has frequently “invoked the content-based/content-neutral distinction as the basis for its decisions.”<sup>102</sup> Content-based regulations “suppress, disadvantage, or impose differential burdens upon speech because of its content.”<sup>103</sup> Content-based restrictions are inherently suspicious.<sup>104</sup> This suspicion arises from the belief “that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>105</sup>

Because the content-based/content-neutral distinction underlies some decisions, it is important to recognize that the TCPA is content-based. Although the original ban prohibited all robocalls, the TCPA has been riddled with exemptions that render it content-based.<sup>106</sup> The exemptions have resulted in the TCPA favoring some subject matters over others.<sup>107</sup> The TCPA is not content-neutral because the robocall ban does not apply equally regardless of the message; the ban’s application depends exactly on the robocall’s message. Exemptions “from an otherwise permissible regulation of speech may represent a governmental ‘attempt to give one side of a debatable public question an advantage in expressing its views to the people.’”<sup>108</sup> Here, the TCPA exemptions allow certain speakers to place robocalls while silencing other speakers.<sup>109</sup> The exemptions also allow certain messages to be delivered via robocalls, while suppressing other

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100. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (analyzing restrictions on sign displays under strict scrutiny).

101. *See Burson v. Freeman*, 504 U.S. 191, 211 (1992) (“[I]t is the rare case in which . . . a law survives strict scrutiny.”).

102. ERWIN CHERMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 961 (4th ed. 2011).

103. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

104. *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring) (stating that an ordinance that bans all residential signs except those falling in an exemption violates the First Amendment); *see also Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 312 (2010) (“[T]he First Amendment stands against attempts to disfavor certain subjects . . .”).

105. *Police Dep’t of Chicago v. Moseley*, 408 U.S. 92, 95 (1972) (holding that ordinance that prohibits all picketing within 150 feet of a school except labor disputes violates the First Amendment by impermissibly distinguishing between subjects for picketing).

106. *See discussion supra* Part II.B.

107. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (noting that “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter”).

108. *City of Ladue*, 512 U.S. at 51 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 785–86 (1978)) (internal citations omitted).

109. *See discussion supra* Part II.B. For example, the wireless carrier exemption allows wireless carriers to speak but bans other speakers like political candidates.

messages.<sup>110</sup> Thus, the exemptions result in an imbalance of the TCPA's treatment of speech based on the content of the message, favoring certain commercial speech over other types of speech, including political speech.<sup>111</sup> This imbalance is unusual because commercial speech receives less constitutional protection,<sup>112</sup> while political speech should receive the highest constitutional protection.<sup>113</sup> In essence, the government is picking and choosing which topics can be discussed via robocall and which cannot. For political robocalls, this scheme allows the government to "control . . . the search for political truth."<sup>114</sup> Because the TCPA permits or bans a robocall based on its speaker or content, it is properly considered a content-based restriction. And because it is content-based, the TCPA allows the government "to greatly distort the marketplace of ideas" by choosing which subjects are permissible for robocalls.<sup>115</sup> Thus, courts may weigh this as a factor tipping in favor of invalidating the TCPA ban, although there is no explicit content-based requirement to fail strict scrutiny.

### *B. The Two Interests At Stake*

The two interests at stake are the caller's free speech interest and the recipient's privacy. The caller's free speech interest is what subjects the TCPA ban to strict scrutiny; it also exemplifies why we should allow political robocalls. The recipient's privacy interest is a potential compelling interest to pass the first prong of the strict scrutiny test; it exemplifies why we should ban political robocalls.

#### *1. The Caller's Free Speech Interest*

While political robocalls can be annoying and intrusive, the caller has a free speech interest in making such calls. The First Amendment's protection of political speech does not turn on the "truth, popularity, or

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110. See discussion *supra* Part II.B. For example, the package delivery exemption allows messages about package deliveries but bans other messages like political polls.

111. *But see* H.R. REP. NO. 102-317, at 16 (1991) ("Complaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations.").

112. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1973).

113. Mark Sweet, *Political E-Mail: Protected Speech or Unwelcome Spam?*, 2003 DUKE L. & TECH. REV. 1, 2 (2003) ("Political speech has the highest value among protected forms of speech, and therefore receives the greatest protection.").

