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Rachel Harrison

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REGULATING ROBOCALLS AND MODERN DEBT COLLECTION PRACTICES—EXAMINING GOVERNMENTAL RESPONSES AND THEIR FIRST AMENDMENT IMPLICATIONS

INTRODUCTION

When people pick up their phones to answer a call, most individuals hope to speak with someone who is relaying an important message. With the recent influx of robocalls repeatedly dialing phone numbers, more people are becoming increasingly hesitant to accept a call when an unrecognizable string of numbers flashes across their phone screen. In a February 2019 report from the Federal Communications Commission, the agency reported that YouMail, a private company that collects information on call volume throughout the United States, estimated that upwards of 48 billion robocalls were placed in 2018, with 26.3 billion of those calls being made to mobile phones.¹

In an effort to combat the growing influx of deceptive calls and mitigate the daily annoyance that these calls bring to consumers, the United States Congress, the Federal Communications Commission, and the Consumer Financial Protection Bureau have sought to strengthen the regulations and penalties for telemarketers placing these calls and bolster the protections for consumers to prevent receiving these incessant calls.² The Fair Debt Collection Practices Act (FDCPA) was passed to eliminate abusive debt collection practices and applies to personal and household transactions.³ As federal agencies have increased their robocall and telemarketing regulations in efforts to protect American consumers from scams and deceptive call practices, debt collectors are increasingly being perceived as scammers. The Consumer Financial Protection Bureau (CFPB) has recently begun to respond to this issue by conducting

¹ U.S. FED. COMM. COMMISSION, CONSUMER AND GOVERNMENTAL AFF. BUREAU, CG DOCKET NO. 17-59, REPORT OF ROBOCALLS (2019).

² *The FCC's Push to Combat Robocalls*, FED. COMM. COMMISSION (last visited Nov. 26, 2019), <https://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing>.

In June of 2019, the Federal Communications Commission ruled that phone companies and individual consumers can opt-in to call blocking tools that stop robocalls from reaching consumers' phones. The FCC has also levied large fines against telemarketing companies who have engaged in spoofing, which is a technique used by telemarketing companies that tricks consumers into thinking that they are getting a call from a local number, making them more likely to pick up the phone.

Id.

³ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.01 (2019), LEXISNEXIS.

proposed rulemaking in order to better clarify permitted debt collection practices.⁴ Congress has also tried to respond to this issue by passing broader robocall statutes, such as the Telephone Consumer Protection Act (TCPA) and the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), which both delegate authority to agencies to implement measures that better protect American consumers. Yet, regulating debt collectors' communications also raises First Amendment concerns. These Congressional statutes that provide agencies and private entities with the authority to limit and block communications from debt collectors and robocallers could too greatly infringe one's constitutionally protected First Amendment rights.

The gap between permissible debt collection practices and ineffective federal robocall regulations demonstrates a shortcoming in policy-making where more specificity from the federal government is required to help dictate appropriate and effective parameters for legal debt collection practices. In order to properly protect debt collectors and debtors, federal agencies should amend their regulations to provide clearer and more useful rules for debt collectors when they try to recover their debts, while also ensuring that debt collectors are not effectively barred from trying to make good faith contact with the debtor. Additionally, in order to prevent the unconstitutional stifling of speech by debt collectors, Congress should amend its laws to more directly achieve its stated goals without being too over or under-inclusive of barring speech.

This Comment will provide background information on the steps that Congress and federal agencies have taken to try to solve the issues surrounding robocalls and fair debt collection practices, specifically examining the Fair Debt Collection Practices Act (FDCPA), the Federal Communication Commission's declaratory rulings on call blocking, the Consumer Financial Protection Bureau's notice of proposed rulemaking, the Telephone Consumer Protection Act (TCPA), and the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act). This Comment will examine the provisions and shortcomings of these statutes and regulations. Two notable shortcomings include the FCC employing over-broad standards to detect fraudulent calls and pre-emptively blocking those calls from reaching consumers, as well as the Fair Debt Collection Practices Act allowing consumers to cease all communications with debt collectors.

⁴ *Consumer Financial Protection Bureau Proposes Regulations to Implement the Fair Debt Collection Practices Act*, CONSUMER FINANCIAL PROTECTION BUREAU (May 7, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-proposes-regulations-implement-fair-debt-collection-practices-act/>.

