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Constitutional Law—First Amendment and Freedom of Speech—the Constitutionality of Arkansas’s Prohibition On Political Robocalls

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CONSTITUTIONAL LAW—FIRST AMENDMENT AND FREEDOM OF
SPEECH—THE CONSTITUTIONALITY OF ARKANSAS’S
PROHIBITION ON POLITICAL ROBOCALLS

I. INTRODUCTION

Imagine two opposing political candidates, each of whom hold very different understandings of an unenforced state campaign statute. Candidate A believes the statute is enforceable and decides not to use the prohibited tactic despite the fact that the statute has never before been enforced. Candidate B, however, believes the statute is unconstitutional and, consequently, uses the tactic. Assuming the tactic is one that would benefit any party that uses it, which of these candidates made the better decision?

This scenario repeats itself around the nation each election year as candidates decide whether to employ robocalls¹ in their campaigns. As many as twenty-eight states have enacted some form of regulation pertaining to political robocalls, though many states do not enforce these regulations.² According to Arkansas statutory law, robocalls cannot be used “for soliciting information, gathering data, or for any other purpose in connection with a political campaign.”³ But to the dismay of many Arkansans, political robocalls are a common occurrence during election season. Although this statute was recently enforced against a private company,⁴ there has not yet been an attempt to enforce it against political candidates who use them in their campaigns.⁵

1. For a definition of robocalls, see *infra* Part II.A.

2. Jason C. Miller, Note, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 229–30 (2009), available at <http://www.mttlr.org/volsixteen/miller.pdf>. Arkansas, California, Connecticut, Florida, Idaho, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, and Wyoming all have some form of state regulation. See *id.* at 229–30 nn.127–28; *State Laws, WINNING CALLS.COM*, <http://winningcalls.com/statelaws.html> (last visited May 3, 2012).

3. ARK. CODE ANN. § 5-63-204(a)(1) (LEXIS Repl. 2005).

4. In April 2010, Arkansas’s Attorney General, Dustin McDaniel, settled a lawsuit with a Florida-based company that allegedly violated, among other things, Arkansas’s prohibition on commercial robocalls. *Attorney General Announces Robocall Settlement*, ARKANSASONLINE (Apr. 15, 2010, 1:57 PM), <http://www.arkansasonline.com/news/2010/apr/15/attorney-general-announces-robocall-settlement/>.

5. While private parties may have attempted to enforce this statute against a particular candidate, the state of Arkansas has made no official attempt to charge political candidates with a violation of the statute.

This note argues that Arkansas's statutory prohibition on political robocalls ought to remain in effect, but that it is unconstitutional as currently written, in part because it regulates speech in a content-based manner, and, thus, should be reworded. In Part II, this note examines the pros and cons of robocalls, concluding that certain restrictions on political robocalls are desirable. Then, Part III examines the current state of relevant constitutional case law in the nation. Next, Part IV shows how Arkansas's regulation on political robocalls, as currently written, fails to survive a First Amendment challenge. Finally, Part V proposes that Arkansas reword its robocall statute in a manner that would most likely allow it to pass constitutional review.

II. REGULATION OF ROBOCALLS IS DESIRABLE

There are both positive and negative aspects to the use of political robocalls. While robocall users typically reap the majority of the benefits, the weight of the burdens usually falls on robocall recipients, opposing political campaigns, and unrelated third parties.

A. Definition and Explanation of "Political Robocalls"

The term "robocall"⁶ is a generic term used to describe a broad spectrum of automated phone calls.⁷ The common characteristic of all robocalls is that the caller plays a prerecorded message for all, or a significant portion, of the phone call. In this way, robocalls differ in both form and function from ordinary phone calls. Ordinarily, telephone conversations include bilateral communication between the caller and the person called. But with

6. "Robocall," "robo-call," and "automated call" are interchangeable and essentially refer to the same type of calls. The author chose "robocall" because it is the term and spelling most common. See generally Miller, *supra* note 2, at 214 n.8; Josephine Hearn, *A Hangup About Robocalls*, POLITICO (Feb. 28, 2008, 5:12 AM), <http://www.politico.com/news/stories/0208/8742.html>.

7. The definition of "robocall" varies depending on who defines it. Some definitions of "robocall" require that the call both be dialed randomly by a computerized dialer and play a pre-recorded message. See, e.g., ARK. CODE ANN. § 5-63-204(a)(1); *Robocall Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/robocall?s=t> (last visited May 3, 2012). Others simply define it as an automated phone call that delivers a prerecorded message. *Robocall Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/robocall> (last visited May 3, 2012). However, because recipients of robocalls typically have no way of knowing whether the phone call originated through an automated, computerized, or randomized dialer, the most common recognizable characteristic of a robocall to the call's recipient is the prerecorded message.

robocalls, the communication is unilateral and more akin to broadcasting or a mass-mailed advertising than it is to a telephone conversation.⁸

Arkansas's statutory prohibition on robocalls specifically defines them as the use of a telephone that "involves an automated system for the selection and dialing of telephone numbers and the playing of recorded messages when a message is completed to the called number."⁹ In other words, a robocall is a phone call that is made by a computer that automatically selects and dials phone numbers and then plays prerecorded messages to the person who answers the call or to the answering machine.