114. *Consolidated Edison Co. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538 (1980) (holding that prohibiting utility companies from being discussed in bill inserts for controversial policy decisions violates the First Amendment).

115. ERWIN CHEMERINKSY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 962 (4th ed. 2011).

social utility of the ideas and beliefs which are offered.”<sup>116</sup> The free flow of political information is at the core of “the First Amendment freedoms, not at the edges.”<sup>117</sup> Accordingly, “[w]e have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.”<sup>118</sup> Furthermore, it is a “bedrock principle underlying the First Amendment . . . that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”<sup>119</sup> While robocalls may be a disagreeable method of communicating, the free speech analysis “is not dependent on the particular mode in which one chooses to express an idea.”<sup>120</sup> Robocalls “are the price we pay to live in a participatory democracy” because it is a protected right to deliver, or attempt to deliver, political messages.<sup>121</sup> While many citizens may desire the robocall ban, “[a] functional democracy is noisy, rowdy, and sometimes annoying.”<sup>122</sup> Despite the drawbacks, according to one author, robocalls are truly “the sound of democracy in action.”<sup>123</sup> Accordingly, the First Amendment’s protection should embrace the “noise” they create,<sup>124</sup> and there are several reasons why we should allow political robocalls.

First, political robocalls reduce barriers to the electoral process because they are a cost-effective tool for disseminating political messages.<sup>125</sup> For political campaigns, robocalls can reach 100,000 callers in one hour for only \$2,000.<sup>126</sup> As a result, robocalls are one of the most popular campaign tools today.<sup>127</sup> Political robocalls also provide a less expensive method of conducting political polls. While a political survey done through a robocall costs about \$6,000 for a sample of 600 people, a live poll costs about

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116. *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964) (internal quotation marks omitted).

117. Sweet, *supra* note 113, at 2 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002)) (advocating for protecting political spam emails despite their annoyance).

118. *Id.* (quoting *Republican Party of Minn.*, 536 U.S. at 781 (2002)).

119. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (protecting flag burning under the First Amendment).

120. *Id.* at 416 (explaining that while flag burning may be an offensive method of speech, it deserves protection nevertheless).

121. Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 253 (2009).

122. *Id.*

123. *Id.* (emphasis omitted).

124. *Id.* (“Rather than being concerned about the disturbing noise of the ringing phone, we should be alarmed at the potential for silence.”).

125. See Matthew Phillips, *Do Robo-Calls Work?*, NEWSWEEK (Oct. 30, 2008, 8:00 PM), <http://www.newsweek.com/politics-do-robo-calls-work-91491> (noting that robocalls cost about seven cents each).

126. Miller, *supra* note 121, at 215.

127. See Phillips, *supra* note 125.

\$15,000 for the same sample.<sup>128</sup> These live calls cost twice as much per call because of the added time that dialing the number manually takes.<sup>129</sup> Because robocalls can significantly reduce costs, they provide an affordable method to engage in political speech.

Providing cost-effective campaign tools is important because of the record-shattering increases in the costs of running for office. In 2008, \$5.3 billion was spent on the congressional and presidential races, which is a 27% increase from the 2004 races.<sup>130</sup> Large spending is found even in smaller political races.<sup>131</sup> Thus, the TCPA ban increases the barrier to enter politics because of the increased cost of political speech without robocall technology. Political robocalls provide greater access to the elections process by allowing less-funded candidates to spread their message to a larger audience at a manageable cost.<sup>132</sup> Thus, the ban on political robocalls disproportionately hurts candidates with smaller budgets.<sup>133</sup> Consequently, the ban on political robocalls may “cause a minor decrease in the number of candidates and, in combination with other restrictions, decrease the choices available to voters.”<sup>134</sup>

Additionally, the ban on political robocalls is a form of incumbent protection because “[s]ilencing or limiting speech invariably protects the incumbent power structure.”<sup>135</sup> Because incumbents have greater name recognition, newcomers are more likely to be hurt by reducing robocalls, which are a cost-effective tool for combatting incumbent recognition. Robocalls can target specific audiences, such as only the citizens in a candidate’s district.<sup>136</sup> This ability to target particular voters, in addition to its cost-efficiency, make robocalls a powerful platform for newcomers to

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128. Sean Carberry, *New Robocalls Restriction May Affect 2016 Political Campaigns*, VICE NEWS (June 19, 2015, 3:39 PM), <https://news.vice.com/article/new-robocalls-restriction-may-affect-2016-political-campaigns>.