This Comment will then examine the growing First Amendment concerns surrounding these provisions and apply a First Amendment analysis to the Fair Debt Collection Practices Act and the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act. Under a First Amendment analysis, the FDCPA could fail under a content-based strict scrutiny standard of review and under a commercial speech intermediate scrutiny standard of review, while the TRACED Act may be able to survive an intermediate scrutiny standard of review. The Fair Debt Collection Practices Act will be the first provision analyzed below.

I. FAIR DEBT COLLECTION PRACTICES ACT

A. *The Creation of CFPB*

Congress enacted the Fair Debt Collection Practices Act (FDCPA) in 1977 with the goal of preventing debt collectors from utilizing abusive debt collection practices against consumers.⁵ In 2010 under the Dodd-Frank Wall Street Reform Act, the CFPB was created and granted concurrent authority with the Federal Trade Commission (FTC) to oversee debt collection practices and enforce the goals and provisions of the Dodd-Frank Act.⁶ More recently in May of 2019, the CFPB decided to take action by issuing a notice of proposed rulemaking that seeks to provide consumers with stronger protections against debt collectors.⁷ The notice of proposed rulemaking highlighted the CFPB's intention to place limits on the number of calls that can be placed to debtors each week, to outline how debt collectors can utilize new technology to reach consumers, and its plan to require debt collectors to provide more information to consumers on how to respond to calls for the collection of their debts.⁸ The notice of proposed rulemaking specifically addresses new communications technology, such as text messaging, emails, and voicemails, that were unaddressed by the initial passing of the FDCPA.⁹ These regulations seek to modernize the FDCPA to address modern needs unique from the debt collection practices at the time of the law's passage.

The passage of the Dodd-Frank Act in 2010 allowed the FDCPA to be adapted to issues concerning consumers and debtors in a modern economy. Prior

⁵ Mattson, *supra*.

⁶ *Id.*

⁷ *Consumer Financial Protection Bureau Proposes Regulations to Implement the Fair Debt Collection Practices Act, supra*.

⁸ Mattson, *supra*.

⁹ *Id.*

to 2010, the FTC retained a majority of the enforcement role for the FDCPA. The FTC could work in conjunction with other federal agencies whose work related to a party identified to be the subject of an FDCPA enforcement action.¹⁰ The FTC was permitted under the FDCPA to issue advisory opinions on the proper application of the statute, but the agency lacked power delegated from Congress to create new rules and regulations to meet the growing challenges of a constantly modernizing consumer landscape.¹¹ The Dodd-Frank Act created the CFPB and delegated authority to the Bureau to create new rules for debt collection practices.¹² The purpose of the Consumer Financial Protection Bureau is to protect consumers from “unfair, deceptive, or abusive acts and take action against companies that break the law.”¹³ The agency’s supervisory authority is wide-ranging and includes financial institutions, depository institutions with assets over \$10 billion, mortgage-related businesses, pay day lenders, student lenders, and financial companies—including debt collectors.¹⁴

B. *Who the FDCPA Applies To*

The FDCPA applies directly to the conduct of debt collectors,¹⁵ which includes any act that is taken “in connection with the collection of any debt.”¹⁶ In order to qualify as a debt collector, the primary purpose of the actor must be to collect debts.¹⁷ Debt collection agencies are encompassed in the definition of debt collection since their primary business is based on the collection of debts. Under the FDCPA, an individual attempting to collect a debt from a consumer on behalf of the creditor is not necessarily a debt collector.¹⁸ People who collect consumer debt that is not at default at the time of purchasing the debt are not held as debt collectors, but those who purchase debts, such as debts that are part

¹⁰ *Id.* Other regulatory agencies would sometimes include the Federal Reserve Board, Office of the Comptroller of the Currency, Federal Deposit Insurance Corporation, Office of Thrift Supervision, National Credit Union Administration, the Secretary of Transportation, and the Secretary of Agriculture. *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *The Bureau*, CONSUMER FINANCIAL PROTECTION BUREAU (last visited Nov. 26, 2019), <https://www.consumerfinance.gov/about-us/the-bureau/>.

