

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

VICTORY PROCESSING, LLC; DAVE  
DISHAW,

*Plaintiffs-Appellants,*

v.

TIM FOX, in his official capacity as  
Attorney General for the State of  
Montana,

*Defendant-Appellee.*

No. 18-35163

D.C. No.  
6:17-cv-00027-  
CCL

OPINION

Appeal from the United States District Court  
for the District of Montana  
Charles C. Lovell, District Judge, Presiding

Argued and Submitted March 7, 2019  
Seattle, Washington

Filed September 10, 2019

Before: Ronald M. Gould and Richard A. Paez, Circuit  
Judges, and Janis Graham Jack,\* District Judge.

Opinion by Judge Paez

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\* The Honorable Janis Graham Jack, United States District Judge for the Southern District of Texas, sitting by designation.

**SUMMARY\*\***

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**Civil Rights**

The panel reversed the district court's grant of summary judgment in favor of the Attorney General of Montana and remanded in an action alleging that Montana's Robocall Statute, Montana Code section 45-8-216(1)(e), which restricts automated telephone calls promoting a political campaign or any use related to a political campaign, violates the First Amendment.

The panel explained that regulating robocalls based on the content of their messaging presents a more severe threat to First Amendment freedoms than regulating their time, place, and manner. In particular, prohibiting political robocalls strikes at the heart of the First Amendment, as well as disproportionately disadvantages political candidates with fewer resources.

The panel held that plaintiff had standing to challenge the Robocall Statute. The panel noted that as an integral part of its operations, plaintiff engages in political consulting and public opinion polling primarily through the use of automated telephone calls. Plaintiff alleged that it had sustained injury, the injury was traceable to the Robocall Statute, and the relief plaintiff sought would redress its own alleged injuries.

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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The panel determined that because Montana’s Robocall Statute was plainly content-based, strict scrutiny applied. The panel held that Montana demonstrated a compelling state interest—protecting personal privacy—in regulating automated telephone calls. The panel held, however, that the Robocall Statute was not narrowly tailored to further the state’s interest in protecting privacy. The panel held that the statute was both underinclusive and overinclusive. It was underinclusive because by singling out only five topics of robocalling for regulation—including messages related to political campaigns—the Robocall Statute left consumers open to an unlimited proliferation of robocalls on other topics. The statute was overinclusive because robocalls related to political campaigns had not been shown to pose a threat to individual privacy. The panel concluded that the Robocall Statute’s restriction on political messages did not survive strict scrutiny.

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### COUNSEL

Blake E. Johnson (argued) and Katherine J. Spohn, Bruning Law Group, Lincoln, Nebraska; James E. Brown, The James Brown Law Office PLLC, Helena, Montana; for Plaintiffs-Appellants.

Patrick M. Risken (argued), Assistant Attorney General; Timothy C. Fox, Attorney General; Office of the Attorney General, Helena, Montana; for Defendant-Appellee.

**OPINION**

PAEZ, Circuit Judge:

We must decide whether Montana Code section 45-8-216(1)(e)—which restricts automated telephone calls promoting a political campaign or any use related to a political campaign—violates the First Amendment. We hold that it does.

Although automated telephone calls, or robocalls, fall within the First Amendment’s protection, they are subject to regulation—and for good reason. In 2018, studies estimated that Americans received between 25 and 40 billion robocalls—a 45 to 60% increase from the prior year.<sup>1</sup> Most of these robocalls cause only harmless annoyances. Some are even useful, such as automated appointment or payment reminders. At their worst, though, robocalls provide a cheap vehicle for scammers masquerading as the Internal Revenue Service, banks, or utility providers; promising nonexistent preapproved loans or loan forgiveness; and more—aiming to finagle money and sensitive information from unsuspecting consumers. *See* Tara Siegel Bernard, *Yes, It’s Bad. Robocalls, and Their Scams, Are Surging.*, N.Y. Times,

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<sup>1</sup> *See* Kate Fazzini, *Robocalls Jumped 60 Percent in the U.S. Last Year and Scammers Are Finding More Ways to Make Money*, CNBC, Jan. 4, 2019, <https://www.cnbc.com/2019/01/02/as-robo-calling-ramps-up-consumers-increasingly-wonder-why-carriers-cant-stop-scammers-from-spoofing-their-phone-numbers.html>; Paige Leskin & Prachi Bhardwaj, *Americans Were Hit with 26.3 Billion Robocalls in 2018, a Whopping 46% Increase from the Year Before—Here Are Some Ways to Stop Them*, May 2, 2019, <http://www.businessinsider.com/how-to-stop-robocalls-to-cell-phone-explained-2018-5>.

May 6, 2018, <http://www.nytimes.com/2018/05/06/your-money/robocalls-rise-illegal.html>.

That robocalls are subject to regulation does not remove them from the First Amendment’s protection, however. We have heard numerous First Amendment challenges to laws regulating robocalls. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014); *Bland v. Fessler*, 88 F.3d 729, 732–36 (9th Cir. 1996); *Moser v. F.C.C.*, 46 F.3d 970, 973–75 (9th Cir. 1995). We have upheld statutes that regulate the *method* rather than the content of robocalls as reasonable time, place, and manner restrictions. *See, e.g., Moser*, 46 F.3d at 973–75. We have further upheld the application of state consumer protection laws to robocalls as acceptable regulation of commercial speech. *See Bland*, 88 F.3d at 738–39. We have not had the occasion to evaluate the constitutionality of a content-based regulation of robocalls until now.

Regulating robocalls based on the content of their messaging presents a more severe threat to First Amendment freedoms than regulating their time, place, and manner. In particular, prohibiting political robocalls strikes at the heart of the First Amendment, *CarePartners, LLC v. Lashway*, 545 F.3d 867, 877 (9th Cir. 2008), as well as disproportionately disadvantages political candidates with fewer resources. As we discuss below, Montana’s content-based restrictions on robocalls cannot survive strict scrutiny. We thus reverse the district court’s grant of summary judgment to the defendant, Tim Fox in his official capacity as Attorney General of the State of Montana.