129. Steven Shepard, *New “Robocall” Rules Could Leave Americans in the Dark*, POLITICO (May 29, 2015, 5:00 PM), <http://www.politico.com/story/2015/05/new-robocall-rules-fcc-pollsters-polling-118422#ixzz4NYulbFF2>. Interestingly, Shepard also suggests the “tele-town halls” many politicians conduct with their constituents may violate the TCPA robocall ban. *Id.*

130. Jeanne Cummings, *2008 Campaign Costliest in U.S. History*, POLITICO (Nov. 5, 2008, 5:28 AM), <http://www.politico.com/story/2008/11/2008-campaign-costliest-in-us-history-015283>.

131. See John Metcalfe, *The Skyrocketing Costs of Running for Mayor of a Major U.S. City*, CITYLAB (Nov. 6, 2012), <http://www.citylab.com/politics/2012/11/skyrocketing-costs-running-mayor-major-us-city/3814/> (explaining how mayoral races in major U.S. cities cost millions of dollars).

132. See Shepard, *supra* note 129.

133. See *id.*

134. Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or A Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 236 (2009).

135. See *id.* at 253.

136. See *id.* at 217.

challenge incumbents.<sup>137</sup> Thus, the ban on robocalls both protects incumbents and increases the cost of political speech.

Second, political robocalls are beneficial because they give citizens a platform to have their voices heard. A variety of actors in the political sphere, including politicians, interest groups, and lobbyists, use polls to understand their constituents' positions.<sup>138</sup> Political robocalls provide a platform for citizens to participate in the political dialogue on national, state, and local levels. While a person participating in a political poll may be only one voice, the aggregate results of the poll can influence elected officials more effectively than that person merely calling his Congressman.<sup>139</sup> Thus, the TCPA ban reduces opportunities for political speech.

The TCPA ban on robocalls to cell phones, but not landlines, has a greater impact on the young and the poor because these groups are less likely to have a landline.<sup>140</sup> In a recent survey, while 69.2% of young adults exclusively relied on cell phones, only 36.8% of median adults and 17.1% of the elderly exclusively used cell phones.<sup>141</sup> Additionally, adults living in poverty are nearly 60% more likely to live in a household that exclusively relies on cell phones.<sup>142</sup> Low-income citizens are also hurt disproportionately because the robocall ban pushes callers to choose more cost-effective alternatives, like the internet. The move to the internet stifles the poor's voices even more because they form the majority of the 1-in-10 households without internet access.<sup>143</sup> The voices of the young and poor are also diminished because they have less opportunities to participate in political polls. In addition to exclusion from polling samples, these groups also receive less political messages, providing fewer opportunities to gain information about candidates or issues.

Third, and most significantly, political robocalls provide a source of information for voters. Political speech is a foundational value of American

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137. See, e.g., Matthew Philips, *Do Robo-calls Work?*, NEWSWEEK (Oct. 30, 2008, 8:00 PM), <http://www.newsweek.com/politics-do-robo-calls-work-91491>. For example, a robocall campaign from President Bill Clinton told voters to support the unknown newcomer John Edwards in the 1998 North Carolina Senate race. Edwards beat the incumbent by a slim margin. *Id.*

138. Sean Carberry, *New Robocalls Restriction May Affect 2016 Political Campaigns*, VICE NEWS (June 19, 2015, 3:39 PM), <https://news.vice.com/article/new-robocalls-restriction-may-affect-2016-political-campaigns> (suggesting politicians use survey results to decide how to vote).

139. *Id.*

140. *See id.*

141. Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey*, NATIONAL CENTER FOR HEALTH STATISTICS (June 2015), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201506.pdf>.