B. The Positive Aspects of Political Robocalls

While the actual effectiveness of political robocalls for some purposes is debatable,¹⁰ they provide many desirable features and benefits to political campaigns. For example, modern technology makes it possible to place massive quantities of automated phone calls in very short periods of time.¹¹ While Politico reports that one robocall firm claims it can place a million robocalls in less than thirty minutes,¹² other firms, such as VoiceBroadcasting, "can send thousands of calls per minute" due, in part, to predictive dialing.¹³ Astonishingly, one firm claims that on some days it

8. Perhaps this difference in the function of a robocall compared to normal telephone conversations explains why robocalls are sometimes referred to as "voice broadcasting." See, e.g., *Automated Dialing*, VOICEBROADCASTING, <http://www.voicebroadcasting.org/services/automated-dialing/> (last visited May 3, 2012).

9. ARK. CODE ANN. § 5-63-204(a)(1). Robocalls in Arkansas are only unlawful when made

for the purpose of offering any goods or services for sale, or for conveying information regarding any goods or services for the purpose of soliciting the sale or purchase of the goods or services, or for soliciting information, gathering data, or for any other purpose in connection with a political campaign.

Id. Robocalls made in regards to the status of a purchase previously made, or made in response to a call initiated by the person to whom the robocall is directed, are not prohibited by this statute. *Id.* § 5-63-204(a)(2).

10. At least one study has shown that robocalls "did not produce statistically significant effects on [voter] turnout." Ricardo Ramirez, *Giving Voice to Latino Voters: A Field Experiment on the Effectiveness of a National Nonpartisan Mobilization Effort*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2005, at 66, 79 (study showed only eighty-six additional votes were generated from 240,951 robocalls at a total cost of \$23,725, or \$275 per vote). One explanation for why robocalls may not be that effective is people may "ignore them, disbelieve their content, or forget what they have heard." Peter Levine & Mark Hugo Lopez, *What We Should Know About the Effectiveness of Campaigns but Don't*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2005, at 180, 187.

11. Hearn, *supra* note 6.

12. *Id.*

13. See *Political Automated Calls*, VOICEBROADCASTING, <http://www.voicebroadcasting.org/services/voice-broadcast-dialing/> (last visited May 5, 2012). Predictive dialers are computer programs that use sophisticated algorithms to predict

calls up to twenty percent of the entire U.S. population.¹⁴ Furthermore, robocalls are relatively cheap due to low production and distribution costs.¹⁵ Robocalls can be sent for well under ten cents per phone call.¹⁶ When compared to the costs of producing, manufacturing, and mailing political advertisements, robocalls are quite the bargain.¹⁷

In addition to their low costs, robocalls are easy to track and can be quickly produced.¹⁸ The ease and accuracy of tracking robocalls offer political campaigns advantages that are not available with print advertising.¹⁹ A campaign may keep track of which addresses it sends mailers to, but it has no way of knowing how many people actually read the mailer compared to how many people trashed it without reading it.²⁰ However, robocall companies can focus calls to specific cities or states with targeted calling²¹ and still keep track of precisely how many phone calls were completed, how many were prematurely ended by hang up,²² as well as how many calls were answered by an answering machine.²³ Such statistics allow political campaigns to track the public's general interest in their candidate and/or message.

The extremely quick turnaround time between the conceptualization and dissemination of a robocall might be its greatest, most exclusive benefit. For example, in Maryland's 2010 gubernatorial race, Brian Murphy's campaign was able to write, record, and submit a recording and accompanying phone number list to the robocall firm within two hours after Sarah Palin

"the timing and number of calls being made," the quantity of disconnected and non-answered telephone numbers they will encounter, and the number of calls that will be automatically answered by voicemail or answering machines, in order to simultaneously dial the optimum quantity of phone numbers at one time. *Predictive Dialing*, VOICEBROADCASTING, <http://www.voicebroadcasting.org/services/predictive-dialing/> (last visited May 5, 2012).

14. Hearn, *supra* note 6.

15. Kaitlin Kovach, *How Robocalls Work*, CONGRESS.ORG, https://ssl.congress.org/news/2010/10/29/how_robocalls_work (last visited May 5, 2012).