## I.

In the early 1990s, the federal and state governments sought to address the widespread concern over computerized

telephone calls that were tying up phone lines, even after the recipient hung up the phone, and filling up answering machines. The federal government passed the Telephone Consumer Protection Act in 1991 (“TCPA”), 42 U.S.C. § 227, while states followed with their own enactments for addressing the problems caused by robocalls. In 1991, the Montana legislature enacted Montana Code section 45-8-216 (hereinafter “Robocall Statute”), which provides in subsection (1) that:

(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.

Although the Robocall Statute prohibits unsolicited automated calls that fall into these categories, the statute further provides in subsection (2) that “[t]his section does not prohibit the use of an automated telephone system or device if the permission of the called party is obtained by a

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live operator before the recorded message is delivered.”<sup>2</sup> *Id.* Those who violate the Robocall Statute are subject to up to a \$2,500 fine. *Id.*

Victory Processing is a limited liability company formed under the laws of Michigan and headquartered in Michigan. Victory Processing offers its clients political consulting and data gathering services throughout the United States. To communicate political messages and collect public opinion data on a variety of issues, Victory Processing primarily uses automated telephone calls, or “robocalls.”

Victory Processing seeks to communicate political messages and conduct public opinion polling for clients through automated telephone calls to Montana voters without using a live voice. After consulting with legal counsel, however, Victory Processing refrained from engaging in these activities in Montana because such

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<sup>2</sup> Subsection 2 provides in full:

This section does not prohibit the use of an automated telephone system, device, or facsimile machine described under subsection (1) for the 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.

Mont. Code § 45-8-216(2).

activities would violate the Robocall Statute. Victory Processing, however, desires to use robocalls to engage in political speech in Montana in the future.

Alleging that Montana’s Robocall Statute has limited its ability to communicate with Montana voters and chilled its speech, Victory Processing filed this suit under 42 U.S.C. § 1983 against Tim Fox in his official capacity as the Attorney General of Montana (hereinafter referred to as “Montana”). In its complaint, Victory Processing alleges that subsection (1)(e) of Montana’s Robocall Statute violates the First Amendment, facially and as-applied,<sup>3</sup> as an invalid content-based restriction on speech. Victory Processing seeks declaratory and injunctive relief.

On cross-motions for summary judgment, the district court granted summary judgment to Montana. *See Victory Processing, LLC v. Fox*, 307 F. Supp. 3d 1109, 1121 (D. Mont. 2018). The district court expressed concern that Victory Processing had provided “only a thin basis for standing,” noting that Victory Processing had not provided many details about the campaigns it sought to undertake in Montana, citing client confidentiality. *Id.* at 1113. Nonetheless, the district court concluded that constitutional standing existed and proceeded to the merits of the cross-motions for summary judgment. *Id.* at 1113–14. Concluding that the Robocall Statute was content-based, the district court applied strict scrutiny. *Id.* at 1116–17, 1119 (“There can be no doubt that Montana’s robocall statute is content-based.”). The district court held that Montana had a

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<sup>3</sup> Victory Processing appears to have since abandoned its as-applied challenge. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (“[A]rguments not raised by a party in its opening brief are deemed waived.”).



compelling interest in regulating automated telephone calls to “protect[] the well-being, tranquility, and privacy of the home,” and that the Robocall Statute was narrowly tailored to serve this interest. *Id.* at 1114, 1120–21. Accordingly, the district court concluded that Montana Code section 45-8-216(1)(e) survived strict scrutiny. *Id.* at 1121. Victory Processing timely appealed.<sup>4</sup>

## II.

We first address Montana’s contention that Victory Processing lacks standing to challenge the state’s Robocall Statute. Montana contends that the Robocall Statute affects the speech of Victory Processing’s clients, but that Victory Processing has not demonstrated standing to sue on behalf of these third parties. We must decide this jurisdictional question before we can reach the merits.<sup>5</sup>

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<sup>4</sup> In 2018, Victory Processing filed a similar First Amendment facial challenge to the Wyoming statute upon which the Montana Robocall Statute is based. *See* Wy. Stat. Ann. § 6-6-104. In that case, the District Court of Wyoming applied strict scrutiny and concluded that Wyoming’s Robocall Statute was neither justified by a compelling state interest nor narrowly tailored to advance that interest. *Victory Processing, LLC v. Michael*, 333 F. Supp. 3d 1263, 1271–72 (D. Wy. 2018).

<sup>5</sup> Victory Processing argues that the issue of standing is not properly before us because Montana did not raise the issue through a cross-appeal. It is true that, in general, a prevailing party may not assert an argument that would modify the judgment absent a cross-appeal. *See Ball v. Rodgers*, 492 F.3d 1094 (9th Cir. 2007). Where standing—and thus federal court jurisdiction—is in question, however, this rule does not apply. *See, e.g., Big Country Foods, Inc. v. Bd. of Educ. of Anchorage Sch. Dist.*, 952 F.2d 1173, 1176 (9th Cir. 1992) (finding that this court “must consider the standing issue,” even absent a cross-appeal). Thus, because “[s]tanding is a necessary element of federal-court jurisdiction[,]” we address the issue. *Id.*

Article III of the Constitution limits federal jurisdiction to cases and controversies. U.S. Const. art. III, § 2, cl. 1. “One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue.” *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). A plaintiff must establish the “irreducible minimum” of standing: an “injury in fact” that is “fairly traceable” to the defendant’s actions and “likely . . . [to] be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and alterations omitted). Additionally, a plaintiff’s claim must be “sufficiently individualized to ensure effective judicial review.” See *Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 866, 891 (9th Cir. 2007); see also *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (holding that litigants generally cannot “assert[] the rights or legal interests of others in order to obtain relief from injury to themselves”).