142. *Id.*

143. Steven Shepard, *New "Robocall" Rules Could Leave Americans in the Dark*, POLITICO (May 29, 2015, 5:00 PM), <http://www.politico.com/story/2015/05/new-robocall-rules-fcc-pollsters-polling-118422#ixzz4NYuIbFF2>.

democracy because of our recognition “that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.”<sup>144</sup> The protection of free speech is justified by a desire for an open marketplace of ideas, and this marketplace necessarily will include speech that is annoying.<sup>145</sup> While people may find political robocalls annoying, “much of what the First Amendment vigorously protects” is repugnant.<sup>146</sup> Thus, political robocalls still have a place in the marketplace of ideas and deserve protection, even though a ban may be popular with citizens.<sup>147</sup> In short, political robocalls should be allowed because they reduce the cost of political speech, promote the ability of the young and the poor to participate in the political process, and provide a source of political information. Accordingly, the caller’s free speech interest carries great weight. However, it is not the only interest at stake.

## 2. *The Recipient’s Privacy Interest*

Although the caller’s free speech interest is important, even this freedom is not unlimited; free speech must sometimes give way to other values.<sup>148</sup> The recipient of the robocall has an interest in protecting his privacy. Additionally, the TCPA ban is desirable because robocalls may not be particularly effective and are easily abused.

First, and most notably, political robocalls are annoying, frequent, and intrusive.<sup>149</sup> The ban on robocalls is the result of the democratic process.<sup>150</sup> Many robocall regulations are a direct result of constituent complaints, and politicians are eager to pass them because of their popularity.<sup>151</sup> The TCPA ban on robocalls was prompted by consumer complaints about the intrusiveness of robocalls. For example, robocalls are often made during dinner times or on the weekends because people are most likely to be at

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144. *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)

145. *See supra* notes 116–22.

146. *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1441 (2014).

147. *See id.* (“Many people might find those latter objectives attractive: They would be delighted to see fewer television commercials touting a candidate’s accomplishments or disparaging an opponent’s character. Money in politics may at times seem repugnant to some, but so too does much of what the First Amendment vigorously protects. If the First Amendment protects flag burning, funeral protests, and Nazi parades—despite the profound offense such spectacles cause—it surely protects political campaign speech despite popular opposition.”).

148. *See* Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 240 (2009).

149. *See id.* at 215.

150. *See id.* at 238.

151. *See id.* More cynically, politicians may be eager to pass these regulations because of their incumbent-protecting effect.

home or around their phone during these times.<sup>152</sup> Thus, robocalls particularly disturb moments of privacy.

The government has an interest, perhaps even a duty, in preserving the well-being of the community.<sup>153</sup> The government is not “powerless to pass laws to protect the public from . . . conduct that disturbs the tranquility of spots selected by the people.”<sup>154</sup> The Supreme Court has acknowledged an implied right of privacy under the Fourteenth Amendment’s Due Process Clause.<sup>155</sup> This right of privacy is grounded in a desire to protect the home.<sup>156</sup> The home provides a refuge from which a person “can escape the hurly-burly of the outside business and political world.”<sup>157</sup> The Constitution “secure[s] conditions favorable to the pursuit of happiness,” including the right to be left alone.<sup>158</sup> The heightened concern for residential privacy is due partially to a desire to protect the unwilling listener.<sup>159</sup> While a person cannot always avoid speech he does not want to hear, “[t]hat we are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.”<sup>160</sup> Thus, the government may protect the unwilling listener in his home from unwanted speech because of the “special benefit of the privacy all citizens enjoy within their own walls.”<sup>161</sup>

While the home is viewed as a special place, the strength of the privacy interests “depends on the nature of the communication and its forum.”<sup>162</sup> Notably, the TCPA ban on cell phones may, or may not, intrude on the home. Cell phones open the possibility to calls occurring outside the home in areas not as constitutionally significant for privacy interests.<sup>163</sup> However, robocalls are “particularly intrusive because the recipient cannot simply tell

152. Deborah L. Hamilton, *The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional*, 94 MICH. L. REV. 2352, 2352–53 n.1 (1996).

153. See *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding an ordinance that prohibits picketing in front of a particular residence as serving the compelling state interest of residential privacy).

154. *Gregory v. Chicago*, 394 U.S. 111, 118 (1969) (Black, J., concurring).

