2018 WL 3018729 (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.
June 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

Appellants' Opening Brief

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*I *CORPORATE DISCLOSURE STATEMENT*

Victory Processing, LLC, and Dave Dishaw, pursuant to Fed. R. App. P. 26.1, disclose the following corporate interests:
1. Victory Processing, LLC is not a parent company of any organization.

2. Victory Processing, LLC does not have any subsidiaries that are not wholly owned by Victory Processing, LLC.

3. No publicly held company owns ten percent (10%) or more of Victory Processing, LLC.

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1 *JURISDICTIONAL STATEMENT

The United States District Court for the District of Montana, Helena Division, had jurisdiction to hear the Plaintiffs/Appellants claims pursuant to 28 U.S.C. § 1331. Plaintiffs/Appellants brought an action pursuant to 42 U.S.C. § 1983 for a violation of their rights to freedom of speech protected by the First Amendment to the United States Constitution. (ER 1 at 1). Plaintiffs/Appellants sought declaratory and injunctive relief from the restriction on speech imposed by the State of Montana through Mont. Code Ann. § 45-8-216 (2017). (ER 1 at 1).

The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear this appeal pursuant to *28 U.S.C. § 1291*. On February 9, 2018, the District Court entered a final order granting the Defendant/Appellee's motion for summary judgement. (ER 39). The District Court entered a final judgment on February 12, 2018, thereby disposing of all parties' claims. (ER 40). Plaintiffs/Appellants filed a timely notice of appeal of that judgment to the Ninth Circuit on March 3, 2018 pursuant to Fed. R. App. P. 4(a)(1). (ER 41).

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants request the opportunity to present oral argument regarding the issues presented by this appeal. Plaintiffs'/Appellants' claims present questions concerning the constitutionality of a specific state statute, Mont. Code Ann. § 45-8-216, which issues have not otherwise been authoritatively decided. *See* Fed. R. App. P. 34(a)(2). Given the complexity of the jurisprudence under the First Amendment to the U.S. Constitution, oral argument will aid the decisional process by allowing the parties to clarify their respective positions regarding the operation of relevant authority bearing on this constitutional inquiry. *See, Id*.

*2 *ISSUES PRESENTED*

The First Amendment prohibits content-based restrictions on speech unless the government can show the restriction serves a compelling interest and is narrowly-tailored to achieve that interest. The District Court determined Mont. Code Ann. § 45-8-216 restricts speech based on its content. Does the State of Montana have a compelling interest in restricting speech on the basis of content and is Mont. Code Ann. § 45-8-216 narrowly-tailored to achieve that interest?

*3 *CIRCUIT RULE 28-2.7 ADDENDUM TO BRIEF*

U.S. Const. amend. I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Mont. Code Ann. § 45-8-216 (2017).

(1) A person may not 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:
(a) offering goods or services for sale;

(b) conveying information on goods or services in soliciting sales or purchases;

(c) soliciting information;

(d) gathering data or statistics; or

(e) promoting a political campaign or any use related to a political campaign.

(2) This section does not prohibit the use of an automated telephone system, device, or facsimile machine described under subsection (1) for purposes of informing purchasers of the receipt, availability for delivery, delay in delivery, or other pertinent information on the status of any purchased goods or services, of responding to an inquiry initiated by any person, or of providing any other pertinent information when there is a preexisting business relationship. This section does not prohibit the use of an automated telephone system or device if the permission of the called party is obtained by a live operator before the recorded message is delivered.

(3) A person violating subsection (1) is subject to a fine of not more than $2,500.

*4 *STATEMENT OF THE CASE*

Appellant Victory Processing, LLC engages in political consulting activities and conducts data gathering and dissemination projects regarding political campaigns, election races, ballot initiatives and other matters of interest to the general public throughout the United States, primarily through the use of automated telephone calls. (ER 27 at 3-4). Appellant Dave Dishaw is the managing member of Victory Processing, LLC (hereinafter collectively referred to as "Victory Processing"). (ER 27 at 3).

Victory Processing conducts surveys and polls regarding policy issues in order to acquire information for their own knowledge but also for the benefit of clients in other instances. (ER 27 at 4). The results of these information gathering efforts are often provided to political or polling organizations, but not in every case. *Id*. Under some circumstances, the organization receiving the data from Victory Processing will provide monetary compensation, but not under all circumstances. *Id*. In addition to information gathering, Victory Processing consults with political campaigns and organizations and assists in disseminating the campaign or organization's message to the voters. *Id*.

Victory Processing's ability to engage Montana voters is vital to their right to free speech. (ER 1 at 4-5). In 2016, Victory Processing sought to conduct information gathering and dissemination activities in the State of Montana on a number of occasions concerning a variety of issues. *Id*. Before engaging in such activities, Victory Processing apprised itself of relevant state law and discovered that conveying messages and collecting data relating to political campaigns was a criminal offense. *Id*. This is because Mont. Code Ann. § 45-8-216 (hereinafter referred to as the "Robocall Ban"), makes it a crime for any person to convey messages concerning any one of a limited list of topics through an automated telephone system.

***5** In its entirety, the Robocall Ban states:

(1) A person may not use an automated telephone system, device, or facsimile machine for the selection and dialing of telephone numbers and playing recorded messages if a message is completed to the dialed number for the purpose of:

(a) offering goods or services for sale;

(b) conveying information on goods or services in soliciting sales or purchases;

(c) soliciting information;

(d) gathering data or statistics; or

(e) promoting a political campaign or any use related to a political campaign.

(2) This section does not prohibit the use of an automated telephone system, device, or facsimile machine described under subsection (1) for purposes of informing purchasers of the receipt, availability for delivery, delay in delivery, or other pertinent information on the status of any purchased goods or services, of responding to an inquiry initiated by any person, or of providing any other pertinent information when there is a preexisting business relationship. This section does not prohibit the use of an automated telephone system or device if the permission of the called party is obtained by a live operator before the recorded message is delivered.

(3) A person violating subsection (1) is subject to a fine of not more than $2,500.

Mont. Code Ann. § 45-8-216.

Victory Processing desires to engage Montana voters regarding current political issues and campaigns. (ER 1 at 4). However, the threat of criminal sanctions under the Robocall Ban forces Victory Processing to refrain from conveying messages regarding those political issues. *Id*.

Victory Processing brought a facial challenge to the constitutionality of the Robocall Ban pursuant to 42 U.S.C. § 1983. In its Complaint, Victory Processing sought: (1) a declaration that Mont. Code Ann. § 45-8-216(1)(e) is invalid; and (2) a permanent injunction of the statute's ***6** enforcement. (ER 1 at 1 & 5). The parties filed cross-motions for summary judgement on October 16, 2017. (ER 24 & 28). The District Court issued its order on February 9, 2018, finding that the Robocall Ban served a compelling interest - protecting residential privacy and tranquility -- and that it was narrowly-tailored to achieve that interest. (ER 39). The District Court entered a final judgment on February 12, 2018. (ER 40). On March 3, 2018, Victory Processing filed its notice of appeal seeking review of the Court's February 9, 2018 order. (ER 41).

SUMMARY OF THE ARGUMENT

The Robocall Ban criminalizes speech that is otherwise protected by the First Amendment to the United States Constitution. The First Amendment prohibits state and local governments from enacting laws abridging the freedom of speech, particularly those which "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (internal citations omitted). The District Court determined the Robocall Ban restricts speech based on its content. The federal courts subject these so-called "content-based" regulations to strict scrutiny. *Id*. at 2228. Under a strict scrutiny analysis, the restriction on speech is presumptively unconstitutional and may be justified only if the government proves it is narrowly tailored to serve compelling state interests. *Id*.

The District Court erred in finding the Robocall Ban serves a compelling governmental interest. The State did not submit sufficient evidence concerning the particular governmental interest at stake to support a finding that the Robocall Ban furthers a compelling interest. In addition, the District Court incorrectly interpreted prior United States Supreme Court decisions as holding the government's interest in residential privacy is deemed "compelling" so as to justify restricting speech protected by the First Amendment. Finally, the District Court failed to consider ***7** the nature of the governmental interest at stake in light of the Robocall Ban's restriction on political speech.

The District Court also erred in finding the Robocall Ban is narrowly-tailored to serve a compelling government interest. The District Court failed to adequately address how the Robocall Ban's restrictions are the "least restrictive means" available to protect residential privacy. Although the District Court states that it will apply traditional strict scrutiny analysis, its conclusion incorrectly relies in part on finding that: 1) the "live operator" provision of the Robocall Ban is a reasonable time, place, and manner restriction; and 2) the Robocall Ban "leave[s] open ample alternative channels for communication of the information." Finally, the District Court improperly concludes that "it is clear robocalls are by and large permissible in most contexts in Montana" which position is irreconcilable with the express language of the statute.

Because the District Court erred in concluding the Robocall Ban survives strict scrutiny, the Court should reverse and find the statute is an impermissible content-based restriction on speech protected by the First Amendment.

STANDARD OF REVIEW

The Court of Appeals reviews the District Court's grant of summary judgment de novo. *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 759 (9th Cir. 2017); *Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011). Constitutional issues arising under the First Amendment are reviewed de novo. *Berry v. Dep't of Social Services*, 447 F.3d 642, 648 (9th Cir. 2006). The Court conducts an independent review of the facts in First Amendment cases. *Lair v. Motl*, 873 F.3d 1170, 1178

(9th Cir. 2017). The constitutionality of a state statute is also reviewed de novo. *Caruso v. Yamhill County ex rel. County Comm'r*, 422 F.3d 848, 855 (9th Cir. 2005).

8 *ARGUMENT

The Robocall Ban criminalizes speech that is otherwise protected by the First Amendment to the United States Constitution. The First Amendment declares:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I.

Applied to the states through the Fourteenth Amendment, the First Amendment prohibits state and local governments from enacting laws abridging the freedom of speech, particularly those which "restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (internal citations omitted). The federal courts subject these so-called "content-based" regulations to strict scrutiny. *Id*. at 2228. Under a strict scrutiny analysis, the restriction on speech is presumptively unconstitutional and may be justified only if the government proves it is narrowly tailored to serve compelling state interests. *Id*.

The District Court correctly held that the Robocall Ban was a "content-based" restriction on the freedom of speech. (ER 39 at 16) ("There can be no doubt that Montana's robocall statute is content-based."). The Robocall Ban restricts a person's ability to freely convey messages regarding certain topics. *See* Mont. Code Ann. § 45-8-216(1)(a)-(e) (listing the five general topics or purposes for which automated calls are prohibited). The distinction between prohibited messaging and permitted messaging under the Robocall Ban is drawn based on the function or purpose of the speech, i.e. soliciting information, gathering data or statistics, promoting a political campaign. *Id*. Under *Reed*, such distinctions are clearly based on the content of the message. 135 S. Ct. at 2227.

***9** The District Court was also correct in determining strict scrutiny applied to its review of the constitutionality of the Robocall Ban. (ER 39 at 26). However, the District Court erred in its application of the strict scrutiny analysis and in the conclusions to be drawn therefrom. Indeed, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Group*, 529 U.S. 803, 818 (2000). Because the State of Montana did not satisfy its burden of demonstrating how the Robocall Ban survives strict scrutiny, namely that it furthers a compelling government interest and is narrowly tailored, the District Court erred in granting summary judgment.

I. THE DISTRICT COURT ERRED IN FINDING THAT THE ROBOCALL BAN FURTHERS A COMPELLING GOVERNMENTAL INTEREST.

The District Court erred in finding the Robocall Ban serves a compelling governmental interest. (ER 39 at 9-16). The State did not submit sufficient evidence concerning the particular governmental interest at stake to support a finding that the Robocall Ban furthers a compelling interest. In addition, the District Court erred in interpreting prior United States Supreme Court decisions as holding the government's interest in residential privacy is deemed "compelling" so as to justify restricting speech protected

by the First Amendment. Finally, the District Court erred in failing to consider the nature of the governmental interest at stake in light of the Robocall Ban's restriction on political speech.

A. The District Court erred in failing to require the State to present evidence to prove an actual problem exists which the Robocall Ban is necessary to remedy.

The District Court improperly concluded the interruption endured by a Montana resident receiving an uninvited telephone call is so compelling as to justify abridging the right to free speech. (ER 29 at 21, 23). The record does not contain sufficient evidence to support a finding that the State has a compelling interest in residential privacy. Rather, the District Court relies largely on the mere assertion of such interest by counsel for the State. (ER 39 at 9) ("Defendant Fox asserts ***10** that a compelling and long-respected government interest is served by Montana's statutory prohibition on robocalls made to nonconsenting parties."); *see* *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 543 (1980) (finding that mere speculation of harm does not constitute a compelling state interest.). The District Court erred in failing to require the State to present evidence to prove an actual problem existed which the Robocall Ban was necessary to remedy.

The United States Supreme Court has found, "[t]he First Amendment requires a more careful assessment and characterization of an evil in order to justify a regulation as sweeping as this." *Playboy*, 529 U.S. at 819. "This is not to suggest that a 10,000 page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdotal evidence and supposition". *Id.* at 822; *see also* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 667 (1994) (explaining that without evidence of an actual problem, "we cannot determine whether the threat [asserted by the government] is real enough" to survive strict scrutiny).

The State would ordinarily refer to the statute's legislative history for evidence of the problem which the enactment sought to remedy, but here the legislative history is insufficient. *See* *Playboy*, 529 U.S. at 822. Victory Processing submitted the Robocall Ban's legislative history to the District Court as evidence of Montana's intent when enacting the law. (ER 27 at 6-24). Transcripts from the Committee on Business and Economic Development demonstrate the Montana Legislature was primarily concerned with automated telephone calls tying up phone lines. (ER 27 at 9-10).

To be sure, one Representative in the committee mentioned residential privacy, stating "[t]here is a right of privacy and this bill supports that." (ER 27 at 12). However, as the Court ***11** observed in *Playboy*, a sole conclusory statement from one lawmaker tells little about the existence of the problem or the efficiency of the contemplated solution. 529 U.S. at 822; *see* *also* *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129-30 (1989) ("Aside from conclusory statement during the debates by proponents of the bill, ...the congressional record presented to us contains no evidence as to how effective or ineffective the...regulations were or might prove to be."). The State offered no additional evidence or analysis of the Robocall Ban's legislative history to demonstrate the significance of the problem or the particular interest that the Montana Legislature sought to advance when enacting the law. (ER 30).

The District Court did not analyze or discuss any of the Robocall Ban's legislative history or any other data or evidence pertaining to the problem of "uninvited telephone calls" in Montana. (ER 39 at 9-16). Instead, the District Court only cites a single Senate Report discussing the federal "Automated Telephone Consumer Protection Act of 1991" ("TCPA"), 47 U.S.C. § 227 (2012). (ER 29 at 22).

The TCPA makes it "unlawful for any person within the United States...to initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party...." 42 U.S.C. § 227(b)(1). Notably, nothing in the TCPA requires the government to distinguish between different topics or purposes of messages and,

therefore, has been found to be a content-neutral restriction on speech. *See* *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995). Content-neutral government regulations which place reasonable time, place, and manner restrictions on speech are subject to the less onerous "intermediate scrutiny." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Restrictions on speech may be upheld under intermediate scrutiny analysis if it can be shown to be "narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative ***12** channels for communication of the information." *Id*. Thus, this Court has found the interest in residential privacy advanced by the TCPA to be "significant", but has not held it to be "compelling". *Moser*, 46 F. 3d at 974.

The District Court erred in failing to require the State to present any evidence establishing an actual problem with uninvited telephone calls in Montana beyond a single Senate Report from the TCPA -- a content-neutral federal law. The limited evidence presented by the State cannot properly serve as grounds for the District Court's conclusion that the State has a compelling interest in preventing uninvited telephone calls to Montana residents. Because the State failed to meet its burden in demonstrating the Robocall Ban advances a compelling governmental interest, the District Court erred in granting summary judgment.

B. The District Court erred in concluding protecting residential privacy rises to the level of "compelling" for First Amendment purposes.

The District Court also erroneously concluded the government's interest in protecting residential privacy rises to the level of "compelling" for First Amendment purposes. (ER 39 at 9-16). The government's interest in protecting residential privacy has justified various pieces of state and federal legislation restricting otherwise-protected speech, but it has never been found to be "compelling" so as to satisfy strict scrutiny. *See* *Kirkeby v. Furness*, 92 F.3d 655, 659 (8th Cir. 1996) ("Although the interest asserted by Fargo (protecting residential privacy and tranquility) is a 'substantial' one . . . the Supreme Court has never held that it is a compelling interest.") (*citing* *Carey v. Brown*, 447 U.S. 455, 465 (1980)).

The District Court points to a passage frequently quoted by the federal courts in First Amendment cases as jurisprudence concluding the interest in residential privacy is compelling: "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." (ER 39 at 9-10). The original quote comes ***13** from the Supreme Court's decision in *Carey v. Brown*, 447 U.S. 455, 471 (1980). Notably, at one point in its decision, the District Court diminished the significance of the holding in *Carey*. (ER 39 at 22).

Although the language from *Carey* is widely-quoted, it has never been applied in the context of a finding that the governmental interest in residential privacy is "compelling" so as to satisfy strict scrutiny. In fact, the *Carey* Court found "the generalized classification" of residential privacy is clearly not a compelling objective when the statute itself makes exceptions without any analysis as to why a particular mode of communication is less disruptive based on content than another. *Id*. at 464. There is "nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern." *Id*. at 465. In the same way, there is nothing less disruptive about a robocall which has a live caller obtaining permission before delivering a recorded message than a robocall promoting a political campaign.

Moreover, the District Court overlooks important factual distinctions between the cases upon which it relies and the circumstances underlying the present case. *Carey* involved an Illinois statute prohibiting content-based picketing of residences. *See* 447 U.S. at 457. The Supreme Court observed the Illinois statute at issue was identical in all critical respects to a Chicago ordinance invalidated in an earlier case. *Id*. at 458-61. However, whereas the Chicago ordinance was adopted to advance the City's interest in preventing disruption in the schools, the Illinois statute sought to protect residential privacy. *Id*. at 464. The

Supreme Court explicitly found it to be "unnecessary, however, to consider whether the State's interest in residential privacy outranks its interest in quiet schools in the hierarchy of social values. For even the most legitimate goal may not be advanced in a constitutionally impermissible manner." *Id.* at 464-65. The Court also noted "though we might ***14** agree that certain state interests may be so compelling that where no adequate alternatives exist a content-based distinction -- if narrowly drawn -- would be a permissible way of furthering those objectives, this is not such a case." *Id.* at 465.

The District Court next turns to multiple passages in *Frisby v. Schultz* to support its finding that residential privacy is a "compelling" governmental interest. (ER 39 at 11). But the *Frisby* Court was reviewing a content-neutral municipal ordinance restricting residential picketing subject to intermediate scrutiny. 487 U.S. 474, 482 (1988). When the Court cited the previously quoted passage from *Carey*, it did so as support for the notion that restricting speech in order to protect unwilling listeners is appropriate under some circumstances. *Id.* at 484-85. The Supreme Court did not, however, find the interest in residential privacy to be compelling because the statute was content neutral and the question raised was whether the statute serves a "significant", rather than "compelling", government interest. 487 U.S. at 482.

Similarly, the District Court's references to *Kovacs v. Cooper, Hall v. Commonwealth*, and *Rowan v. Post Office Dep't* should not serve as grounds for concluding residential privacy compels the State of Montana to enforce the Robocall Ban. (ER 39 at 10-11). The facts of *Kovacs* involve a municipal ordinance restricting the use of sound trucks to disseminate messages. *See* 336 U.S. 77, 86 (1949). The District Court does not rely on the holding of the case but rather only points to a statement made in dicta: "Obviously, a door-to-door visitor may not put a foot in a doorway and insist upon making an unwanted presentation to a resident who has no desire to receive the solicitation." (ER 39 at 10). The facts of *Hall* also involve door-to-door solicitations in an apartment building over protest of the building attendant and in disregard notice that solicitation was prohibited. 188 Va. 72, 74-75 (1948). Finally, the facts of *Rowan* involve the delivery of mail ***15** to occupants of a residence that have placed their address on a "no junk mail" list. 397 U.S. 728, 734 (1970).

Notably, none of these three cases involved a content-based restriction on speech; nor do they involve a conclusion that residential privacy is compelling for First Amendment purposes. Thus, these cases are of limited value to support of the proposition that residential privacy compels the State of Montana to restrict all the messaging prohibited by the Robocall Ban contain significant factual distinctions from the case at hand. The District Court overlooks these important distinctions in an effort to uphold the Robocall Ban. But the Robocall Ban is content based and there is no court-recognized compelling interest identified which would justify upholding the statute as constitutional.

Moreover, the Robocall Ban restricts political speech, which is afforded the highest protection and strictest scrutiny of all. *See* Mont. Code Ann. § 45-8-216(1)(e) (criminalizing the conveyance of any message "promoting a political campaign or any use related to a political campaign."). In conducting its strict scrutiny analysis, the District Court should have looked especially at the political speech restrictions to determine if that specific limitation satisfies strict scrutiny analysis. Here, the District Court made no analysis as to whether the restriction on political speech is overinclusive or underinclusive.

Political speech is "at the core of what First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365 (2003). "Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people." *Citizens United v. FEC*, 558 U.S. 310, 339 (2010). "It is through speech that our personalities are formed and expressed. The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control." *Playboy*, 529 U.S. at 818.

***16** "If it be conceded that the First Amendment was fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people, then it can hardly be doubted that the constitutional guarantee has

its fullest and most urgent application precisely to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271-72 (1971) (internal citations omitted).

Here, the privacy of residents from "uninvited telephone calls" is hardly so significant as to warrant an intrusion on speech which is "at the core of what the First Amendment is intended to protect." "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, 558 U.S. at 339.

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. In other words, the Robocall Ban's restrictions are not only content-based, but also abridge Plaintiffs' right to freely engage in political speech. Mont. Code § 45-8-216(1)(e) ("A person may not use an automated telephone system... for the purpose of the promotion of a political campaign or any use related to a political campaign.").

Thus, the District Court erred in determining that the State's interest in residential privacy was compelling so as to justify the restrictions on speech imposed by the Robocall Ban.

II. THE DISTRICT COURT ERRED IN FINDING THAT THE ROBOCALL BAN IS NARROWLY-TAILORED.

The District Court further erred in finding the Robocall Ban is narrowly-tailored to serve a compelling government interest. Under strict scrutiny analysis, "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." ***17** *Frisby*, 487 U.S. at 485 (internal citations omitted). And, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813; *see also, Reed*, 135 S.Ct. at 2231--32; *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 121--23 (1991); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668--69 (2015).

The District Court made several errors in its application of the narrowly-tailored analysis. First, the District Court fails to adequately address how the Robocall Ban's restrictions are the "least restrictive means" available to protect residential privacy. The District Court incorrectly states that that "the least restrictive or least intrusive means is not required." (ER 39 at 27). That finding is contrary to clearly established precedent.

"If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813; *see also Sable Communications of Cal., Inc. v. FCC*, 492 U.S. at 126 ("The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest."). "When a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals." *Playboy*, 529 U.S. at 816.

Instead of properly analyzing why the potentially less restrictive means identified by Victory Processing would be ineffective, the District Court simply concludes the Robocall Ban's live operator provision "is a less restrictive alternative to banning Robocalls altogether, and is content-neutral." (ER 39 at 16). In other words, the District Court found the Robocall Ban's content-based restrictions are permissible because the live operator exception makes the statute less restrictive than "outright" bans. (ER at 16). "A court should not assume a plausible, less ***18** restrictive alternative would be ineffective." *Playboy*, 529 U.S. at 824. Under a properly conducted strict scrutiny analysis, the State should have been required to offer evidence that the other less restrictive alternatives would not be effective and that the Robocall Ban was the least restrictive alternative available. *Id*.

For instance, following the Supreme Court's recent decision in *Reed*, South Carolina and Arkansas's automated telephone call statutes were challenged as violations of the First Amendment. *See Cahaly v. Larosa*, 769 F.3d 399, 399 (4th Cir. 2015); *Gresham v. Rutledge*, 198 F. Supp. 3d 965, 965 (E.D. Ark. 2016). In both instances, the respective courts found the statutes contained content-based restrictions on free speech, applied strict scrutiny, and held the statutes unconstitutional largely because statutes were not the least restrictive alternative available to achieve the states' governmental interests.

In *Cahaly*, the Fourth Circuit found South Carolina's statute was not the least restrictive alternative available to achieve the state's governmental interests. 796 F.3d at 405 ("Plausible less restrictive alternatives include time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists"). Similarly, in *Gresham*, the District Court found the Arkansas statute was not the least restrictive alternative available to Arkansas to achieve its stated objectives. 198 F. Supp. 3d at 972 (observing that time of day-restrictions, disconnection requirements, and prohibitions on calls to emergency lines could be used as other means to offset the negative effects of automated telephone calls). Montana has failed to explain why similar less restrictive alternative were not used.

According to the District Court, the "evil" sought to be remedied by the Robocall Ban is, generally, "residential privacy and tranquility." (ER 39 at 19). However, the District Court does not address why the Robocall Ban does not ban *all* automated calls, but simply targets five ***19** enumerated topics. (ER 39 at 28-29). The Robocall Ban's legislative history reveals that the legislature's primary concern with automated calls pertained to telemarketing. (ER 27 at 10, 12). If preventing intrusions for telemarketing was the State's objective, then a statute which bans more than just telemarketing calls, cannot be said to be narrowly-tailored.

The District Court also erred in simply declaring "[t]here is not a less restrictive alternative that would serve Montana's purpose." (ER 39 at 28). The District Court makes general observations regarding efficacy of time-of-day restrictions and do-not-call lists, but the State presented no evidence to support the District Court's conclusions. (ER 39 at 28-29). Without any evidence demonstrating the existence of the 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.

Second, although the District Court states that it will apply traditional strict scrutiny analysis, its conclusion incorrectly relies in part on a finding that the "live operator" provision of the Robocall Ban is a reasonable time, place, and manner restriction. (ER 39 at 27) (citing *Bland v. Fessler*, 88 F.3d 729, 733 (9th Cir. 1996) wherein this Court found California's automated telephone call statute to be content-neutral and applied *intermediate scrutiny*). Whether a restriction on speech is a reasonable time, place, and manner restriction has no place in strict scrutiny analysis. While such a standard would apply under intermediate scrutiny of a content-neutral statute, the Robocall Ban is content-based, is subject to strict scrutiny and must be the least restrictive alternative available.

Further, the District Court incorrectly relies in part on a finding that the Robocall Ban "leave[s] open ample alternative channels for communication of the information." (ER 39 at 39) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) wherein the ***20** Supreme Court applied *intermediate scrutiny* to a regulation governing expressive conduct in a content-neutral manner). Whether a restriction on speech leaves open ample alternative channels for communication has no place in strict scrutiny analysis.

Finally, the District Court improperly concludes that "it is clear robocalls are by and large permissible in most contexts in Montana." (ER 39 at 28). This statement cannot be reconciled with the plain language of the Robocall Ban which *criminalizes* any automated telephone calls regarding five enumerated topics. Mont. Code. Ann. § 45-8-216(1)(a)-(e). Contrary to the District Court's conclusion, the "live operator" provision of the Robocall Ban does not auto make the statute narrowly-tailored. "Basic speech principles are at stake in this case. When the purpose and design of a statute is to regulate speech by reason of its content,

special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression." *Playboy*, 529 U.S. at 826.

The District Court erred in finding the restrictions imposed by the Robocall Ban are narrowly-tailored to protect residential privacy.

CONCLUSION

Clearly, the State of Montana looks upon automated telephone calls with a degree of disdain. The Robocall Ban is codified among the *criminal* provisions of Title 45, Chapter 8 of the Montana Code under the heading "offensive, indecent, and inhumane conduct" and right between provisions regarding "desecration of flags" and "aggravated animal cruelty." The District Court echoes this sentiment, observing that "a recording disclosing a caller's identity is cold comfort for a blaring recorded message that is unwanted." (ER 39 at 29).

The Supreme Court has admonished: "We cannot be influenced, moreover, by the perception that the regulation in question is not a major one because the speech is not very ***21** important. The history of the law of free expression is one of vindication in cases involving free speech that many citizens find shabby, offensive, or even ugly. It follows that all content-based restrictions on speech must give us more than a moment's pause." *Playboy*, 529 U.S. at 826. Irrespective of the State's perception of automated telephone calls, the Robocall Ban restricts the freedom of speech based on the *content of the message*.

The District Court correctly found the Robocall Ban to be a content-based regulation of speech subject to strict scrutiny analysis. However, the District Court erred in failing to require the State to present sufficient evidence to demonstrate that the Robocall Ban should survive strict scrutiny analysis. The District Court also made several errors when analyzing whether the Robocall Ban could be deemed narrowly-tailored. As a result, the District Court has issued a decision that is inconsistent with well-established First Amendment jurisprudence.

For the forgoing reasons, Appellants Victory Processing, LLC and Dave Dishaw request that the Court enter an order:

1. Reversing the February 9, 2018 order of the District Court granting Appellee's motion for summary judgment;

2. Declaring the Robocall Ban unconstitutionally restricts free speech as protected by the First Amendment to the United States Constitution;

3. Permanently enjoining the Montana Attorney General and any other Montana officials from enforcing any of the provisions of Mont. Code Ann. § 45-8-216.

***22** Respectfully submitted this 13th day of June, 2018.

s/ Blake E. Johnson

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