Montana’s dispute with Victory Processing’s standing is based on the premise that Victory Processing’s First Amendment claim rests on the rights of its clients, rather than its own. This premise misreads Victory Processing’s allegations and ignores its ability to assert standing on its own behalf. See *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1057 n.7 (9th Cir. 2002) (“That [a plaintiff] is a corporation has no bearing on its standing to assert violations of the first and fourteenth amendments under 42 U.S.C. § 1983.” (internal quotation marks and citation omitted)). As an integral part of its operations, Victory Processing engages in political consulting and public opinion polling primarily through the use of automated telephone calls. Some of this information gathering is for Victory Processing’s own use while some is for the benefit of paying clients. Because of the restriction on political robocalls, Victory Processing alleges that it has been unable

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to convey political messages to voters through automated telephone calls, despite its desire to do so.

In its complaint and throughout this litigation, Victory Processing has only sought to vindicate its own First Amendment rights, not the rights of its clients. In pursuit of that objective, Victory Processing alleges that it has sustained injury; the injury is traceable to the Robocall Statute; and the relief Victory Processing seeks would redress its own alleged injuries. Victory Processing has thus demonstrated standing on its own behalf.<sup>6</sup> *See Lujan*, 504 U.S. at 561–62; *see also Bland v. Fessler*, 88 F.3d 729, 736–38 (9th Cir. 1996). Accordingly, we exercise jurisdiction pursuant to 28 U.S.C. § 1291, and reach the merits of this case.

### III.

We review de novo the constitutionality of Montana’s Robocall Statute. *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995). As a preliminary matter, we must decide what level of scrutiny to apply.

The level of scrutiny we apply to laws regulating speech varies depending on whether the law is content-based or content-neutral. “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Content-neutral laws, on the

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<sup>6</sup> Victory Processing need not wait for Montana to enforce its Robocall Statute against it in order to bring a First Amendment claim on its own behalf. *See Lopez v. Candaele*, 630 F.3d 775, 785–88 (9th Cir. 2010); *LSO, Ltd. v. Stroh*, 204 F.3d 1146, 1154–56 (9th Cir. 2000).

other hand, are subject to lesser scrutiny and can be justified as time, place, and manner restrictions. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

A law can be content-based in one of two ways. *Reed*, 135 S. Ct. at 2227. The most commonsense way a law can be content-based is if it distinguishes particular speech based on the topic discussed, viewpoint or idea expressed, or, more subtly, the function or purpose of the speech. *Id.* at 2227. Such a law is content-based because it explicitly draws distinctions based on the message a speaker conveys. *Id.* The law’s purpose will not alter the level of scrutiny: “A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Id.* at 2228.

A law need not draw explicit distinctions to be content-based, however. *Id.* at 2227. Even a law that appears “facially content neutral” may be content-based if it cannot be justified without reference to the content of the regulated speech or if it was adopted because the government disagreed with the message the regulated speech conveyed. *Id.* For example, in *United States v. Swisher*, we found a statute that criminalized wearing unauthorized military medals to be content-based not because it explicitly distinguished between types of speech, but rather because it could not be justified without reference to the message communicated by the regulated conduct. 811 F.3d 299, 312–13 (9th Cir. 2016).

Here, Montana’s Robocall Statute is plainly content-based. Under the Robocall Statute, a person cannot use an automated telephone system “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.” Mont. Code Ann. § 45-8-216(1). The law explicitly targets certain speech for regulation based on the topic of that speech; accordingly, we must apply strict scrutiny. *See Reed*, 135 S. Ct. at 2227. Even if these distinctions could be substantiated with content-neutral justifications—as the district court suggested—it would not change the level of scrutiny we must apply. *See id.* at 2228. Thus, in order for the Robocall Statute’s restriction on political speech to survive strict scrutiny, Montana must demonstrate that the law is justified by a compelling interest and is narrowly tailored to further that interest. *Id.* at 2231.

#### A.

First, we must decide whether Section 45-6-216(1)(e) is justified by a compelling state interest. There can be no doubt that “[t]he 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). “One important aspect of residential privacy is protection of the unwilling listener.” *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). Although, in many public locations, individuals are expected to avoid speech they do not wish to hear, “individuals are not required to welcome unwanted speech into their own homes and [] the government may protect this freedom.” *Id.* at 485.

Congress sought to do just that when it passed the TCPA, 42 U.S.C. § 227. In the 1990s, Congress was concerned that unsolicited automated calls—predominantly to landline telephones—were invading individuals’ homes and tying up their phone lines. In *Moser*, we noted the “significant evidence before Congress of consumer concerns about telephone solicitation in general and about automated calls

in particular,” leading us to “conclude that Congress accurately identified automated telemarketing calls as a threat to privacy” and thus had a significant interest in restricting these calls. 46 F.3d at 974.

We have not only reaffirmed this conclusion, but we also have held that this interest in protecting privacy justifies applying the TCPA to cellular devices. We have never held that the interest in privacy ends at one’s home. *See Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014). Indeed, cellular phones have become such critical fixtures in everyday life that they often serve as the primary phone used in the home as well as the device holding an individual’s most sensitive data. *Id.*; *cf. also Riley v. California*, 573 U.S. 373, 393–96 (2014); *United States v. Cotterman*, 709 F.3d 952, 966 (9th Cir. 2013). Thus, the interest in protecting privacy applies with equal force to cellular devices.