155. See *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

156. See *Gregory*, 394 U.S. at 118 (Black, J., concurring).

157. See *id.* at 118 (Black, J., concurring); see also *id.* at 125 (stating that the home is unique because it is “the last citadel of the tired, the weary, and the sick”).

158. See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (calling the right to be left alone “the most comprehensive of rights and the right most valued by civilized men”).

159. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

160. See *id.* at 484 (quoting *Rowan v. Post Office Dep’t*, 397 U.S. 728, 738 (1970)).

161. *Id.*

162. Deborah L. Hamilton, *The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional*, 94 MICH. L. REV. 2352, 2372 (1996).

163. See *Cohen v. California*, 403 U.S. 15, 21 (1971) (“[W]e are often ‘captives’ outside the sanctuary of the home.”) (internal citation omitted).

the caller to go away, and the caller, rather than the recipient, selects the time and manner that the message arrives.”<sup>164</sup> Thus, the complexity of cell phone communications demonstrates that the recipient’s privacy can be invaded if political robocalls are not banned.

Second, political robocalls are also potentially ineffective, at least for campaigns. There is little evidence to support that robocalls change voter opinion.<sup>165</sup> Political polls conducted through robocalls are not always accurate or reliable.<sup>166</sup> Robocall polls have a “response rate [of] . . . around 1 percent, and those who do respond tend to be more ideological in nature.”<sup>167</sup> By banning robocalls, the quality of polling may increase because live operators can generally ask better questions and have a better understanding of the participant’s answers.<sup>168</sup>

Lastly, robocalls can be abused by callers, resulting in voter confusion, which undercuts the argument that political robocalls are a beneficial source of information.<sup>169</sup> Political robocalls can expand opportunities for mudslinging and misinformation. For example, robocalls during the 2008 presidential election implied that Barrack Obama was a “domestic terrorist.”<sup>170</sup> A 2016 robocall smear campaign tried to turn conservative Utah voters against independent candidate Evan McMullin by falsely stating that he “has two mommies. His mother is a lesbian, married to another woman.”<sup>171</sup> Thus, the TCPA ban on political robocalls may be desirable because they are not particularly effective and can be abused, but most significantly, the ban protects the recipient’s privacy.

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164. Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 241 (2009); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (noting that broadcast media has a “uniquely pervasive presence” that confronts citizens in public and in their private homes).

165. See Matthew Philips, *Do Robo-calls Work?*, NEWSWEEK (Oct. 30, 2008, 8:00 PM), <http://www.newsweek.com/politics-do-robo-calls-work-91491>.

166. Sean Carberry, *New Robocalls Restriction May Affect 2016 Political Campaigns*, VICE NEWS (June 19, 2015, 3:39 PM), <https://news.vice.com/article/new-robocalls-restriction-may-affect-2016-political-campaigns>.

167. *Id.*

168. *Id.*

169. See M.J. Stephey, *A Brief History of Robo-calls*, TIME (Oct. 23, 2008), <http://content.time.com/time/politics/article/0,8599,1853436,00.html> (discussing robocalls during 2000 Republican primary referring to candidates as a “vicious bigot” and member of a “satanic cult”).

170. *Id.*

171. Alan Rappoport, *In Robocall, White Nationalist Accuses Utah’s Evan McMullin of Secretly Being Gay*, N.Y. TIMES (Nov. 1, 2016), [http://www.nytimes.com/2016/11/02/us/politics/william-johnson-evan-mcmullin-robocalls-utah.html?\\_r=0](http://www.nytimes.com/2016/11/02/us/politics/william-johnson-evan-mcmullin-robocalls-utah.html?_r=0) (discussing abusive robocalls designed to misinform Utah voters).

### *C. Analysis of the TCPA Ban under the First Amendment*

The tension between the caller's free speech interest and the recipient's privacy interest informs the strict scrutiny analysis. Strict scrutiny is a two-pronged standard.<sup>172</sup> First, the statute must serve a compelling governmental interest. Second, the statute must be narrowly tailored to achieve that interest.