¹⁴ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.01 (2019), LEXISNEXIS.

¹⁵ Mattson, *supra* §1.03.

¹⁶ *Id.*

¹⁷ *Id.* An entity that collects debts while in the course of conducting other business does not qualify as a debt collector under the FDCPA. *Id.*

¹⁸ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.01 (2019), LEXISNEXIS. An example of this situation is where a car dealership makes collection calls for its finance company. *Id.*

of loan portfolios, that are in default at the time purchase are held to be debt collectors for the purposes of the Act.¹⁹

Case law has demonstrated a willingness by the courts to treat individuals as debt collectors under the FDCPA when through their communications with debtors, the caller requesting payment acts as if a debt is in default even if the debt has already been repaid. The Sixth Circuit Court of Appeals in *Bridge v. Ocwen Federal Bank*²⁰ held that a debt collector includes “any non-originating debt holder that either acquired the debt in default or has treated the debt as if it were in default at time of acquisition.”²¹ Through this ruling, the Sixth Circuit placed these debt collectors under the authority and limitations of the FDCPA for merely treating a perceived debt as if it was in default, thus opening debt collectors up to penalty for their mistakes or lack of updated information on the status of a debt.²² Harvesters of phone numbers can also be deemed debt collectors. The Ninth Circuit Court of Appeals in *Romine v. Diversified Collection Services, Inc.*²³ held that when the Automated Voice Telegram System service obtained debtors’ phone numbers and subsequently provided those numbers to creditors and collection agencies, that third party’s conduct would be enough to deem the company a debt collector.²⁴ The court relied on the legislative history of the FDCPA and argued that the purpose of the statute is to “limit harassing, misleading, and fraudulent contacts and communications with or about consumer debtors. . . . Most of the ‘collection abuses’ outlined in

¹⁹ Mattson, *supra* §1.03.

²⁰ *Id.* (see *Bridge v. Ocwen Fed. Bank*, 681 F.3d 355, 355–64 (6th Cir. 2012)). In *Bridge*, Lisa Bridge signed a mortgage and note for a home. William Bridge did not sign the note but signed the mortgage. There was confusion as to whether Lisa made her April 2002 mortgage loan payment due to a question of availability of funds. Lisa asserts that she made two mortgage payments in April 2002, even though only one payment was recorded. Lisa and William filed a complaint that asserted that Ocwen placed multiple phone calls to engage in debt collection for the alleged debt owed by Lisa Bridge and that these debt collection calls violated the FDCPA. In her third amended complaint, the Northern District of Ohio held that Lisa Bridge lost in her claim of violation of the FDCPA, because she failed to allege that Ocwen’s debt collection practices were “false and misleading, unfair, harassing, abusive, or otherwise violated the FDCPA.” *Bridge v. Ocwen Fed. Bank*, No. 1:07 CV 2739, 2014 U.S. Dist. LEXIS 74192, at *26 (N.D. Ohio May 30, 2014).

²¹ *Id.*

²² *Id.*

²³ Mattson, *supra* §1.03 (citing *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1143–49 (9th Cir. 1998)). In *Romine*, Diversified Collection Services (DCS), a debt collection agency, hired Western Union for its Automated Voice Telegram (AVT) service. The AVT service sends notices to debtors to call the AVT service. Once the call is placed, Western Union collects the debtor’s phone number and personal information and sends that information to DCS. Here, the petitioner called Western Union after getting a notification and was not told that the purpose of the call was to collect a debt that they allegedly owed. AVT then sent DCS the debtor’s information. DCS used the petitioner’s newly acquired phone number to contact the debtor on multiple occasions. *Romine*, 155 F.3d at 1143–49.

²⁴ *Id.* (citing *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1143–49 (9th Cir. 1998)).

the legislative history involve improper contacts with consumer debtors.”²⁵ If Congress intended to limit the term debt collector to just include registered debt collection agencies and exclude non-registered third parties whose work includes collecting debts, it would have specified the limitation.²⁶ Because of both Western Union’s advertised service to catalyze debt collection through its urgent contacts with debtors, as well as its conduct through the collection of phone numbers and personal information of debtors, Western Union was liable as a debt collector under the FDCPA.²⁷

C. Restrictions Placed on Debt Collectors under the FDCPA

Along with its defining debt collection in a way that protects consumers, the FDCPA attempts to impose restrictions on how a debt collector may contact a debtor.²⁸ In general, a debt collector cannot engage in conduct that would “harass, oppress, or abuse any person in connection with collection of debt.”²⁹ The debt collector also may not try to make contact with a debtor at inconvenient and impermissible times and places, as well as through unauthorized persons.