16. *See id.*; *see also* ROBODIAL.ORG, <http://www.robodial.org/pricing.php> (last visited May 5, 2012) (charges \$25 setup fee plus \$0.01 – 0.05 per call, depending on the length of call).

17. *See generally* Dennis Cauchon, *States Try to Pull Plug on 'Robo-calls'*, ABC NEWS (Jan. 19, 2008), <http://abcnews.go.com/Politics/story?id=4152761&page=1#.T6Xew-3R3zI> ("A robo-call costs 2 to 4 cents per household compared with about 50 cents for direct mail."); David W. Nickerson, *Partisan Mobilization Using Volunteer Phone Banks and Door Hangers*, ANNALS AM. ACAD. POL. & SOC. SCI., Sept. 2005, at 10, 21 (noting that direct mailers cost approximately forty cents to produce and mail).

18. Kovach, *supra* note 15.

19. *See id.*

20. *See id.*

21. *See Automated Dialing*, *supra* note 8.

22. Kovach, *supra* note 15.

23. *See Political Automated Calls*, *supra* note 13 ("Our state of the art system can detect a live call and answering machine message. Some clients record separate messages for an answering machine and a live call-if [sic] a person picks up the phone.")

agreed to endorse him.²⁴ This ability to quickly produce and distribute pre-recorded messages to millions of households allows campaigns to respond to any time sensitive issues that may arise. Prior to robocalls, there was little, if any, way that a campaign could respond to last minute allegations by the opposition. If voters received an opponent's negative ad the day before election day, the campaign had very little time to develop and disseminate a radio or television response. With the advent of robocalls, however, a campaign can now directly respond to last minute allegations within hours.

C. The Negative Aspects of Political Robocalls

The negative aspects of robocalls are often forced upon the recipient of the call, opposing political campaigns, and unrelated third parties. In fact, it is the many positive characteristics of robocalls, such as the low cost,²⁵ the potential mass quantities of automatically dialed calls,²⁶ and the ability to produce them in mere hours,²⁷ that create a perfect storm for abuse. This problem is compounded by the complete lack of accountability for campaigns that do not adhere to disclosure standards or calling guidelines.²⁸

Perhaps the most obvious downside to robocalls is that recipients simply find them inconvenient and annoying.²⁹ Many candidates request "live calls," which are made in the evening,³⁰ but these calls anger some recipients,³¹ and people often hang up on such calls.³² Evening robocalls can be

24. Kovach, *supra* note 15.

25. Kovach, *supra* note 15; ROBODIAL.ORG, <http://www.robodial.org/pricing.php> (last visited May 5, 2012).

26. Hearn, *supra* note 6.

27. Kovach, *supra* note 15.

28. The Federal Election Commission requires all political committees and any person who solicits contributions or expressly advocates for the election or defeat of a candidate to give a disclaimer when sending more than 500 robocalls in a month that clearly states the name of the authorizing committee and indicates who paid for the communication or, in the case of calls not authorized by a candidate committee, states other information that would allow a recipient to identify and contact the person authorizing the calls. See 11 C.F.R. §§ 110.11(a)–(b) (2012); 2 U.S.C. §§ 431(22), (24) (2012). However, the author was unable to locate even a single instance where these rules were enforced in Arkansas—despite the rampant violations that have occurred.

29. Tim West, Editorial, *Robocalls Are the Restroom Wall of Politics*, NAPERVILLE SUN, Mar. 13, 2012, <http://napervillesun.suntimes.com/news/west/11132901-418/robocalls-are-the-restroom-wall-of-politics.html> ("I haven't been keeping track of how many robocalls I've received this election period, but any number above zero is more than I wanted.").

30. Kovach, *supra* note 15. "Live calls" are calls that are made at a time, typically in the evening, when the call is more likely to be answered by a live person, rather than an answering machine. *Id.*

31. Iowa, *NH Voters Heavily Courted, Dems Have Edge in Personal Contact: Campaign 'Robo-Calls' Pervasive*, PEW RESEARCH CENTER (Dec. 7, 2007), <http://people-press.org/report/377/iowa-nh-voters-heavily-courted-dems-have-edge-in-personal-contact>.

especially irritating because they sometimes interrupt the family dinner or other family activities.³³ Furthermore, some robocalls come at an even more inconvenient time—the middle of the night. For example, in 2010, a robocall using former Supreme Court Justice Sandra Day O'Connor's voice accidentally went out to voters at 1:00 a.m.³⁴

People are also irritated by the frequency of robocalls.³⁵ In 2006, some voters received ten to twelve robocalls per day with an ad that purported to make Arkansas Supreme Court Justice Donald Corbin look good.³⁶ His reelection campaign, however, did not produce the calls.³⁷ Justice Corbin believed the excessive robocalls were part of a ploy to irritate voters enough to cause them to vote for his opponent.³⁸ To compound the problem, the content of the robocalls could have led to judicial ethics discipline.³⁹ These events highlight the fact that robocalls can be used—indeed, sometimes are being used—to unjustly tarnish the reputation of opposing political candidates.