In enacting the Robocall Statute, Montana sought to protect a person’s personal privacy as well as privacy at home. The sponsor of the Robocall Statute in the Montana House of Representatives observed that automated calls had been tying up residential phone lines, answering machines, and fax machines. Proponents emphasized individuals’ right of privacy and argued that “this [Robocall Statute] supports that.” Montana continues to emphasize that its Robocall Statute serves a compelling interest in protecting the privacy and tranquility of its residents. Considering that this interest is “of the highest order,” *Carey*, 447 U.S. at 471, and that we have recognized that robocalls directly threaten this interest, *Moser*, 46 F.3d at 974, we conclude that Montana has

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demonstrated a compelling state interest in regulating automated telephone calls.<sup>7</sup>

**B.**

Our inquiry does not end here, however. We must next decide whether the Robocall Statute is narrowly tailored to advance Montana’s compelling interest. “A statute is narrowly tailored if it targets and eliminates no more than the exact source of the ‘evil’ it seeks to remedy.” *Frisby*, 487 U.S. at 485. If a less restrictive alternative would serve the state’s compelling interest with the same level of effectiveness, the state must use that alternative. *See United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000). Furthermore, when the plaintiff offers “a plausible, less restrictive alternative . . . to a content-based speech restriction, it is the Government’s obligation to prove that the alternative will be ineffective to achieve its goals.” *Id.* at 816. To meet this burden, the state must provide “more than anecdote and supposition;” it must point to evidence in the legislative record or present other evidence that demonstrates why the challenged restriction, rather than a less restrictive alternative, is necessary to further its significant interests. *Id.* at 820–22.

While narrow tailoring requires that a statute not cover *more* speech than is necessary to serve a compelling government interest, a statute can also fail strict scrutiny if it covers *too little* speech. “Underinclusivity creates a First Amendment concern when the State regulates one aspect of

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<sup>7</sup> Victory Processing seeks to distinguish the protection of individual privacy as a *significant* governmental interest, but not a *compelling* one. This distinction is unpersuasive. We recognize the protection of individual privacy as an interest “of the highest order,” and it is thus both significant and compelling. *Carey*, 447 U.S. at 471.

a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way.*” *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015) (emphasis in original). While we do not require the government to address all aspects of a problem in one fell swoop, an underinclusive restriction “can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Id.* at 1668 (internal quotation marks omitted); *see also Reed*, 135 S. Ct. at 2231. Additionally, underinclusivity may show that the law does not in fact advance the state’s compelling interest. *See Williams-Yulee*, 135 F.3d at 1668.

Although we have not yet addressed whether a content-based regulation of robocalls is narrowly tailored to protect individual privacy, the Fourth Circuit recently addressed this question in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015). There, the Fourth Circuit addressed a First Amendment challenge to South Carolina code section 16-17-446(A), which prohibited all consumer and political robocalls subject to limited exceptions. *Id.* at 402–03. Applying strict scrutiny, the Fourth Circuit held that although South Carolina’s interest in protecting privacy was compelling, section 16-17-446(A) was not narrowly tailored to serve that interest. *Id.* at 405. Rather, the Fourth Circuit held that the challenged statute was both overinclusive and underinclusive. *Id.* at 406. The South Carolina statute was overinclusive because federal “[c]omplaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations.” *Id.* Additionally, the statute was underinclusive because it permitted “unlimited proliferation” of all robocalls that are not political or commercial. *Id.*



We similarly hold that section 45-8-216(1)(e) is not narrowly tailored to further the state’s interest in protecting privacy. Notably, according to the Montana State Legislature, the privacy threat posed by robocalls relates to the methods or effects of robocalls—the fact that they tie up phone lines and fill answering machines—rather than their content. Accordingly, regulating robocalls based on their content does not address Montana’s expressed concerns. Montana argues that “the method of delivery, not the message, is the target” of the Robocall Statute, emphasizing that the law does not entirely prohibit robocalls, but rather requires that a live operator announce the message for five enumerated topics. *See* Mont. Code § 45-8-216(2). Even with the live operator exception, Montana nonetheless seeks to address problems caused by robocalls by distinguishing based on the content of the calls.<sup>8</sup> *See id.*

If Montana’s quarrel with robocalling is indeed with the method, rather than the content, of the calls, then its Robocall Statute is underinclusive. By singling out only five topics of robocalling for regulation—including messages related to political campaigns—the Robocall Statute leaves consumers open to an “unlimited proliferation” of robocalls on other topics. *See Cahaly*, 796 F.3d at 406. Although Montana argues that “virtually every conceivable subject of calling is covered,” there are many categories of robocalls

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<sup>8</sup> If Montana had required all robocalls to be announced by a live operator, rather than imposing this requirement based on the topic of the robocall, our analysis may be different. California, for example, has addressed similar concerns about robocalls by requiring a live operator to obtain the consent of the person they call before playing a recorded message, regardless of the content of the message. *See* California Pub. Util. § 2874. Because this regulation was content-neutral, we did not apply strict scrutiny and concluded that the statute was constitutional. *Bland*, 88 F.3d at 733, 739.

that Montana’s Robocall Statute does not cover, such as those related to government services, medical information, or charitable solicitations. Montana has offered no reason why, for example, an automated fundraising call from a political campaign is inherently more intrusive than a similar automated fundraising call from an apolitical nonprofit entity—both would tie up phone lines and answering machines in the exact same manner. This underinclusiveness raises doubts about whether the Robocall Statute aims to address the problems caused by robocalling or instead to hinder discussion of certain topics.

Even assuming that political messages and the other four topics regulated by the Robocall Statute pose a greater threat to privacy that justifies singling them out, Montana has not presented evidence to this effect. Indeed, available evidence does not support this conclusion. In passing the TCPA, Congress identified that “unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations.” H.R. Rep. 102-317 at 16, 102nd Cong. (1st Sess. 1991). More up-to-date research suggests that robocall scams pose one of the biggest threats to consumers, constituting 40% of all robocalls. *See* Fazini, *supra*; *The FCC’s Push to Combat Robocalls & Spoofing*, Fed. Comm’n Comm’n, <http://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing> (last visited June 1, 2019). Robocalls related to political campaigns, by contrast, have not been shown to pose a threat to individual privacy. By regulating categories of robocalling that have not been shown to pose a threat, the Robocall Statute is overinclusive in its efforts to further Montana’s compelling interest in protecting privacy.