1. Unusual Times and Places

Debt collectors are not permitted to communicate with consumers during unusual times or places, or at any time or place that the collectors know would be an inconvenience for that debtor.³⁰ The debt collector is required to operate on the assumption that a convenient time to communicate with the consumer is between 8:00 a.m. and 9 p.m.³¹ A violation occurs if the consumer indicates to the collector that they work a night shift and the collector proceeds to call during early morning hours when the individual is likely to be asleep.³² Absent consent, communications taking place at the consumer’s place of employment are also prohibited if the debt collector is aware that the employer prohibits the employee from receiving those types of communications in the workplace.³³

²⁵ *Romine*, 155 F.3d at 1149.

²⁶ *Id.* at 1146.

²⁷ *Id.* at 1149.

²⁸ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

2. *Locating and Communicating with Individuals*

If the collector is attempting to locate the debtor, they may not tell the state where the debtor lives that the individual owes a debt.³⁴ The collector also may not communicate with a person more than once to track down the location of the debtor unless the first response was erroneous.³⁵ In terms of communicating with an individual, debt collectors may not use language on a mailed envelope or in its contents indicating that the debt collector is seeking to collect a debt from the recipient or that the communication relates to such topic, or communicate with anyone other than a debtor's attorney if the debtor retains counsel for the matter.³⁶ A debt collector is also prohibited from communicating about the debts with anyone other than the consumer, their retained attorney, a consumer-reporting agency, the creditor, and the creditor's attorney.³⁷

D. *Restrictions under Section 1692(d)*

Under §1692(d) of the FDCPA, a debt collector may not engage in conduct to recover debts whose consequences include harassing, oppressing, or abusing any person related to the debt.³⁸ The following list provides six categories of activities that are prohibited under this section.

1. *Violence & Other Criminal Means*

First, a debt collector cannot threaten or use violence or any other criminal means to harm a person's property, reputation, or person. This includes protection for third parties in the debtor's life, such as their employer, coworkers, friends, and family.³⁹

2. *Obscene or Profane Language*

Second, the debt collector is not permitted to use obscene or profane language or language that would offend the hearer.⁴⁰ Obscenity is defined as, "(1) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2)

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

³⁹ *Id.*

⁴⁰ *Id.*

whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁴¹ The Seventh Circuit Court of Appeals defined profane as “denoting certain of those personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive to members of the public who actually hear it as to amount to a nuisance.”⁴² Oftentimes, this is a fact specific inquiry for the court. Sexual innuendos, racial slurs, name-calling, stereotyping, and overzealous insults tend to be recognized by the court as being obscene and profane language.⁴³ Additionally, the profane or obscene message does not have to be directly relayed to the debtor. The debtor does not have to read or hear the original language in order for the natural consequence of the language to qualify as harassing, oppressing, or abusing the individual.⁴⁴

3. *Published Lists*

The third category of impermissible conduct states that debt collectors may not publish lists of consumers who have failed to pay their debts.⁴⁵

4. *Advertising Sale of Debt*

Fourth, a debt collector is not permitted to advertise a debt for sale in order to elicit payment of the debt from the debtor.⁴⁶ Advertising the sale of a debt could be viewed as a method to pressure the debtor to pay back their debts.⁴⁷ However, a debt collector is permitted to place advertisements for the sale of the debt as long as the advertisement’s purpose is not to elicit payment from the debtor.⁴⁸

⁴¹ *Id.*

⁴² *Id.* (quoting *Tallman v. United States*, 465 F.2d 282, 286 (7th Cir. 1972)).