There are other instances of opposing candidates using multiple robocalls as a tactic to annoy voters and turn them against the candidate perceived as making the call. Just prior to Election Day in 2010, a series of four back-to-back robocalls purporting to be from then-congressional candidate Matt Zeller asked constituents to vote for Zeller.⁴⁰ However, both Zeller and his opponent, Tom Reed, denied all responsibility in sending the

32. *Robo-Calls Now Top Type of Campaign Outreach*, PEW RESEARCH CENTER PUBLICATIONS (Apr. 3, 2008), <http://pewresearch.org/pubs/785/robo-calls-election-2008> (finding that more than half of the people who receive robocalls normally hang up).

33. See, e.g., Mike Masterson, Editorial, *Short-circuit the Robocalls*, ARKANSAS DEMOCRAT-GAZETTE, June 15, 2010, available at LEXIS (describing robocalls as a “rude disruption” and “unwelcome”).

34. Ben Smith, *O'Connor Backs off Robocalls*, POLITICO (Oct. 28, 2010, 12:35 AM), http://www.politico.com/blogs/bensmith/1010/OConnor_backs_off_robocalls.html. It should be noted that Justice O'Connor did not authorize the use of her recorded statement as part of the robocall campaign. *Id.*

35. See, e.g., Laura Kellams, *Illegal in State Since '81, Computer Calls Remain Popular with Politicians*, ARKANSAS DEMOCRAT-GAZETTE, Oct. 15, 2006, available at LEXIS.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* (“The problem was the content of the messages could get [Justice Corbin] in trouble over judicial ethics - it referred to specific issues that might come before the court - and the calls were relentless.”).

40. Jeffrey Blackwell, *29th District Candidates Dispute Origin of 'Robo-calls'*, STAR-GAZETTE, Nov. 1, 2010, <http://pqasb.pqarchiver.com/stargazette/access/2177127261.html?FMT=ABS&FMTS=ABS:FT&date=Nov+1%2C+2010&author=Jeffrey+Blackwell&pub=Star++Gazette&edition=&startpage=n%2Fa&desc=29th+District+candidates+dispute+origin+of+%27robo-calls%27>.

calls, and both accused each other of being behind the calls.⁴¹ In the same election cycle, the North Carolina Democratic Party claimed that Republicans targeted Democrat and independent voters with robocalls that purported to support Democratic candidates; some voters received up to eight robocalls in a row.⁴² As illustrated, the frequency of these repetitive, unidentified calls understandably frustrates some voters.

The problem in identifying the source of robocalls stems from the fact that robocallers can avoid detection by “spoofing.”⁴³ “Spoofing occurs when a caller causes a fictitious phone number to appear on caller-identification units”⁴⁴ A fictitious phone number prevents the call’s recipient from being able to correctly identify the actual originating phone number and, thus, from being able to identify who actually sent the call.⁴⁵

Robocall spoofing has potentially dangerous side effects to third parties when the fictitious phone number being used is an actual telephone number. In another instance where two candidates blamed each other for originating robocalls, the real victim was the Adair County Ambulance District.⁴⁶ In this instance, the fictitious phone number used was actually the number to the ambulance district.⁴⁷ Apparently referring to the number on their caller identifications, over 150 upset voters flooded the ambulance district with calls complaining about the robocalls they had received.⁴⁸ One candidate correctly explained that such robocall spoofing is “dangerous and puts people’s safety at risk by flooding [the ambulance district’s] phone lines with complaints.”⁴⁹

Yet another negative aspect of robocalls is how they have confused voters and suppressed election turnout. Robocalls have instructed voters that

41. *Id.*

42. Joan McCarter, *Dirty Voter Suppression Tricks in North Carolina*, DAILY KOS (Nov. 1, 2010, 8:46 PM), <http://www.dailykos.com/storyonly/2010/11/1/915944/-Dirty-voter-suppression-tricks-in-North-Carolina>; see also Suzy Khimm, *Bogus Robocalls Still Bombarding Kansas*, MOTHER JONES, Nov. 2, 2010, <http://www.motherjones.com/mojo/2010/11/bogus-robocalls-kansas-investigation> (reporting sabotaging robocalls that “reminded” Democrats to vote on Wednesday when the election was, of course, on Tuesday and to bring “required” documentation, which was not, in fact, required).

43. Linda Satter, *Pay \$138,534, Orders Robocall-suit Judge Federal Case Against Auto-warranty Firm the 2nd of 7 State Lodged in '09*, ARKANSAS DEMOCRAT-GAZETTE, June 11, 2010, available at LEXIS.

44. *Id.*

45. *Id.*

46. *'Robo-calls' Spark Accusations*, KIRKSVILLE DAILY EXPRESS, Oct. 28, 2010, <http://www.kirksvilledailyexpress.com/news/x1696238118/-Robo-calls-spark-accusations>.

47. *Id.*

48. *Id.*

49. *Id.*

voting requires documents they may not possess,⁵⁰ that Election Day was November 3rd not November 2nd,⁵¹ that there was no reason they should show up to vote,⁵² to go to incorrect polling locations,⁵³ and to vote online.⁵⁴ Finally, while it is possible that robocall technology may exist (or be developed) to provide voters with the ability to indicate their preference to not receive robocalls, robocalls typically do not provide such an option.⁵⁵ As such, voters have no way to indicate that they no longer want robocalls to intrude upon the privacy of their home, and they will, therefore, continue to receive such calls until action is taken.

In sum, robocall recipients, opposing political campaigns, and unrelated third parties bear the brunt of the burden imposed by these political devices. Those characteristics that are beneficial to the robocaller, such as the low cost and ease of production, create a perfect storm for abuse that is compounded because campaigns that refuse to adhere to any sort of disclosure standards or calling guidelines are not held accountable. Because the harms should not be ignored, even in light of the benefits, certain regulations on political robocalls are desired.

50. See Khimm, *supra* note 42. Political robocalls in Kansas instructed voters to bring proof of home ownership and voter registration, neither of which is required to vote. *Id.* While many voters may have voter registration paperwork, many voters are not homeowners, and may be persuaded not to vote because of they do not possess the “necessary” paperwork.

51. *Id.*; Kim Zetter, *Malicious RoboCalls Aim at Suppressing Election Day Turnout*, WIRED (Nov. 2, 2010, 6:58 PM), <http://www.wired.com/threatlevel/2010/11/robocalls/>.

52. See John Wagner, *Gansler Files Federal Complaint in Election Robocalls Episode*, WASH. POST, Nov. 10, 2010,

http://voices.washingtonpost.com/annapolis/2010/11/gansler_files_federal_complain.html.

A political consultant working for a Republican campaign sent 112,000 robocalls that said Hello. I’m calling to let everyone know that Governor O’Malley and President Obama have been successful. Our goals have been met. The polls were correct, and we took it back. We’re okay. Relax. Everything is fine. The only thing left is to watch it on TV tonight. Congratulations and thank you.

Id.

53. Jared Miller, *Campaign Calls Draw Scrutiny*, STAR-TRIBUNE (Wyoming), Nov. 15, 2010, http://trib.com/news/top_story/article_82db5bc9-435a-5acb-a710-6f5d20631d43.html.

54. Zetter, *supra* note 51.

55. See *Van Bergen v. Minnesota*, 59 F.3d 1541, 1555 n.13 (8th Cir. 1995).

III. EXAMINATION OF THE CURRENT STATE OF RELEVANT CONSTITUTIONAL LAW

A. The First Amendment's Freedom of Speech Clause

The First Amendment of the Constitution prevents Congress from abridging the freedom of speech.⁵⁶ This provision has been incorporated to the states through the Fourteenth Amendment's due process clause.⁵⁷ However, freedom of speech "is not an unlimited, unqualified right."⁵⁸ Rather, societal values, as well as other considerations, sometimes outweigh the value that society places upon free speech.⁵⁹ Therefore, an analysis of the constitutionality of a statute that restricts speech must identify the type of speech being restricted before analyzing the restriction itself.⁶⁰

First Amendment analysis draws a distinction between restrictions placed on commercial speech and restrictions placed on other types of speech, including political expression.⁶¹ Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience."⁶² This distinction must be made because the state has more discretion in regulating commercial speech than other forms of protected speech.⁶³ Accordingly, an intermediate level of scrutiny is used to assess the validity of restrictions on commercial speech.⁶⁴

After determining the type of speech being restricted, the next step in the analysis is to examine the restriction itself. There is a meaningful distinction between restrictions on speech that are content *neutral* and restrictions on speech that are content *based*. Content-based restrictions are subject to strict scrutiny; thus, they "must be narrowly tailored to promote a

56. "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.

57. *E.g.*, *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) ("Freedom of speech and freedom of the press, which are protected by the First Amendment from infringement by Congress, are among the fundamental personal rights and liberties which are protected by the Fourteenth Amendment from invasion by state action.").

58. *Dennis v. United States*, 341 U.S. 494, 503 (1951).

59. *Id.*

60. *See, e.g.*, *New York v. Ferber*, 458 U.S. 747, 763 (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976)) ("The question whether speech is, or is not protected by the First Amendment often depends on the content of the speech.").

61. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498–99 (1996).

62. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980).

63. *44 Liquormart, Inc.*, 517 U.S. at 498–99.

64. *E.g.*, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995).

compelling [g]overnment interest.”⁶⁵ Additionally, with content-based restrictions, the government must use a less restrictive alternative if one exists.⁶⁶

Content-neutral restrictions are subject to reasonable time, place, or manner restrictions, which “very closely resemble[s] ‘intermediate’ judicial scrutiny, a standard with some actual teeth.”⁶⁷ In order to be content neutral, these reasonable time, place, or manner restrictions must be “justified without reference to the content of the regulated speech.”⁶⁸ Furthermore, they must be “narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information” being restricted.⁶⁹

B. Determining Content Neutrality

In determining whether a restriction on speech is content neutral or content based, the “controlling consideration” is the purpose of the government’s restriction.⁷⁰ The test for determining content neutrality examines “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”⁷¹ A restriction is deemed neutral when it “serves purposes unrelated to the content . . . even if it has an incidental effect on some speakers or messages but not others.”⁷²

Courts have applied First Amendment analysis to state restrictions on robocalls. In 1995, the Eighth Circuit Court of Appeals upheld a Minnesota statute⁷³ that prohibits all robocalls, except in instances where the caller and the recipient have a prior relationship, business or otherwise.⁷⁴ The statute explicitly states that the restriction applies to “any call, regardless of its content.”⁷⁵ It also does not limit the restriction to calls made for a particular

65. *E.g.*, *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813–14 (2000).

66. *Id.* at 813 (“If a less restrictive alternative would serve the [g]overnment's purpose, the legislature must use that alternative.”).

67. Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 *GEO. WASH. L. REV.* 439, 452 (2006).

68. *E.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

69. *Id.*

70. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

71. *Id.* (quoting *Cmty. for Creative Non-Violence*, 468 U.S. at 293) (“Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’”).

72. *Id.*; see also *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2994 (2010).

73. *MINN. STAT. ANN.* §§ 325E.26 to .31 (West 2011).

74. *Van Bergen v. Minnesota*, 59 F.3d 1541, 1551 (8th Cir. 1995).

75. *MINN. STAT. ANN.* § 325E.26 subd. 6.

purpose, though it does allow a recorded message to be played if it is preceded by a live operator who receives consent to play the message.⁷⁶

Relying in part on the Eighth Circuit's analysis, the Ninth Circuit upheld a California statute⁷⁷ that is very similar to the Minnesota statute in that it targets all robocalls without reference to the purpose or content of the call.⁷⁸

C. Reasonable Time, Place, and Manner Restrictions

Reasonableness is at the core of time, place, or manner restriction analysis as these restrictions may be valid even when they directly infringe on the freedom of expression.⁷⁹ Reasonableness balances general societal values against the value that society places upon free speech in order to determine whether the restriction may be upheld as consistent with the First Amendment. For instance, "the ancient concept that a man's home is his castle into which not even the king may enter"⁸⁰ exemplifies the notion that individual privacy in the home is a societal value of the highest order.⁸¹ Fur-

76. MINN. STAT. ANN. § 325E.27.

A caller shall not use or connect to a telephone line an automatic dialing-announcing device unless: (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 325E.30 do not apply to (1) messages from school districts to students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) messages advising employees of work schedules. This section does not apply to messages from a nonprofit tax-exempt charitable organization sent solely for the purpose of soliciting voluntary donations of clothing to benefit disabled United States military veterans and containing no request for monetary donations or other solicitations of any kind.

Id.

77. CAL. PUB. UTIL. CODE § 2874(a) (West 2010) ("Whenever telephone calls are placed through the use of an automatic dialing-announcing device, the device may be operated only after an unrecorded, natural voice announcement has been made to the person called by the person calling.").

78. *Bland v. Fessler*, 88 F.3d 729, 732–36 (9th Cir. 1996). The California statute also makes exceptions similar to those in the Minnesota statutes.

79. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 n.8 (1984) ("Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression.").

80. *Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm'n*, 358 F.3d 1228, 1237 (10th Cir. 2004) (quoting *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737 (1970) (internal quotation marks omitted)).