#### *1. The Government's Interest is Not Compelling*

The TCPA robocall ban must "be demonstrably supported by not only a legitimate state interest, but a compelling one."<sup>173</sup> The compelling interest requirement is a high barrier to meet when political speech is at stake.<sup>174</sup> For example, in *Brown v. Hartlage*, the state voided an election under a corruption law because the candidate had promised to work for a lower salary.<sup>175</sup> The Court found that the state's interest in preventing corruption was not compelling, and the election was valid.<sup>176</sup> However, the requirement is not impossible to meet. For example, in *Burson v. Freeman*, a ban on campaigning within 100 feet of a polling place was upheld.<sup>177</sup> The Court found that the ban was needed to protect the right to vote and that this compelling interest outweighed the candidates' political speech interest.<sup>178</sup>

While the government does have a legitimate interest in protecting the recipient's privacy, these privacy concerns are likely not compelling in the context of the TCPA ban.<sup>179</sup> The TCPA ban applies to cell phones, but cell phones' mobility makes the government's *residential* privacy concern more tenuous. While cell phone robocalls may still be intrusive, "the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker" when the speech occurs outside the home.<sup>180</sup> A cell phone robocall is also far less intrusive than a solicitation at a person's

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172. See discussion *supra* Part IV.A.

173. See *Brown v. Hartlage*, 456 U.S. 45, 53–54 (1982).

174. See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (striking down law that prohibited judicial candidates from making statements about disputed issues by finding the state's interest in impartiality did not outweigh the candidate's free speech protection).

175. *Brown*, 456 U.S. at 47–48.

176. *Id.* at 62.

177. 504 U.S. 191 (1992) (plurality opinion).

178. *Id.* at 211.

179. See *Gresham v. Rutledge*, 198 F. Supp. 3d 965, 970 (E.D. Ark. 2016) (noting that the Eighth Circuit has found that similar residential privacy interests are substantial but not compelling).

180. *FCC v. Pacifica Found.*, 438 U.S. 726, 749 n.27 (1978) (finding sanctions can be placed against a "patently offensive" radio broadcast).

house—the unwanted communication can be ended or silenced with the quick push of a button.<sup>181</sup>

Furthermore, the state’s interest in the recipient’s privacy is undercut by the TCPA’s underinclusiveness.<sup>182</sup> The TCPA is underinclusive because its host of exemptions allow certain robocalls. Exemptions “diminish the credibility of the government’s rationale for restricting speech in the first place.”<sup>183</sup> While the government touts privacy as the justification for its ban, do robocalls that fall under the exemptions not also pose an intrusion on privacy?<sup>184</sup> As one scholar has advocated, it is the ringing of the phone itself, even before listening to the message, that is the unwanted intrusion.<sup>185</sup> Thus, the government’s privacy concerns are undermined by the exemptions because the TCPA distinguishes between types of speech even though all robocalls present the same annoyance.<sup>186</sup>

Finally, the TCPA makes the government the gate-keeper for whether speech is communicated via a robocall. However, this decision properly rests in the hands of each person.<sup>187</sup> What the TCPA fails to recognize is that some people may want to receive these robocalls, but the government forecloses any such opportunity. And for those who do not, “requiring the offended listener to turn away” instead of preventing the robocalls before they are even made may be constitutionally required.<sup>188</sup> Accordingly, the recipient’s privacy concerns are likely not a compelling governmental interest.

## 2. *The TCPA Ban Is Not Narrowly Tailored*

Second, even if the government’s privacy concerns are deemed compelling, the TCPA robocall ban is likely not narrowly tailored to achieve that end. “A statute is narrowly tailored if it targets and eliminates

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181. *But see* Van Bergen v. Minnesota, 59 F.3d 1541, 1555 (8th Cir. 1995) (arguing that robocalls are more disruptive than door-to-door solicitation because the called party does not have the option of cutting off the calls).

182. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2232 (2015).

183. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994).

184. *Pacifica Found.*, 438 U.S. at 749 (“One may hang up on an indecent phone call, but that option does not . . . avoid a harm that has already taken place.”).

185. *See* Deborah L. Hamilton, *The First Amendment Status of Commercial Speech: Why the FCC Regulations Implementing the Telephone Consumer Protection Act of 1991 Are Unconstitutional*, 94 MICH. L. REV. 2352, 2353 (1996) (suggesting that the content of the message does not affect the type of harm the call causes).