In regulating the content of robocalls by restricting political speech, rather than their method, in a way that is

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both underinclusive and overinclusive, section 45-8-216(1)(e) is not narrowly tailored to address the State's compelling governmental interests. Thus, the Robocall Statute's restriction on political messages does not survive strict scrutiny.

#### IV.

For the reasons stated above, we reverse the district court's grant of summary judgment to Fox and remand for further proceedings consistent with this Opinion.

**REVERSED and REMANDED.**



# *Yes, It's Bad. Robocalls, and Their Scams, Are Surging.*

By Tara Siegel Bernard

May 6, 2018

It's not just you.

Those pesky robocalls — at best annoying disturbances and at worst costly financial scams — are getting worse.

In an age when cellphones have become extensions of our bodies, robocallers now follow people wherever they go, disrupting business meetings, church services and bedtime stories with their children.

Though automated calls have long plagued consumers, the volume has skyrocketed in recent years, reaching an estimated 3.4 billion in April, according to YouMail, which collects and analyzes calls through its robocall blocking service. That's an increase of almost 900 million a month compared with a year ago.

Federal lawmakers have noticed the surge. Both the House and Senate held hearings on the issue within the last two weeks, and each chamber has either passed or introduced legislation aimed at curbing abuses. Federal regulators have also noticed, issuing new rules in November that give phone companies the authority to block certain robocalls.

Law enforcement authorities have noticed, too. Just the other week, the New York State attorney general, Eric T. Schneiderman, warned consumers about a scheme targeting people with Chinese last names, in which the caller purports to be from the Chinese Consulate and demands money. Since December, the New York Police Department said, 21 Chinese immigrants had lost a total of \$2.5 million.

Despite these efforts, robocalls are a thorny problem to solve. Calls can travel through various carriers and a maze of networks, making it hard to pinpoint their origins, enabling the callers to evade rules. Regulators are working with the telecommunications industry to find ways to authenticate calls, which would help unmask the callers.



“Everywhere I go, it is what people talk about,” said Denise Grimsley, a Florida state senator, who said she received automated sales calls several times a day.  
Todd Anderson for The New York Times

[ALSO READ: “Robocalls Flooding Your Cellphone? Here’s How to Stop Them”]

In the meantime, the deceptive measures have become more sophisticated. In one tactic, known as “neighborhood spoofing,” robocallers use local numbers in the hope that recipients will be more likely to pick up. It’s a trick that Dr. Gary Pess, a hand surgeon in Eatontown, N.J., knows all too well. He receives so many calls that mimic his area code and the first three digits of his phone number that he no longer answers them. But having to sort robocalls from emergency calls has cost him precious minutes.

Dr. Pess recounted an incident in which he didn’t recognize a number and figured it was a robocall. He later learned it was an emergency room doctor calling about a person who had severed a thumb that he wanted Dr. Pess to reattach. “It delayed the treatment of a patient,” he said.

Consumer advocates say they worry the flood of calls could get even worse. A federal court ruling recently struck down a Barack Obama-era definition of an auto-dialer, leaving it to the Federal Communications Commission to come up with new guidance. Advocates fear that it will open up the field to even more robocallers, leaving consumers with little recourse.

Business groups, including the Consumer Bankers Association, counter that defining auto-dialers too broadly would hurt legitimate businesses trying to reach their customers.

Robocallers see the current F.C.C. leadership “as friendly to industry,” said Margot Saunders, senior counsel at the National Consumer Law Center, “and they are anticipating F.C.C. rulings that will enable more calling and forgive past mistakes — or violations of the current law.”

A spokesman for the F.C.C. said the commission would seek public comment on how auto-dialers should be defined, and then “take action based on the record it compiles.”

Automated calls are increasing because they are cheap and easy to make. Robocallers can easily dial millions of consumers daily, experts say, at little cost.

That's essentially what one accused robocaller recently told legislators at a Senate hearing: Adrian Abramovich, a Miami man who regulators say made nearly 100 million "spoofed" robocalls, was peddling vacation packages that were advertised as coming from well-known companies like Marriott. But when consumers pressed to hear more, they were transferred to foreign call centers often trying to sell time shares, according to the F.C.C., which is seeking a \$120 million fine. Mr. Abramovich has denied the charges and asked the regulator to reduce the penalty.

The calls are increasing despite stepped-up enforcement and other efforts to stamp them out, which some have likened to a game of Whac-a-Mole; robocallers find new phone numbers to hide behind once their numbers are ignored or blocked.

The federal Do Not Call List, which is supposed to help consumers avoid robocalls, instead resembles a tennis net trying to stop a flood. The list may prevent some (but not all) legitimate companies from calling people on the list, but it does little to deter fraudsters and marketers, some of them overseas, who are willing to take their chances and flout the law.

Complaints to federal regulators are also increasing sharply. The Federal Trade Commission, which oversees the Do Not Call Registry, said there were 4.5 million complaints about robocalls in 2017, more than double the 2.18 million complaints logged in 2013.

"Everywhere I go, it is what people talk about," said Denise Grimsley, a Republican member of the Florida Senate, who said a woman named Elizabeth leaves her prerecorded messages several times daily selling a vacation package.

"But it's not just annoying," she added. "They are coming after your personal information."

Florida passed a bill in March giving phone companies the authority to block certain robocalls.

Other efforts are underway. The Federal Trade Commission has held contests to encourage app developers to create innovative ways to block calls. And some phone companies offer blocking services, though "many people don't have access to free, effective robo-blocking tools," said Maureen Mahoney, a policy analyst at Consumers Union.

With some exceptions — like calls from schools on snow days — auto-dialed calls to mobile phones are typically illegal, unless a person has given prior consent. Advocates say courts have generally interpreted the law to say that when a consumer revokes that consent, the calls must stop — though they often don't.

The same rules apply to creditors seeking to collect debts, which lawyers and advocates say can be some of the most ruthless dialers.

There are fewer restrictions on landlines, unless you're on the Do Not Call list, but prerecorded telemarketing calls are always illegal without written consent, advocates say, and debt collectors must stop calling after consumers send a written request.

James Hunter, a Florida resident who is paralyzed below the waist and can no longer work, had his federal student loans forgiven. But Navient, the giant company that services and collects student debt, made more than 2,500 automated calls to him about his private loans over a period of about two years, sometimes calling nine times a day, according to Mr. Hunter's lawyer, who filed a suit on his behalf claiming Navient acted illegally.

Navient did not immediately comment.

**F**or now, consumers must do their best to find ways to control the wave of calls. Brett Hein, a sports editor at a newspaper in Ogden, Utah, said that for him it was a losing battle. His mobile phone has been inundated with calls in recent weeks, rousting him from bed and twice interrupting him while he was volunteering in his son's kindergarten class.

"It's disconcerting to have your phone go off all the time," Mr. Hein said from a landline in his office, when his mobile phone began to ring.

It was another robocall. The fifth one that day.

A version of this article appears in print on May 5, 2018, Section A, Page 1 of the New York edition with the headline: Yes, Those Calls You're Ignoring Are Increasing

[READ 946 COMMENTS](#)

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No. 18-35163 archived on Sept 4, 2019*





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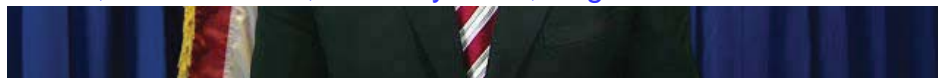
# The FCC's Push to Combat Robocalls & Spoofing

The FCC is working to, as Chairman Pai says, "combat the robocall scourge." He has made combatting unlawful **robocalls** and malicious caller ID **spoofing** his top consumer protection priority. By proposing and implementing impactful policy initiatives and pursuing strong enforcement actions, the FCC has been taking a bold stand to protect and empower consumers.





## A Top Priority



Unwanted calls are far and away the

biggest consumer complaint to the FCC with over 200,000 complaints each year—around 60 percent of all the complaints we receive. Some private analyses estimate that U.S. consumers received nearly 4 billion robocalls per month in 2018.

Unfortunately, advancements in technology make it cheap and easy to make massive numbers of robocalls and to "spoof" caller ID information to hide a caller's true identity.

Chairman Pai and other FCC staff get these calls too. He wrote in USA Today: "I hate robocalls as much as you do. I get them myself on my mobile phone, I hear about them from my family and friends, and I know that consumers want to reclaim their sanity."

The FCC knows that these calls are a major concern of millions of Americans, and scam calls in particular can result in very real financial losses and serious consumer frustration. The agency is therefore committed to using every tool in our tool box and working closely with private, public, and international partners to combat unlawful robocalls and spoofing. These efforts are outlined in the FCC's first ever [report](#) on illegal robocalls.

**FCC Report on  
Illegal Robocalls**

## FCC Action

Chairman Pai has implemented policies and actions to help combat unlawful robocalls and malicious caller ID spoofing. The Commission under his leadership has also taken unprecedented enforcement actions to punish those who flout consumer protection laws.

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No. 18-35163 archived on Sept 4, 2019*



### Call-Blocking Rules



### Caller ID Authentication



### Reducing Unwanted Calls to Reassigned Numbers



### Major Fines Against Spoofers



### Robotexts

## Other Tools

### Consumer Tips

- Don't answer calls from unknown numbers. Let them go to voicemail.
- If the caller claims to be from a legitimate company or organization, hang up and call them back using a valid number found on their website or on your latest bill if you do business with them.
- If you answer and the caller (often a recording) asks you to press a button to stop receiving calls, or asks you to say "yes" in response to a question, just hang up. Scammers often use these tricks to identify, and then target, live respondents, or to use your "yes" to apply unauthorized charges on your bill.
- Be Aware: Caller ID showing a "local" number no longer means it is necessarily a local caller.
- If you answer and the caller asks for payment using a gift card, it's likely a scam. Legitimate organizations like law enforcement will not ask for payment with a gift card.
- If you receive a scam call, file a complaint with the [FCC Consumer Complaint Center](#) by selecting the "phone" option and selecting "unwanted calls." The data we collect helps us track trends and supports our enforcement investigations.
- If you have lost money because of a scam call, contact your local law enforcement agency for assistance.
- Ask your phone company if it offers a robocall blocking service. If not, encourage them to offer one. You can also visit the FCC's [website](#) for more information about illegal robocalls and resources on available robocall blocking tools to help reduce unwanted calls.
- Consider registering your telephone numbers in the [National Do Not Call Registry](#). Lawful telemarketers use this list to avoid calling consumers on the list.



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#### Tags:

[Caller ID](#) - [Constituencies](#) - [Consumer Protection](#) - [Consumers](#) - [Consumers \(general\)](#) - [Enforcement](#) - [Fraud](#) - [Robocall](#) - [Telephone Consumer Issues](#)



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## TOP STORIES



### TOP STORIES

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#### CYBERSECURITY

# Robocalls jumped 60 percent in the U.S. last year and scammers are finding more ways to make money

PUBLISHED FRI, JAN 4 2019 • 2:12 PM EST



**Kate Fazzini**  
@KATEFAZZINI

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### KEY POINTS

Some 48 billion robocalls were made last year to U.S. mobile phone users last year, according to YouMail, a company that tracks the calls.

The scams are surprisingly effective, with 3 percent to 5 percent of people responding to the automated messages and sometimes sending scammers thousand of dollars.

Cell carriers and tech companies are working to fix the problem, but criminals are outpacing them with cheap technology.



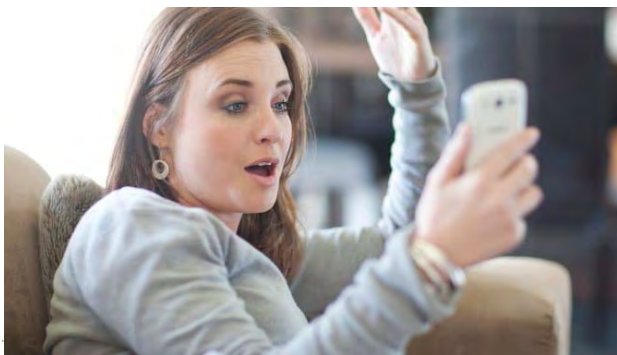
MARKETS



WATCHLIST



CNBC TV



Zero Creatives | Getty Images

It's not your imagination. You are getting bombarded with robocalls.

Robocalling, a practice where marketers send automated voice messages to thousands of phones at once, surged 60 percent in the U.S. last year to 48 billion calls, according to preliminary year-end data from YouMail, a robocall management company that tracks the volume of calls.

“Scam calls have been increasing very steadily, and it's driving people to not answer their phone,” said YouMail CEO Alex Quilici. “It's driving people to not answer their phone and it's kind of created this death spiral of phone calls as the robocallers ramp up their efforts, and the legitimate robocalls try harder to get through.”

Both mobile carriers and smart phone makers are racing to keep up with the influx, but have been unsuccessful so far because the technology to deploy the calls is cheap, easy and lucrative for scammers. Scams make up an estimated 40 percent of all robocalls, Quilici said, while the other 60 percent are “legitimate” robocalls, like those that come from pharmacies, libraries, schools and political candidates.

“New, inexpensive technology and products have enabled scammers, including those located outside the U.S., to set up mass calling operations that can place high volumes of spoofed calls with minimal investment,” said Andrew Morgan, a spokesman for [AT&T](#). “We will have to continue to find new tools as illegal scammers adjust their techniques to overcome the latest innovations.”

MARKETS

WATCHLIST

CNBC TV

## What can stop it?



Most wireless carriers have adopted a security protocol called [STIR/SHAKEN](#) to limit the number of calls hitting their networks. The protocol helps verify that the number displayed on caller ID is the same number that actually originated the call, and isn't a number spoofed by the sender, said David Weissman, a spokesman for [Verizon](#).

“Verizon continues to expand on spam identification and control features as part of our Caller Name ID app, which deployed over a year ago,” Weissman said. “The latest update allows subscribers to automatically forward spam calls that correspond to their selected level of risk straight to voicemail.”

[Apple](#) and [Android](#) both offer developer tools for app makers and functionality to block unwanted calls and known scammers.

In addition to STIR/SHAKEN, [AT&T](#) has been using data analysis and the “Call Protect” app to block calls, including 4.4 billion robocalls since 2016, Morgan said.

*cited in Victory Proceeding, LLC v. Tim Fox,  
No. 18-35163 archived on Sept 4, 2019*

## Robocall scams are surprisingly successful

The problem for consumers and operators is that scams work, Quilici said. Several robocall schemes are quite lucrative, particularly the 50 to 100 million fake IRS messages that circulate each month.

While only 3 percent to 5 percent of people return the calls, the IRS schemes can net criminals thousands of dollars each, with some users even setting up recurring payments, he said. Identity theft scams have also become increasingly popular, with the robocallers masquerading as health-care providers who collect valuable personal details from return callers.



MARKETS



WATCHLIST



CNBC TV

# What happened to the Do not Call list?



You can still add your number to the Do Not Call registry at donotcall.gov, and companies likely won't call you if your number is on the registry, Morgan said.

But robocallers who are illegitimate criminals calling from overseas locations have no stake in honoring the law.

Quilici said that when his company began tracking robocalls, it was under the impression that many of the "scam" calls were coming from legitimate but overzealous telemarketers. Further research has shown most of these were either identity or financial scams, he said.

**WATCH:** [Robocalls are getting out of hand and here's how to stop them](#)

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**VIDEO** 01:50

**Robocalls are getting out of hand and here's how to stop them**







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# Americans were hit with 26.3 billion robocalls in 2018, a whopping 46% increase from the year before — here are some ways to stop them

Paige Leskin and Prachi Bhardwaj May 2, 2019, 11:51 AM

Facebook



There are some tactics you can adopt to limit your number of robocalls. Carlos Barria/Reuters

- Robocalls are getting more and more prevalent.

- In 2018, Americans were hit with 26.3 billion robocalls — a whopping 46% increase compared to 2017.
- 
- While it's nearly impossible to be 100% robocall-free, here are some tactics you can adopt to limit your number of robocalls.
- 
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In November 2018 alone, Americans received an estimated 5.1 billion scam calls from automated machines — more than any month on record, according to [YouMail's robocall index](#).

That number was about 2.9 billion in the beginning of 2018, and the spike didn't come out of nowhere. Consumer advocates worry the number will only continue to increase, now that the FCC has [removed an Obama-era](#) definition of auto-dialers that the agency thought was too broad.

In 2018, Americans were hit with 26.3 billion robocalls — a whopping 46% increase compared to 2017, [according to The Wall Street Journal](#).

Federal agencies are taking action, [holding robocallers accountable](#) and searching for new ways to regulate as robocallers continue to become more sophisticated with their tactics. FCC chairman Ajit Pai [sent a letter in November](#) to more than a dozen phone providers demanding they adopt "a robust call authentication system to combat illegal caller ID spoofing." Pai warned that the FCC "will take action" if it doesn't see any progress in creating such a system by 2019.

Policies are in the works to address "neighborhood spoofing," which is the extremely effective tactic used by robocallers to make calls [look like they're coming from recipients' own area code](#) so they're more willing to answer. So far, no policy has been successful in preventing those.

Even when consumers don't fall for the scam and share personal information, being inundated with robocalls can be a liability: there's no way to know whether the unknown number dialing you is a time-wasting

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scam, or a real-life emergency. So while lawmakers and regulators work to figure out the best way to subside the number of outgoing scam calls, agencies and companies have come up with solutions to block the ones that get through.

It's nearly impossible to be 100% robocall-free, but here are some tactics you can adopt to limit your number of robocalls:

---

Add your name to the FTC's "Do not call" registry, and report the calls you get anyway.

FTC's "Do not call" registry, and report the calls you get anyway." data-title="" data-class=" postload" >

[WOCinTech Chat/Flickr](#)

Registration for the service began in 2003 and sign-ups don't expire, yet the FTC reported receiving 4.5 million complaints in 2017, at "an average of more than 375,000 robocall complaints per month" compared to 2015's 2.18 million.

*cited in Victory Processing, LLC v. Tim Fox, No. 18-35163 archived on Sept 4, 2019*

It isn't completely effective, but the people who signed up probably get fewer calls than they would have if they hadn't.

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Use your phone's Do Not Disturb mode so that you only get calls from people in your contact list.

Screenshot

This way you don't have to see the calls come through or have to ignore them. Keep in mind this strategy won't work for any professional hoping to hear from new clients or those who receive regular calls from unknown numbers are part of their job, but it's a great option if you have a separate, non-work phone.

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If you don't want to block all new numbers, block them as they come by going into the callers' contact information in your phone.

[Google Play](#)

This is especially helpful if there are a few numbers you get calls from frequently. If you choose the route of answering unknown numbers instead of waiting for a voicemail, keep a couple of things in mind:

Don't engage by speaking OR by pressing a number even to be taken off a list, [according to the FTC](#): "Doing so will probably lead to more unwanted calls. Instead, hang up and [file a complaint](#) with the FTC."

Train yourself to answer questions by repeating them instead of saying "yes," because that can be used as a vocal signature to make unauthorized credit card charges. For example, the answer to "Can you hear me?" should be "I can hear you," instead of "Yes."

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Buy a Samsung Galaxy S, Samsung Galaxy Note, or Google Pixel phone that lets you know a call is a scam, so you don't have to answer to find out.

Google's Call Screen feature. [Google](#)

Samsung's Smart Call feature flags calls it suspects are spam. Meanwhile, Google [recently announced](#) the addition of Call Screen to its Pixel phones. The software lets you use Google Assistant to answer a call and get an instant transcription. From there, you can instantly mark the call as spam.

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If you have any other phone, ask your carrier about caller ID options that help identify callers that aren't legitimate.

YouTube/Sprint

For now, Sprint and Verizon still make you pay for premium caller ID; AT&T and T-Mobile offer it for free to postpaid customers. Again, this won't completely eradicate calls but it'll help. Lately, [senators](#) and [members of congress](#) have been pushing for legislation that requires carriers to offer free robocalling blocking.

The FCC also started allowing carriers to "proactively block illegal robocallers" in November, but a lot of robocalls go through multiple carriers, which makes it nearly impossible to track the source.

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Use third-party apps like Nomorobo, Hiya, and RoboKiller.

Nomorobo, Hiya, and RoboKiller." data-title="" data-class=" postload" >

Nam Y. Huh/AP

Most of these apps will require a fee that can be paid monthly (about \$1 to \$3) or annually (about \$25). In addition to caller ID and personal block lists, they automatically block calls from telemarketers and robocallers, sometimes giving them a taste of their own medicine by responding with bots.

Some of these apps also give the option to make a caller hit a button (0 or 1) to prove they're not a bot, like some sites do with captchas. There are bots smart enough to get around it just like there are bots that get around captchas, though.

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For any phone that isn't iOS or Android, like landlines or Google Voice, use third-party subscription services like Jolly Roger Telephone Company.

DreamWorks/I Love You Man

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To join Jolly Roger, subscribers have to share their phone number and email address. After you pick a robot, you can send spam numbers to it and receive a recording of the call to your email so you still know what it was about.

But be careful with who you send to the bot, because it doesn't sound very professional judging by [The New York Times](#)' description. The Jolly Roger bots apparently give the caller generic "uh-huh" responses and then asks them to repeat the pitch when it's over.

---

And if you really want to scam a robocaller, take David Cogen's approach: He carries around a recording of static sound with a message that tells your robocaller your number is no longer available. Play on repeat until they hang up.

SEE ALSO: This viral video of a chimpanzee scrolling through Instagram proves how easy it is to get sucked into the app »

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More: [Features](#) [FTC](#) [FFC](#) [Senate](#) [Circuit](#) [Commission](#) Click on it to indicate an expandable section or menu, or sometimes previous / next navigation options.

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## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding Judgment and Post-Judgment Proceedings

#### Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

#### Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

#### Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

#### (1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

#### B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:



- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

**(2) Deadlines for Filing:**

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

**(3) Statement of Counsel**

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

**(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))**

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)**

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.gov)

### **Counsel Listing in Published Opinions**

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 10. Bill of Costs**

*Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>*

**9th Cir. Case Number(s)**

**Case Name**

The Clerk is requested to award costs to (*party name(s)*):

I swear under penalty of perjury that the copies for which costs are requested were actually and necessarily produced, and that the requested costs were actually expended.

**Signature**  **Date**

(use "s/[typed name]" to sign electronically-filed documents)

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Petition for Review Docket Fee / Petition for Writ of Mandamus Docket Fee				\$ <input style="width: 100px; height: 20px;" type="text"/>
<b>TOTAL:</b>				\$ <input style="width: 100px; height: 20px;" type="text"/>

**\*Example:** Calculate 4 copies of 3 volumes of excerpts of record that total 500 pages [Vol. 1 (10 pgs.) + Vol. 2 (250 pgs.) + Vol. 3 (240 pgs.)] as:

No. of Copies: 4; Pages per Copy: 500; Cost per Page: \$.10 (or actual cost IF less than \$.10);

TOTAL: 4 x 500 x \$.10 = \$200.

*Feedback or questions about this form? Email us at [forms@ca9.uscourts.gov](mailto:forms@ca9.uscourts.gov)*