81. *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)) ("The [s]tate'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."); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995).

thermore, this societal value trumps the value placed on free speech.⁸² For example, the Supreme Court has held that a municipal ordinance that prohibits picketing in front of a residence is a content neutral restriction that promotes a significant government interest of protecting the privacy of the home.⁸³ The time, place, and manner restrictions of such ordinances are reasonable because an individual's freedom to not welcome speech into his or her home outweighs the value of the speech.⁸⁴

In *Van Bergen v. Minnesota*,⁸⁵ the Eighth Circuit Court of Appeals considered the societal value of the freedom to welcome or reject communication as a factor in its First Amendment analysis that weighed in favor of upholding Minnesota's restrictions on robocalls.⁸⁶ This is because the privacy interests of individuals in their homes were severely hampered by their inability to convey to the robocaller that they no longer wished to be contacted.⁸⁷ Thus, the key distinction that separates live calls from robocalls is the ability, or lack thereof, of the person being called to actively preserve the privacy and tranquility of his or her home.⁸⁸

IV. ARGUMENT

As currently written, Arkansas's prohibition on political robocalls unconstitutionally violates the First Amendment's freedom of speech clause because it is a restriction based on the content of the message that fails to survive strict scrutiny.

The first step in analyzing the constitutionality of Ark. Code Ann. § 5-63-204 is to identify the type of speech being restricted. While the restriction does target commercial speech,⁸⁹ the restricted speech at issue pro-

82. *Frisby*, 487 U.S. at 484–85; *Van Bergen*, 59 F.3d at 1554.

83. *Frisby*, 487 U.S. at 488.

84. *Id.* at 485. The Court also pointed out that, while we typically expect individuals to simply avoid speech that is unwelcome, the home is different because of "the unique nature of the home [as] 'the last citadel of the tired, the weary, and the sick.'" *Id.* at 484 (quoting *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

85. 59 F.3d 1541 (8th Cir. 1995).

86. *Id.* at 1554–56.

87. *Id.* at 1556 ("Because [robocalls] intrude upon the privacy and tranquility of the home and the efficiency of the workplace, and because the recipient has no opportunity to indicate the desire not to receive such calls, we find that the government has a substantial interest in limiting the use of unsolicited, unconsented-to [robocalls].").

88. *Id.* See also Vivek Arora, Comment, *The CAN-SPAM Act: An Inadequate Attempt to Deal with a Growing Problem*, 39 COLUM. J.L. & SOC. PROBS. 299, 313–14 (2006) (arguing that valid forms of political communication must respect privacy rights).

89. The portions of the statute that address commercial speech concern those calls made "for the purpose of offering any goods or services for sale, or for conveying information regarding any goods or services for the purpose of soliciting the sale." ARK. CODE ANN. § 5-63-204(2)(1) (LEXIS Repl. 2005).

hibits those calls made “for soliciting information, gathering data, or for any other purpose in connection with a political campaign.”⁹⁰ Calls made for these purposes do not constitute commercial speech because they do not constitute “expression related solely to the economic interests of the speaker and its audience.”⁹¹

The next step in the analysis is to determine whether the type of speech being restricted is content neutral or content based. This step proves to be the most difficult because the statute does not specifically regulate the content of the messages, but rather prohibits robocalls for “any . . . purpose in connection with a political campaign.”⁹² Examining whether the Arkansas legislature chose to restrict these robocalls because it disagreed with “purposes in connection with a political campaign” is not initially insightful because the messages being restricted cover the entire spectrum of political philosophies.⁹³ More specifically, Arkansas has not restricted a particular viewpoint but rather an entire category of speakers based on their message’s connection with a political campaign.

Any examination of a speaker’s purpose for sending a robocall necessarily includes an analysis of the content of the message. The Arkansas restriction does not apply to a class of speakers based on their relationship to a political campaign; instead, it only applies when their *purpose* is in connection with a political campaign. The only objective way to determine the purpose of a robocall is to examine the content of the phone call. For example, does the prerecorded message support a particular candidate? Is it a negative ad that chastises a particular candidate or issue and, thus, necessarily supports that candidate’s opponent or the candidate who also rejects that particular issue?

It is this examination of the content of a robocall that deems Arkansas’s prohibition on political robocalls a content-based restriction. The effect of the prohibition is not simply “incidental”—it is an absolute and complete prohibition on virtually all *political* robocalls. Despite the many negative aspects of robocalls, the prohibition is not justified without reference to the content of the regulated speech because the statute does not eliminate robocalls altogether. Instead, it prohibits robocalls only for particular types of messages.

Arkansas’s statute, which only prohibits certain types of robocalls, is fundamentally different from the statutes the Eighth and Ninth Circuits have

90. *Id.*

91. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y., 447 U.S. 557, 561 (1980).

92. ARK. CODE ANN. § 5-63-204(a)(1).

93. *See supra* Part III.B. The notion that legislators would categorically disagree with messages connected to a political campaign, when each of those legislators ran a political campaign, is preposterous.

held constitutional.⁹⁴ Both the Minnesota statute and the California statute contain blanket prohibitions that, with a few exceptions, apply to all robocalls, regardless of content.⁹⁵ They do not specify particular types of messages that cannot be broadcast via robocalls.⁹⁶

Because Arkansas's prohibition on political robocalls is a content-based regulation, it is subject to the strictest level of scrutiny.⁹⁷ The prohibition would fail to survive strict scrutiny, however, because less restrictive alternatives exist that would protect the government's interests.⁹⁸ Several less restrictive alternatives include the following: (1) a requirement that recorded messages must be preceded by a live operator⁹⁹ who would disclose the identity of the person or organization who authorized the robocall, give that party's contact information,¹⁰⁰ and receive the recipient's consent before playing the prerecorded message; (2) a time restriction prescribing when calls are acceptable;¹⁰¹ and (3) a prohibition on phone number spoofing.¹⁰²

V. PROPOSED SOLUTION

Robocalls should be restricted for many reasons. First, they are generally annoying; this problem is compounded when calls arrive at extremely inconvenient times of the day or arrive frequently.¹⁰³ Furthermore, campaigns sometimes utilize spoofing to misrepresent that the caller is an opposing candidate in order to annoy or misinform voters.¹⁰⁴ Robocall spoofing also has the potentially dangerous side effect of clogging entire calling grids and the phone lines of emergency service providers.¹⁰⁵ Most importantly, robocalls intrude on an individual's right to privacy in his or her home. Therefore, Arkansas should restrict political robocalls.

94. *See supra* Part III.B.

95. *See supra* Part III.B.

96. *See supra* Part III.B.

97. *See supra* Part III.A.

98. *See supra* Part III.A.

99. Requiring a live operator would return the freedom to protect the "well-being, tranquility, and privacy of the home" to individuals by allowing them to opt-out of future robocalls.

100. This requirement would significantly reduce the number of instances where candidates claim not to have authorized a set of robocalls, as well as other instances of voter suppression. *See supra* Part II.C.

101. This would prevent robocallers from placing the calls during late hours of the night. The Eighth Circuit upheld a similar Minnesota restriction. *See supra* Part III.B.

102. A prohibition on spoofing would prevent potentially dangerous scenarios similar to what happened with the Adair County Ambulance District. *See supra* Part II.C.

103. *See supra* Part II.C.

104. *See supra* Part II.C.

105. *See supra* Part II.C.

Arkansas's prohibition on robocalls should be reworded in order to pass constitutional muster. As currently written, the statute only prohibits the use of robocalls for certain purposes. A better strategy would be to use statutory language that categorically prohibits the use of robocalls regardless of content; special exceptions can be made for those particular types of robocalls the state does not wish to restrict. Such a statute would look similar to the Minnesota statute, which the Eighth Circuit held constitutional.

A content-neutral restriction could be formed from the existing statute by omitting the portions of section 5-63-204(a)(1) that describe the specific purposes for which robocalls are prohibited. If implemented, the statute would read as follows: It is unlawful for any person to use a telephone when the use involves an automated system for the selection and dialing of telephone numbers and the playing of recorded messages when a message is completed to the called number.

VI. CONCLUSION

The current state of Arkansas's prohibition on political robocalls is a mess. While political robocalls are statutorily prohibited, there has been no attempt to enforce the prohibition against political campaigns out of fear that the prohibition is an unconstitutional restraint on political speech.¹⁰⁶ This situation leads to scenarios where one candidate, believing the prohibition is unenforceable, may elect to make robocalls, but his opponent, believing that the prohibition can be enforced, does not utilize such calls. While there are benefits to robocalls, such as fast production time, relatively low cost, the ease and accuracy of tracking voter interest, and an ability to reach large quantities of voters, robocallers enjoy these perks almost exclusively. The burdens, however, are placed upon robocall recipients, opposing political campaigns, and unrelated third parties. As a result, the government has an interest in restricting political robocalls.

Although there is an important governmental interest in restricting robocalls, Arkansas's statutory prohibition on political robocalls as written is unconstitutional because it is a content-based restriction that is not narrowly tailored as there are less restrictive alternatives available. The prohibition is content based, as opposed to content neutral, because any determination of whether a robocall's purpose is connected with a political campaign requires an examination of the content of the message. However, by simply rewording the statute to prohibit all robocalls, Arkansas's prohibition on

106. An opinion from the Arkansas Attorney General, which was released contemporaneously with the submission of this note, concluded that Arkansas's statutory prohibition on political robocalls "is highly constitutionally suspect under the First Amendment to the U.S. Constitution." Ark. Atty. Gen. Op. No. 2010-151, 2011 Ark. AG LEXIS 45, at *20 (Apr. 8, 2011).

robocalls will become content neutral and will pass constitutional muster as reasonable time, place, or manner restrictions.

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