186. *See Pacifica Found.*, 438 U.S. at 745–46 (“For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”).

187. *See Martin v. City of Struthers*, 319 U.S. 141, 147–48 (1943). In *Martin*, the government’s interest in privacy did not outweigh the free speech rights of door-to-door pamphleteers. The Court recognized that each person—instead of the government—should make the decision of whether to hear the pamphleteer’s message or not. *See id.* at 146–47.

188. *See Pacifica Found.*, 438 U.S. at 749 n.27.

no more than the exact source of the ‘evil’ it seeks to remedy.”<sup>189</sup> The First Amendment “needs breathing space,” so restrictions “must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”<sup>190</sup>

The TCPA ban is not narrowly tailored because less restrictive alternatives are available that could further the government’s interest in protecting residential privacy and tranquility without violating the First Amendment.<sup>191</sup> If there is a “plausible, less restrictive alternative . . . to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.”<sup>192</sup> The TCPA forecloses an entire medium of communication by placing a complete ban on robocalls. Although political speech could be communicated through live operators or manual dialing, “the cases do not say that a speech restriction can survive strict scrutiny if other means of communication are available to the speaker.”<sup>193</sup> For example, the government could solely rely on do-not-call lists.<sup>194</sup> Unlike the TCPA ban, where the government forecloses any consumer choice, do-not-call lists allow each person to decide for himself whether he wants to receive these robocalls or not. Disclosure and opt-out requirements are another way to protect the recipient’s privacy without suppressing political speech.<sup>195</sup> Under this scheme, the caller would be required to disclose his identity and provide a way for the recipient to opt-out of future calls. Finally, time of day restrictions could reduce the intrusiveness of robocalls by prohibiting them from taking place during certain hours.<sup>196</sup> All of these alternatives allow political speech while reducing the intrusion on the recipient. Because plausible alternatives exist, the TCPA is not narrowly tailored. Thus, even

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189. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 808–10 (1984)).

190. *Broadrick v. Oklahoma*, 413 U.S. 601, 611–12 (1973) (upholding statute that prohibited state employees from engaging in partisan political activities).

191. *See Cahaly v. LaRosa*, 796 F.3d 399, 405–06 (4th Cir. 2015) (finding less restrictive alternatives are available for state TCPA robocall ban).

192. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 816 (2000) (holding “signal bleed” ban for pornography violated the First Amendment).

193. *Gresham v. Rutledge*, 198 F. Supp. 3d 965, 973 (E.D. Ark. 2016) (striking down state TCPA ban as violating the First Amendment as an impermissible content-based restriction that fails strict scrutiny).

194. *See Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1241–42 (10th Cir. 2004).

195. *See Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376–77 (4th Cir. 2013) (finding do-not-call lists are permissible and finding TCPA disclosure requirement does not violate the First Amendment).

196. *Cahaly v. LaRosa*, 796 F.3d 399, 405 (4th Cir. 2015) (noting time of day restrictions as a less restrictive alternative).

if the privacy of the recipient outweighed the importance of political speech, the TCPA robocall ban would still fail the strict scrutiny analysis.

#### CONCLUSION

While most agree that political robocalls are an annoyance, “[t]he hard fact is that sometimes we must make decisions we do not like.”<sup>197</sup> Political speech is at the very core of the First Amendment’s protection of free speech. Indeed, protection of political speech was one of the driving factors behind the creation of the Amendment. However, it harms the marketplace of ideas to have the government act as a gate-keeper by foreclosing any opportunity to receive robocalls. Furthermore, it is contrary to the First Amendment to allow the government to pick which subjects are permissible for robocalls and which are not. While the recipient’s privacy may be a legitimate concern, it is not compelling, and a host of less restrictive alternatives are available to protect the recipient’s privacy without silencing all robocalls. Accordingly, this Note concludes that the TCPA robocall ban fails to meet strict scrutiny, and therefore, violates the First Amendment. While citizens may prefer to hear their cell phone ring less frequently, political robocalls are a necessary noise for democracy, and we should let freedom ring.

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197. *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (Kennedy, J., concurring).

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