⁴³ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

⁴⁴ *Id.* An example is where a debt collector leaves a message for the individual that is harassing in nature. The consumer did not have to hear or read this message contemporaneously for it to qualify as being harassing in nature. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* Debts can be sold by debt collectors on a secondary market. *Id.* The purchasers of debt will try to recover the outstanding debts and are paid once the debts are re-paid. Amy Fontinelle, *How the Debt Collection Agency Business Works*, INVESTOPEDIA (Jul. 6, 2019), <https://www.investopedia.com/articles/personal-finance/121514/how-debt-collection-agency-business-works.asp>.

⁴⁷ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

⁴⁸ *Id.*

5. *Telephone Harassment*

Fifth, telephone harassment is prohibited. The collector may not cause the phone to ring repeatedly and continuously with the intent to “annoy, abuse, or harass” the person who is called.⁴⁹ The creditor also may not engage in repeated phone conversations to harass the individual.⁵⁰ Because the Act specifically prohibits repeated telephone calls, the debt collector needs to consider the number of times that they are placing their calls. If the debtor terminates a call, the debt collector calling the debtor back contemporaneously with the end of the prior call would most likely count as harassment.⁵¹

6. *Caller Identity*

Sixth, debt collectors may not place these calls without disclosure of the caller’s identity.⁵² The FDCPA does not prohibit individuals from telling the debtor a trade name or alias. This is permitted because there is still a meaningful disclosure of the caller’s identity, regardless of whether the individual placing the call reveals their full name.⁵³

E. *Affirmative Protections for Debtors*

The FDCPA includes proactive protections for the debtor, such as permitting the debtor to notify the debt collector that they either refuse to pay the debt or express their wish for the debt collector to stop further communication.⁵⁴ If either of these wishes are demonstrated by the debtor, the debt collector must respect the consumer’s wishes and communication must come to a complete stop.⁵⁵ This bar to communication excludes the debt collector stating that their debt collection efforts are being terminated, notifying the debtor that the debt collector will remedy the debt by enforcing payment in court, and notifying the consumer that the debtor intends to invoke a special remedy not ordinarily utilized.⁵⁶ A lawyer could constitute a debt collector under FDCPA for their communications with the debtor. The Ninth Circuit Court of Appeals in *Romine* highlighted that a lawyer who is engaged in litigation to cover debts owed to the

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

creditor could constitute debt collection.⁵⁷ The Supreme Court in *Heintz v. Jenkins* stated that “Litigation . . . seems simply one way of collecting debt.”⁵⁸

The question remains whether a consumer could stop a lawsuit by barring further communications between themselves and the debt collector. The Supreme Court in *Heintz*⁵⁹ held that while it would be strange for the Act to permit the consumer to stop communications relating to a lawsuit and cause the litigation to cease, the statute already prevents this scenario by allowing the debt collector to argue that they are notifying the debtor that they are invoking a special remedy, which could mean that the creditor is going to enforce payment of the debt in court.⁶⁰ To prevent additional liability as a debt collector, attorneys for the debt collector who are notified of the debtor’s wishes to end communications should avoid communications with the debtor that are not specifically related to the procedure of the unfolding litigation.⁶¹

Even though the debtor can cut off communication with the debt collector, this protection may be waived. The Ninth Circuit Court of Appeals in *Clark v. Capital Credit & Collection Services* held that when a consumer communicates their wishes to terminate contact but subsequently contacts the debt collector, the consumer effectively waived their right to cease contact.⁶² In applying this ruling, the Eleventh Circuit Court of Appeals in *Shuler v. Ingram & Associates* held that a collector’s five phone calls to debtor, which included one successful contact and two voicemails after the debtor’s request to cut off communication, did not amount to harassment since the calls were made after the debtor contacted the collector to engage in further discussions regarding their debt. The debtor’s communication was effectively a waiver of the right to terminate communications.⁶³

As seen above, the FDCPA places restrictions on the methods by which a debt collector can contact a debtor to collect outstanding debts. In efforts to

⁵⁷ *Romine v. Diversified Collection Servs.*, 155 F.3d 1142, 1146 (9th Cir. 1998).

⁵⁸ *Id.* (quoting *Heintz v. Jenkins*, 514 U.S. 291, 297–98 (1995)).

⁵⁹ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS (citing *Heintz v. Jenkins*, 514 U.S. 291, 292–99 (1995)). In *Heintz*, Jenkins borrowed money from a bank to purchase a car. The bank’s lawyer, