2018 WL 4007955 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

VICTORY PROCESSING, LLC, and Dave Dishaw, Plaintiffs-Appellants,

v.

Tim FOX, in his official capacity as Attorney General for the State of Montana, Defendant-Appellee.

No. 18-35163.
August 13, 2018.

On Appeal from the United States District Court for the District of Montana, Helena Division
Honorable Charles C. Lovell
Docket No. 6:17-cv-00027-CCL

Brief of Appellee

Timothy C. Fox, Montana Attorney General, Dale Schowengerdt, Solicitor General, Patrick M. Risken*, Assistant Attorney General, Justice Building, P.O. Box 201401, Helena, MT 59620-1401, (406) 444-2026, dales@mt.gov prisken @mt.gov, for defendant-appellee.

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***1** The official capacity defendant Montana Attorney General Timothy Fox (hereinafter "State") files this brief in opposition to Victory Processing, LLC's and Dave Dishaw's (collectively "Victory") appeal of the district court order granting the State's motion for summary judgment and denying Victory's cross-motion for summary judgment.

INTRODUCTION

This case is about a Michigan-based company, Victory Processing, that sought to expand its market in 2016 by providing automated telephone dialing services, or "robocalls," in Montana. Like the federal government and most other states, Montana restricts the use of robocall by requiring that a live operator introduce the call.

Rather than taking advantage of the allowance provided in Montana's robocall statute - Mont. Code Ann. § 45-8-216 - Victory sued the State. It alleged both facial and as-applied First Amendment challenges to the statute, claiming that political free speech rights were being trampled. Victory contends that the peace, tranquility and privacy of Montana residents, in their homes or persons, is not a ***2** "compelling state interest" that justifies restrictions on automated telephone dialing intrusion.

Robocall laws such as Montana's are widely viewed as reasonable means of preventing uninvited, intrusive, harassing prerecorded telephone messages that are made randomly by companies like Victory. Those laws preserve the privacy, peace and tranquility of residents. For decades, the Supreme Court has recognized the need to protect that privacy in cases dealing with a variety of methods, such as picketing, blaring sound trucks, and other low-tech media.

With ever-evolving communication technology, a body of case law is developing to protect people from harassment. Courts are finding that robocall restrictions like Montana's survive strict scrutiny, and the district court in this case joined those other courts. No genuine issues of material fact exist, Montana's Robocall law is constitutional, and this Court should affirm the order granting summary judgment for the State and denying Victory's summary judgment.

STATEMENT OF JURISDICTION

Because Victory raised federal constitutional claims, the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district ***3** court also had declaratory judgment jurisdiction under 28 U.S.C. §§ 2201 and 2202. The district court's summary judgment ruling disposed of all parties' claims and constitutes a final order; thus, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court was correct in granting standing to Victory to bring this suit on behalf of unidentified third parties.

2. Whether the district court correctly determined that the State has a compelling government interest in protecting Montana residents from unwanted, intrusive automated robocalls in their homes and persons.

3. Whether the district court correctly determined that Montana's robocall statute satisfies strict scrutiny.

STATEMENT OF THE CASE AND FACTS

Preliminary Statement

Victory has abandoned its "as-applied" challenge. *See* *Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir. 1994). *See* Victory Br. at 6. Victory's Complaint alleged both facial and as-applied constitutional challenges to Montana's Robocall statute. ER 1 at 5, ***4** "Claim," ¶ 17. On appeal, however, the factual record below is quite thin, since Victory refused to provide basic discovery. SER

30 at 2; 30-2 at 14-16, 19-24, 26.[1] The district court noted Victory's discovery failures when ruling on the cross-motions for summary judgment.[2] The state of the record probably explains why Victory now argues only a facial challenge to the statute.

There is no need to address Victory's statement of facts in detail because its facts are not "relevant to the issues submitted for review." Fed. R. App. 28(a)(6). Since Victory's challenge on appeal is limited to the facial challenge alleged below the facts relevant to the challenge are few.

***5 Statement of Facts**

Montana Code Ann. § 45-8-216 - "Unlawful Automated Telephone Solicitation" - restricts "the use an automated telephone system, device, or facsimile machine for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number for the purpose of" both commercial and noncommercial messages: sales, promotion, solicitation, polling or information gathering, and finally "promoting a political campaign or any use related to a political campaign." *Id.* at (1)(a)-(e). Subsection (2) of the statute provides three exceptions based upon ongoing or implied consent and allows robocalls on *any* topic if the call is introduced by a live operator to secure consent to play the message.

Victory is a Michigan "for profit" corporation but not registered to conduct business in Montana. (ER 27 at 22-23, ¶¶ 4, 8; SER 30 at 2; 30-1 at 5-11, 13, 16; 31 at 44-45).[3] Although unregistered, Victory provided paid "live polling" services for a Montana candidate and a political organization during the 2016 election cycle. SER 30-2 at 17; ***6** 31 at 44-45.[4] Victory admittedly offers robocall services for a fee or price but, at the time this case was filed, it had never attempted to provide that service in Montana. SER 30-2 at 14-15, 17; SER 31 at 45-46.[5] Victory provided no specific evidence of alleged opportunities to provide robocall in Montana. *See* n.1, *supra*.

Victory contends that it has a First Amendment right to send unrestricted robocalls on behalf of "prospective" political candidates in Montana (ER 1, ¶¶ 6, 7, 9) and first considered doing so in 2013. SER 30-2 at 21-22; SER 31 at 46.[6] The messages were not Victory's own political speech. SER 30-2 at15, 21; SER 31 at 46. At all times relevant, Victory owner Dishaw was incapable of running for office in Montana (ER 1, ¶ 2) and Victory, a limited liability company (*Id.,* ¶ 1), certainly could not.[7]

No Montana candidate joined Victory in its lawsuit. The only potential injury Victory has alleged is the loss of "prospective clients" ***7** (ER 1, ¶¶ 7-9); obviously sales. Victory did not allege that Montana threatened to enforce the statute against it. *Id.,* ¶¶ 8-9.

Both parties moved for summary judgment. On February 9, 2018, the district court denied Victory's motion while granting the State's motion, dismissing Victory's Complaint and the action, and denying all relief. ER 39 at 88-90.

SUMMARY OF THE ARGUMENT

Victory has never had standing to bring this case. By refusing to provide relevant information during discovery, leaving only an unverified complaint as its factual support, Victory destroyed any chance at standing on behalf of unnamed third parties. Specific facts demonstrating standing are required, even under a facial challenge to the statute.

Victory has also abandoned its as-applied challenge to Mont. Code Ann. § 45-8-216. There is no dispute over material facts that could preclude this Court from affirming the district court's summary judgment ruling in the State's favor. Victory's sole challenge can be decided as a matter of law.

***8** The district court was correct that Mont. Code Ann. § 45-8-216 promotes a compelling government interest and passes strict scrutiny. Victory's strategy from the outset has been to attack only one specific subsection - Mont. Code Ann. § 45-8-216(1) - as a "stand alone," rendering subsection (2) of the statute meaningless surplus. That approach is counter to settled rules of statutory interpretation. The district court recognized that the entire statue is organized by consent to receive a robocall, whatever the topic. ER 39 at 72-73, 75-76. The three exceptions stated in subsection (2) recognize implied consent and a relationship between caller and call recipient. ER 39 at 86. Every topic is allowed with actual consent. Victory's unrelenting characterization of the Montana statute as a "ban" is misdirection. The district court was correct in finding that the ability to secure consent, even advance permission, and other listed means of communication left ample opportunity for individuals and organizations to spread their messages. ER 39 at 87-88.

A statute requiring consent for uninvited, intrusive robocalls promotes a compelling Montana interest, namely the protection of personal privacy and tranquility. Victory's contentions regarding ***9** evidence sufficient to meet the State's burden of proof miss the mark, given that Congress and a number of courts have already recognized the intrusiveness of robocalls and the compelling government interest in protecting people from that intrusion. Victory's position is a repudiation of those decisions. The "less restrictive" means of regulation that Victory promotes have been universally rejected.

This Court should affirm the district court's summary judgment ruling against Victory and in favor of the State.

STANDARD OF REVIEW

This Court reviews de novo a grant of summary judgment and, in First Amendment cases, conducts an independent review of the facts. *Kaahumanu v. Hawaii*, 682 F.3d 789, 796 (9th Cir. 2012).

ARGUMENT

Recent decisions in other circuits demonstrate the evolution of state and federal law protection afforded to individuals confronted with automated telephone messaging. Mont. Code Ann. § 45-8-216 is consistent with both the cases and Congressional findings explaining the concerns raised by robocall technology. The district court recognized the overall structure of Mont. Code Ann. § 45-8-216 when it determined ***10** that, even under a strict scrutiny analysis, vendors such as Victory are not *prohibited* from speaking. ER 39 at 76-78, 86-88. Victory's argument, on the other hand, relies on extrapolation of cases involving more rudimentary methods of speech delivery, ignoring recent case law developments specifically involving robocall.

The district court determined that Mont. Code Ann. § 45-8-216 is content neutral in effect but subjected it to a strict scrutiny analysis since it presented a content-based restriction of speech on its face. Assuming the statute is content-based, the statute must be narrowly tailored to serve a compelling government interest. As the district court found, the statute meets that burden.

I. Victory failed to establish standing in the district court.

The district court found that Victory had "only a thin basis for standing" to sue on behalf of unnamed prospective clients while noting that Victory had provided no evidence to support that type of standing. ER 39 at 66. Victory's standing was extinguished when it refused to participate in discovery that would have demonstrated its ability to sue on behalf of third parties.

***11** The "case or controversy" requirement of Article III of the U.S. Constitution requires that plaintiffs have standing to bring the lawsuit. *Allen v. Wright,* 468 U.S. 737, 750 (1984). Jurisdiction is based upon the facts at the time the lawsuit is filed. *Righthaven v. Hoehn,* 716 F.3d 1166, 1171 (9th Cir. 2013). The facts alleged in the Complaint were never supported by Victory in discovery. See n. 1, supra. Subject matter jurisdiction in lacking this case. *Righthaven* at 1172.

Standing requires that a party assert his own legal rights and interests, and he cannot rest his claim to relief on the legal rights or interests of others. *Kowalski v. Tesmer,* 543 U.S. 125, 129 (2004). At a minimum, Article III requires a plaintiff to show that he personally has suffered some actual or threatened injury, that the injury fairly can be traced to the challenged action, and that it is likely to be redressed by a favorable decision. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State,* 454 U.S. 464, 472 (1982).

None of the alleged political speech was personal to Dishaw, who was never qualified to be a candidate for office in Montana. ER 1, ¶ 2; Mont. Const. art. IV, §§ 2, 4; Mont. Code Ann. § 13-1-111. Dishaw operates "through his company" (ER 1 at ¶ 2), which never registered to ***12** conduct business in Montana. SER 30-2 at 13 (RFA No. 2). Because Dishaw relied on claims specific to Victory or to hypothetical candidates for Montana office, he never had standing to sue in his own right. *Kowalski,* 543 U.S. at 129. Hypothetical injury to unknown third parties, being the regulation of robocalls pre-recorded for political candidates, was the only potential basis for Victory's standing.

Victory may assert third party standing to make a First Amendment claim on behalf of Montana political candidates only if it can satisfy three elements: "(1) [Victory] must have suffered an 'injury in fact,' (2) [Victory] must have a close relation to the third party, and (3) there must exist some hindrance to the third party's ability to protect his or her own interests." *Wasson v. Sonoma County Junior College,* 203 F.3d 659, 663 (9th Cir. 2000) (citing *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

As the district court noted, Victory failed to provide any evidence that its "prospective clients" were prohibited from joining this suit in their own names, or "specific instances of conduct as to either [Victory's] intent to violate the law or as to [Montana's] intent to enforce the law." ER 39 at 65-66; SER 30-2 at 13-14, 21 (RFA No. 3; Int. No. 7). By ***13** refusing to provide information relevant to standing during discovery, Victory extinguished its standing on behalf of third parties.

Victory is a business that sells its robocall service to others for a price or fee. SER 30-2 at 14-16; SER 31 at 44-45. [8] Victory's product is only a conduit for the speech of paying clients, and its interests purely commercial. ER 1, ¶¶ 1, 2, 7, 8; SER 30-2 at 15-16, 18. [9] Victory can sell its robocall services in Montana if it complies with Mont. Code Ann. § 45-8-216. There simply is no evidence of an "injury in fact" to Victory.

First, the loss of customers constitutes a hardship that is primarily economic in nature. *Lydo Enterprises v. City of Las Vegas,* 745 F.2d 1211, 1213, 1216 (9th Cir. 1984). Economic loss is generally not a basis for injunctive relief. *Arcamuzi v. Continental Air Lines,* 819 F.2d 935, 938 (9th Cir. 1987) (citing *Sampson v. Murray,* 415 U.S. 61, 89-91 (1974)) (loss of earnings not an irreparable injury). While the existence of the Montana robocall restrictions may impact Victory's overhead, they do not threaten the existence of Victory's business. SER 30-2 at 16-17, 22, 26; SER 31 at 45-46. [10]

***14** The First Amendment is concerned with freedom of expression, not the prospect of financial gain. *See* *Warner Cable Communications v. Niceville,* 911 F.2d 634, 638 (11th Cir. 1990) ("[t]he inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of [a statute] upon freedom of expression."). Victory refused to provide evidence that Montana prohibits robocalling. Its claim boils down to the fact that, under Mont. Code Ann. § 45-8-216, it might not offer as many simultaneous computer-generated calls as it would like. That is not a constitutional injury.

Second, it is not the government's duty to make "doing business" less arduous or more economical or efficient. Restriction of robocalling is not immune from reasonable regulation by the state. *Moser v. FCC,* 46 F.3d 970, 975 (9th Cir. 1995). "That more people may more easily and cheaply be reached by [robocalls] ... is not enough to call forth constitutional protection" prohibiting regulation by the state. *Kovacs v. Cooper,* 336 U.S. 77, 88-89 (1949), cited in *Moser* at 975. Absent legal controls requiring a live person to initiate the call, robocalls like those Victory seeks to make in Montana "makes the call frustrating for the ***15** recipient but cheap for the caller." *Patriotic Veterans v. Zoeller,* 845 F.3d 303, 306 (7th Cir. 2017). Business expedience does not confer standing.

Victory failed to provide any evidence that Mont. Code Ann. § 45-8-216 cannot be met or is otherwise unconstitutional. The only injury that it claims is purely economic. Victory sued on the backs of unnamed "potential clients" and then refused to divulge even the most basic information that might support its standing to sue in this case. It failed to meet any of the three standing requirements of *Wasson v. Sonoma County Junior College,* 203 F.3d at 63.

II. The State has a compelling interest in protecting the privacy and tranquility of its residents.

A. The record developed below contained substantial evidence of the government's interest in protecting the privacy of its residents.

For decades courts have recognized the problem of unwanted invasive messaging. As the United States Supreme Court stated, "we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Frisby v. Schultz,* 487 U.S. 474, 484 (1988). Offensive speech includes speech that is disruptive and unwanted. *Id.,* 487 U.S. at 487. "The First Amendment permits the government to ***16** prohibit offensive speech as intrusive when the 'captive' audience cannot avoid the objectionable speech." *Id.* "Nothing in the constitution compels us to listen to or view any unwanted communication, whatever its merit . . .." *Rowan v. Post Office Dep't,* 397 U.S. 728, 737 (1970). "There is simply no right to force speech into the home of an unwilling listener." *Frisby,* 487 U.S. at 485.

Victory contends that the district court erred because "the State did not submit sufficient evidence concerning the particular government interest at stake" to support the statute. [11] Yet the government is not required to provide empirical evidence when the asserted government interest is "neither novel nor implausible." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 391 (2000). In *Nixon* an affidavit from a state senator confirming the Missouri legislature's concern that large contributions have "the real potential to buy votes," submitted with copies of newspaper articles reporting political contribution corruption, was sufficient to substantiate the state's interest in preventing that corruption. *Id.,* 528 U.S. at 391-394. As explained below, courts and ***17** legislators have long recognized the significant problems robocalls cause to personal peace, privacy, and tranquility. The legislation and decisions amply demonstrate that "the particular government interest" Montana has in robocall regulation is very real. Victory's arguments are not persuasive.

The district court cited *Frisby* and *Rowan,* as well as Senate Report 102-178 (Oct. 8, 1991) supporting the Automated Telephone Consumer Protection Act of 1991 (TCPA) (47 U.S.C. § 227, *et seq.*) as supporting the determination that "government protection of residential privacy is a compelling government interest." ER 39 at 67-70. Courts that have examined the federal version of robocall legislation uniformly hold that protecting people from the disruptive nuisance of uninvited recorded telephone solicitations is indeed a compelling interest. *See* *Brickman v. Facebook,* 230 F.Supp.3d 1036, 1046 (N.D. Cal. 2017), and *Holt v. Facebook,* 240 F.Supp.3d 1021, 1033 (N.D. Cal. 2017), both cited by the district court as support of the compelling interest. As explained below, recent cases across the nation are consistent with that determination.

***18** Regardless, Victory asserts that the record does not "support a finding that the State has a compelling interest in residential privacy." Victory Br. at 11. Victory misplaces its reliance on *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 530, 543 (1980), for the proposition that speculation will not supplant evidence. *Consolidated Edison* involved a public utility providing what it determined to be "useful" information in 1976 - the benefits of nuclear power - by inserts in ratepayers' bill envelopes while at the same time excluding opposing information. Regarding evidence, the utility argued that its prohibition on opposing views protected ratepayers from subsidizing political speech. Yet the court found "no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base." *Consolidated Edison,* 447 U.S. at 543. That specific finding had nothing to do with what has already been recognized as a compelling interest in protecting residents' peace ***19** and tranquility within their homes. It was only a comment on the state of the record *in that case*. [12]

The *Consolidated Edison* decision also recognized that the State's interest is higher when there is a captive audience, as in this case. For example, the Court noted the difference between the blaring sound truck in *Kovacs* and merely discarding unwanted inserts found in a mailed utility bill. *Consolidated Edison,* 447 U.S. at 541. The utility controlled the information provided, suppressing opposing views on one topic. In contrast to *Consolidated Edison,* Montana does not distinguish between competing viewpoints. Rather, Montana allows robocalls on any topic so long as the call is introduced by a live operator. *Consolidated Edison* simply does not apply.

Victory argues that the offensive nature of robocalls is speculative; that it is impossible to determine whether "the threat is real enough." Victory Br. at 12. But the Montana Legislature very clearly recognized ***20** the interest of residents' relief from busy telephone lines and residential privacy (ER 27 at 28-37), discussing the annoyance of computer generated telephone calls at length. *Id.* at 28, 29, 33. The benefit of a "live operator" was also discussed (*Id.* at 31, Rep. Bachini; at 33, Rep. Scheye) including testimony from telephone industry representatives supporting the live operator requirement. *Id.* at 33-34, 40.

The factors considered by the Montana Legislature were in line with those being considered by the U.S. Congress, also in 1991. *See* Senate Report 102-178 (Sept. 19, 1991), 102nd Congress "Background and Needs" Sections A-C and F. SER 30-3 at 30-34. Congressional findings supporting the adoption of the TCPA in December 1991 included the intrusive invasion of privacy; consumer outrage over the proliferation of intrusive, nuisance calls to their homes from telemarketers; and evidence compiled by the Congress indicating that residential telephone subscribers consider automated or prerecorded telephone calls to be a nuisance and an invasion of privacy. Public Law 102-243 (Dec. 20, 1991), 102nd Congress, section 2 - ***21** Findings, sections 5, 6, 10. ER 39 at 70. [13] Congress "was trying to prohibit the use of [robocalls] to communicate with others by telephone in a manner that would be an invasion of privacy." *Satterfield v. Simon & Schuster,* 569 F.3d 946, 954 (9th Cir. 2009). "The TCPA thus seeks to curb abusive telemarketing practices that threaten the privacy of consumers and businesses." *Ashland Hosp. Corp. v. SEIU,* 708 F.3d 737, 741 (6th Cir. 2013). Montana legislative history, Congressional findings and the cases examining those findings show that "the threat is real enough," and the State's interests are compelling.

Regardless of the arbitrary approach Victory takes on this issue, concerns regarding the uninvited invasion of a person's privacy have been well understood in the courts, state legislatures and Congress for decades. Robocall is just the newest technology. Victory's assertion of an absence of proof of an "actual problem" is simply wrong.

***22 B. The government's compelling interest is now widely recognized.**

The State's interest in protecting the well-being, tranquility, and privacy of the home "is certainly of the highest order in a free and civilized society." *Carey v. Brown,* 447 U.S. 455, 471 (1980). Victory seizes this statement as literal proof that courts cannot translate "the highest order" into "compelling interest," citing *Kirkeby v. Furness,* 92 F.3d 655, 659 (8th Cir. 1996),

an Eighth Circuit picketing case that did not translate "the highest order" into "compelling." The district court refused to follow that literal line, instead holding that it "cannot subscribe to [Victory's] argument that a government interest that is 'certainly of the highest order in a free and civilized society' is not also a compelling government interest.'" ER 39 at 74, citing *Frisby,* 487 U.S. at 484.

The district court was correct when it included in its analysis virtually identical federal regulation of robocalls under the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, *et seq.*, and the cases that analyze those protections. Like the Montana statute, the TCPA "aims to curb a particular type of *uninvited* call. As a result, the statute omits from its ambit those calls that a person agrees to receive." ***23** *Fober v. Mgmnt. & Tech. Consultants,* 886 F.3d 789, 792 (9th Cir. 2018) (emphasis original), citing *Satterfield,* 569 F.3d at 954.

Other courts, especially courts within the Ninth Circuit, are rapidly building a body of case law holding that a person's peace and tranquility is a compelling interest when robocall is involved. It is "the consensus view among district courts that the TCPA serves a compelling government interest in protecting residential privacy from the nuisance of unsolicited, automated telephone calls." *Gallion v. Charter Communications,* 287 F.Supp.3d 920, 928 (C.D. Cal. 2018), citing *Brickman v. Facebook,* 230 F.Supp.3d 1036, 1045-46 (N.D. Cal. 2017); *Holt v. Facebook,* 240 F.Supp.3d 1021, 1033 (N.D. Cal. 2017); *Mejia v. Time Warner Cable Inc.,* 2017 U.S. Dist. LEXIS 120445 at *45 (S.D.N.Y. 2017); and *Greenley v. Laborers' Int'l Union of N. Am.,* 217 F.Supp.3d 1128, 1150 (D. Minn. 2017). The compelling interest was based upon "extensive Congressional findings." *Mejia* at *45. Those decisions have since been joined by *American Assoc. of Political Consultants v. Sessions,* 2018 U.S. Dist. LEXIS 48883 (E.D.N.C. 2018), again finding a compelling state interest in protecting North Carolina ***24** residents from uninvited robocalls based upon the Congressional findings supporting the TCPA.

Victory's analysis of a content-neutral TCPA (Victory Br. at 14-15) is unpersuasive because it is outdated.[14] Its attempt to distinguish previous cases involving picketing (*Carey,* 1980 and *Frisby,* 1988), sound trucks (*Kovacs*, 1949), door-to-door sales (*Hall,* 1948) and junk mail (*Rowan,* 1970) (Victory Br. at 16-19) ignores the evolution of technology. Each of these cases recognized the importance of protecting the peace and quiet of people within their own homes. "I believe that the homes of men, sometimes the last citadel of the tired, the weary, and the sick, can be protected by government from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory v. Chicago,* 394 U.S. 111, 125-126 (1969) (Black, J., concurring in a decision upholding the peacefully picketing an elected official when the protesters were *not* on the official's property). Only in *Rowan* did ***25** the offending message physically invade the residence, through inserts found by residents in their utility bill envelopes.

Robocalling is far more intrusive because an uninvited telephone call can reach a person wherever their phone might be, at any time and with no warning. The above-cited TCPA cases recognized that situation when finding the interest in protecting individual peace and tranquility to be compelling. The interest of the government has remained the same even though technology has advanced beyond blaring sound trucks, pickets and junk mail. *See Carpenter v. United States,* 2018 U.S. LEXIS 3844 at *14 (2018) (recognizing that Fourth Amendment privacy concerns must keep pace with advancing technology, in that case surveillance tracking the interaction between a subject's cell phone and cell phone towers); *see also Kyllo v. United States,* 533 U.S. 27, 34 (2001) (finding the use of thermal imaging to pierce a subject's home was a search). Failing to regulate the nuisance of robocalls, as Congress did when enacting the TCPA, "would leave the homeowner at the mercy of advancing technology." *Kyllo,* 533 U.S. at 35.

It is difficult to imagine a setting beyond a person's residence, pocket or pocketbook that commands greater protection of privacy. ***26** American jurisprudence is replete with statements recognizing that goal. "Protecting residential privacy has long been recognized by Supreme Court decisions as a pre-eminent governmental interest." *Carey v. Brown,* 447 U.S. at 471, quoting

Black, J., concurring in *Gregory v. Chicago,* supra. "Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; .... The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality, and none of the recognized exceptions includes any right to communicate offensively with another." *Rowan v. United States Post Office Dep't,* 397 U.S. 728, 737 (1970).

Rowan recognized that by prohibiting "pandering" advertisements sent by mail in 39 U.S.C. § 3008 [formerly 39 U.S.C. § 4009] "Congress has erected a wall - or more accurately permits a citizen to erect a wall - that no advertiser may penetrate without [the resident's] acquiescence." Rowan, 397 U.S. at 738. "To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home." ***27** *Id.*, 397 U.S. 737. The Montana Legislature erected a similar restriction that a robocaller can circumvent by gaining the implied or express consent of the call recipient. Consent is clearly the key.

The district court subjected Mont. Code Ann. § 45-8-216 to strict scrutiny as content-based.[15] Because of the universal recognition of the compelling governmental interest that robocall regulation serves,[16] Victory's contention of an absence of evidence of compelling state interest fails.

III. Victory's focus on political speech finds no basis in the law.

Victory insists that Mont. Code Ann. § 45-8-216(1)(e) is the only subsection of the entire statute that is in play and it asserts that the ***28** district court should have limited its analysis to only that provision. Victory Br. at 19. Victory's premise is contrary to settled Montana statutory interpretation principals, which require interpretation of the entire statute. The district court correctly rejected Victory's approach. ER 39 at 75-76.

This Court is a federal court faced with a constitutional challenge to a Montana statute and therefore must follow the Montana Supreme Court's interpretive guidance. *See* *Association des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 945 (9th Cir. 2013) ("In interpreting a state statute, we apply the state's rules of statutory construction.") The Montana Supreme Court presumes that statutes are constitutional and will adopt an interpretation that renders a statute constitutional, rather than one that renders it invalid. *See* *State v. Ross*, 889 P.2d 161, 164 (Mont. 1995). The Court construes the statute to further, rather than frustrate, legislative intent. *Id*. Moreover, the Court presumes that when the Montana Legislature enacts a law it is aware of existing law, including court decisions interpreting statutes. *Swanson v. Hartford Ins.*, 46 P.3d 584, ¶ 22 (Mont. 2002).

***29** Here, the district court rightly considered the entire statute in determining its constitutionality. ER 39 at 60-61, 71-72, 75-78. "Political robocalls are permitted - as are all Montana robocalls - with a live operator.... Montana's statute identifies five different categories of robocalls that together comprise the vast majority of robocalls, and Montana's entire statutory scheme functions consistently, logically, and independently of any message content or topic preference to promote a compelling government interest." ER 39 at 79. Just as the State cannot argue with cases that recognize the importance of political speech, Victory cannot ignore the operation of the entire statute.

While the State acknowledges restrictions on political speech may be subject to strict scrutiny, there is no authority for the proposition that political speech is entitled a "stricter" strict scrutiny beyond the test that the district court employed. For example, *Monitor Patriot v. Roy,* 401 U.S. 265, 271-72 (1971) (cited by Victory for the "stricter scrutiny" proposition) involved a libel suit by a political candidate suing a newspaper over a column that identified the candidate as "a former small-time bootlegger." In *Monitor Patriot,* the First Amendment was described as "fashioned to assure the unfettered interchange of ideas for ***30** the bringing about of political and social changes desired by the people." *Monitor Patriot,* 401 U.S. at 272. Again, of that there is no doubt. But "unfettered interchange" is not "unregulated delivery."

Victory mistakenly conflates "abridged" with "prevents" ("ban") throughout its argument under the banner of an inability to "freely" convey messages. Yet that relates solely to the *number* of the same message that may be conveyed at the same moment in time. With certain technology and absent a live operator, Victory could conceivably send the same message simultaneously to thousands of Montanans. "Where a statute does not directly abridge free speech, but - while regulating a subject within the State's power - tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so." *Younger v. Harris,* 401 U.S. 37, 51 (1971). The incidental effect here might result in the employment of live operators, which is of course Victory's choice. Political speech is still allowed.

Victory's criticism of the statute is related only to the efficiencies and profit available if Victory is allowed to "freely" deliver political ***31** messages for clients. In the case of robocalling, society must certainly recognize that a person has a reasonable expectation that he or she will not be disturbed by what is, in all respects, an intruder into private space.

IV. The Montana statue is narrowly tailored, according to recent cases which analyzed robocalling under the TCPA.

Victory contends that Mont. Code Ann. § 45-8-215 is not as narrowly tailored as it could be because the "target" of the statute, according to Victory, is to "ban" political speech. Victory is mistaken. Rather, the target of the "exact source of the 'evil' [the statute] seeks to remedy" is the unwanted intrusion of recorded telephone messages - commercial or noncommercial, including political - into the privacy enjoyed by Montanans. *See* *Frisby,* 487 U.S. at 485.

Victory is also incorrect in promoting a standard that the government must provide the "least restrictive" or "least intrusive" means required to achieve the goal of the Mont. Code Ann. § 45-8-216. Victory Br. at 21-25. "While time, place, and manner restrictions on speech that 'disregard far less restrictive and more precise means are not narrowly tailored,' (citation omitted) they need not be 'the least ***32** restrictive or least intrusive means' of accomplishing the government's goals." *Bland v. Fessler,* 88 F.3d 729, 736 (9th Cir. 1996), citing *Ward v. Rock Against Racism,* 491 U.S. 791, 800 (1989). The "consent" provision of Mont. Code Ann. § 45-8-216(2) demonstrates a less-restrictive alternative to limiting calls based upon content, time-of-day restrictions, expecting consumers to switch the telephone "off" or hanging up. *Bland v. Fessler,* 88 F.3d at 736 (disagreeing with the Fourth Circuit's decision in *Cahaly v. Larosa,*796 F.3d 399, 405-06 (4th Cir. 2015), a case emphasized by Victory, regarding the plausibility of time-of-day limitations).

In this case Victory merely contends that the "live operator" option (recognized in many courts as within acceptable narrow tailoring when dealing with robocall) was ineffective or too prohibitive. Moreover, Victory's claim that the district court lacked evidence of a problem (Victory Br. at 24) ignores Congressional findings, Montana Legislature debate, findings in robocall cases across the country and the fact that Victory offered absolutely nothing new as an example of a lesser but effective restriction than what is contained in Mont. Code Ann. § 45-8-216.

***33** "Narrow tailoring" is not limited to time-of-day restrictions, mandatory disclosure, do-not-call lists, disconnection requirements or the prohibition of calls to emergency lines. *See* *Brickman,* 230 F. Supp. 3d at 1048-49 (rejecting the alternatives in both *Cahaly* and *Gresham v. Rutledge,* 198 F. Supp. 3d 965, 965 (E.D. Ark. 2016)), and *Holt,* 240 F. Supp. 3d at 1034 (rejecting the alternatives in *Cahaly*.) *See also* *Bland,* 88 F.3d at 736 (rejecting do-not-call lists and self-help as effective in protecting the privacy of homes and workplaces). Victory failed to demonstrate any alternative, and not just one that is "far less restrictive" to the operator-consent alternative.

Montana offers the live operator option without restrictions. It is not "underinclusive" since virtually every conceivable subject of calling is covered, which was noted by the district court. ER 39 at 75, 77-78, 87-88. Nor is it "overinclusive" since political speech can be delivered through a variety of other media, as well as by consent to the robocall. ER 39 at 87-88. In Montana, the method of delivery, not the message, is the target. While Victory has argued "alternatives" presented in cases outside the Ninth Circuit, it has presented nothing to support its contention that the entire statute "bans" political messaging.

***34** The live operator option is not only an effective alternative to an outright "ban" on robocalls on any subject, but it is arguably the best alternative for directly speaking with the resident of the home or cell phone subscriber. Other alternatives for message delivery are available and acceptable, including traditional methods of advertising through various media. *Bland*, 88 F.3d at 736; ER 39 at 87-88. If the "evil" targeted by a First Amendment restriction is automated telephone calls that are uninvited and unwelcome, then the solution to extinguish that "evil" is to have a live operator get permission for the call and allow the resident to accept or reject the call. Victory provided no evidence to support its claimed "ban" of political messaging, it did nothing to address the live operator alternative other than to deny its effectiveness, and completely ignored the other means of speech delivery available to political candidates. Narrow tailoring is present.

Victory reliance on *United States v. Playboy Entm't Group,* 529 U.S. 803 (2000) is misplaced because that case demonstrates that Montana's robocall statute is constitutional. *Playboy* involved a federal statute that required fully scrambling adult content cable channels to nonsubscribers or limiting that specific adult-oriented programming to ***35** the hours between 10 p.m. and 6 a.m., to protect children from exposure to that content. The court described either alternative as a "blanket ban." *Id.* at 814. While the compelling nature of the government's interest in protecting children was not disputed, *Playboy* involved discussion of "less restrictive alternatives" to achieve the same goal. *Id.* at 809. That alternative was found in the next statute in sequence, which allowed subscribers to order, at no charge, specific cable channel blocking in their homes. *Id.* at 809-10. The adult channels were delivered only with the customer's consent.

Therefore, like each subscriber's choice in *Playboy,* Mont. Code Ann. § 45-8-216 allows each call recipient the opportunity to consent to the recorded message through a live operator before the message is played. The district court held that "[i]t is this permission which is the saving grace of the Montana statute in this facial challenge." ER 39 at 89. Under the *Playboy* analysis, live operator consent is a less restrictive alternative to banning robocalls altogether during certain times of the day or expecting residents to turn off their telephones.

Victory's reliance on *Sable Communications of Cal. v. FCC,* 492 U.S. 115 (1989) stretches the reach of that case beyond its ***36** boundary. Sable provided erotic pre-recorded telephone messages to subscribers that paid a monthly fee to access those messages. A crucial distinction between *Sable* and this case is that the paying customer called Sable. "The context of dial-in services, where a caller seeks and is willing to pay for the communication, is manifestly different from a situation in which a listener does not want the received message." *Sable,* 492 U.S. at 128. The Court found that 49 U.S.C. § 223(b) (1988) was a blanket prohibition of such calls, violating strict scrutiny because the government failed to consider *any* lesser restrictive means of preventing children from accessing the Sable site. While the FCC and appellate court recognized other less restrictive means such as credit cards, access codes and scrambling rules as "satisfactory solutions to the problem" (*Sable,* 492 U.S. at 128) the Supreme Court found the law to be unconstitutional because "the congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." *Sable,* 492 U.S. at 129.

***37** Here, the district court recognized the import of the Congressional findings supporting the TCPA and found Montana's interest in regulating computer generated telephone calls to be compelling - "one of the pillars of civil society." ER 39 at 70. The only alternative to the TCPA's prohibition of robocalls (excepting an emergency) is "the prior express consent of the called

party." 47 U.S.C. § 227(b)(1)(B). That "consent" requirement is indistinguishable from the option available to robocallers (Victory) under Mont. Code Ann. § 45-8-216(2), which has uniformly been found to pass the narrow tailoring analysis.

The district court did not determine that Montana's statute meets strict scrutiny out of whole cloth, as Victory contends. [17] Victory relies heavily on *Cahaly v. Larosa* and *Gresham v. Rutledge* as examples of cases where state robocall restrictions were determined to be unconstitutional under a "least restrictive means available" analysis. Neither statute under examination in those cases contained the "live operator" option. In *Cahaly* the South Carolina statute defined robocalls ***38** as calls not introduced by a live operator (S.C. Code Ann. § 16-17-446(A)) and targeted robocalls with a consumer or political message "but did not reach calls made for *any other purpose*." *Cahaly,* 769 F.3d at 405 (emphasis added). Thus, other than political or consumer messages, robocalls in South Carolina were unrestricted and if the call was introduced by a live operator it was not even a "robocall."

Here the district court found that Mont. Code Ann. § 45-8-216(1) identified "five different categories of robocalls that together comprise the vast majority of robocalls." ER 39 at 79. Regardless of the topic of the robocall, live operator consent frees the robocall message for delivery. Mont. Code Ann. § 45-8-216(2). In *Cahaly* calls "of a political nature" were simply banned. Victory's argument works only if Mont. Code Ann. § 45-8-216(1)(e) in isolation constitutes a "ban." [18] When ***39** Mont. Code Ann. § 45-8-216(2) is considered in tandem with subsection (1), as required under Montana law, the statute's operation is clear: calls on any topic, including political messages, are allowed if introduced by a live operator or with prior consent, actual or implied.

Likewise, *Gresham v. Rutledge,* 198 F.Supp. 965 (E.D. Ark. 2016), is not persuasive. The Arkansas statute did not provide for recorded message delivery after introduction by a live operator. *Brickman, Holt* and *Greenley* all distinguished *Gresham* because the options offered were demonstrably less effective than a live operator or placed the burden on the call recipient. Notably, recent TCPA cases discussing less restrictive alternatives do not cite *Cahaly* or *Gresham. See* *Holt,* 240 F. Supp. 3d at 1034, and *Gallion,* 287 F. Supp. 3d at 931. While Victory may argue that other alternatives might be less restrictive, each alternative that it cites (Victory Br. at 23) has been rejected in *Holt, Brickman, Mejia, Greenley* and *Gallion*. Narrow tailoring does not mean "perfect tailoring." *Mejia,* 2017 U.S. Dist. LEXIS 120445 at *49.

The district court correctly analyzed strict scrutiny, including narrow tailoring, and should be affirmed.

***40** *CONCLUSION*

For the reasons set forth above this Court should affirm the district court's order.

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Footnotes

1 Risken Declaration ¶ 3; Request for Admission (RFA) Nos. 4, 8, 12; Interrogatory (Int.) Nos. 4, 5, 7, 8, 9, 10, 15; Request for Production (RFA) Nos. 2, 3. *See also* SER 31 at 43-48, Defendant's Statement of Undisputed Facts (DSOF), presented to the district court without objection by Victory, and DSOF No. 12.

2 Victory refused to verify the fact allegations in its complaint regarding the nature of the business, prospective clients and its contention that it lost business because of Mont. Code Ann. § 45-8-216. SER 30-2 at 14-16, 19-24, 26 (n.1 above). The district court noted the paucity of Victory's evidence, including Victory owner Dishaw's Affidavit. ER 39 at 63-66.

3 Risken Decl. ¶¶ 2, 3 and Ex. 2; RFA Nos. 2, 10; DSOF Nos. 1, 2, 6, 7.

4 Int. No. 1; DSOF No. 8.

5 RFA Nos. 6, 7, 9, 13; DSOF Nos. 5, 9.

6 Int. No. 7; DSOF No. 10.

7 RFA No. 8; Int. No. 7; DSOF No. 11.

8 RFA Nos. 5, 6, 7, 9, 10; DSOF Nos. 4, 5.

9 RFA Nos. 7, 10, 11; Int. No. 2.

10 RFA No. 12; Int. Nos. 1, 2, 8, 9, 10, 15.

11 Victory's argument is ironic given that the district court noted, several times, that Victory refused to provide evidence supporting its claims during the discovery period. ER 39 at 63-66.

12 Likewise, Victory cites *Turner Broad. Sys. v. FCC,* 512 U.S. 622, 667 (1994), for the proposition that the absence of evidence of an "actual problem" is fatal in a strict scrutiny analysis. Victory Br. at 12. The cited portion of *Turner* examined the extremely general nature of cause-and-financial-effect evidence submitted by both parties and had nothing to do with strict scrutiny. *Turner* applied *intermediate scrutiny* to a content-neutral regulation. *Turner,* 512 U.S. at 661-662.

13 Public Law 102-243, § 2 - Findings, section 12 states: "Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion."

14 *Brickman, Holt* and *GreeNley* all found the TCPA to be content-based and subject to strict scrutiny.

15 The district court recognized that, when considered in its entirety, Mont. Code Ann. § 45-8-216 is organized according to consent and not by the content of speech. "Whether the statute is content based or content neutral is thus a closer question that (*sic*) first appear, but this Court concedes that the Montana statute is content-based under the Supreme Court's decision in *Reed* [*v. Town of Gilbert,* ___ U.S. ___, 135 S. Ct. 2218 (2015)]." ER 39 at 75-76.

16 Victory's *Moser* argument (Victory Br. at 14-15) is outdated. While *Moser v. FCC,* 46 F.3d 970 (9th Cir. 1995) found the TCPA to be content-neutral speech regulation subject to intermediate scrutiny, the TCPA was amended in 2015 to exempt government debt collection calls. All cases analyzing the TCPA since *Reed* and the Act's 2015 amendment hold that the TPCA is content-based, subject to strict scrutiny and serves a compelling government interest. *Gallion* at 924-25.

17 Victory argues: "Without any evidence demonstrating the existence of a problem regarding intrusion on residential privacy or the relative effectiveness of one alternative over another, the District Court cannot properly conclude the Robocall Ban is the least restrictive alternative available." Victory Br. at 24.

18 Victory argues: "The Robocall Ban *prohibits* Victory Processing from conveying messages concerning political campaigns and thereby precludes Montana citizens from hearing and using that information to reach consensus on the issues of the day." Victory Br. at 20 (emphasis added), and ER 1 at 6, ¶ 9. Victory provided absolutely no evidence, through discovery or during motion practice before the district court, that supports this conclusion. *See also* Victory Br. at 25, wherein it claims that Mont. Code Ann. § 45-8-216(1)(a-e) "criminalizes *any* telephone calls regarding the five enumerated topics" (emphasis added), and Victory Br. at 5. That point depends upon the complete absence of subsection (2).

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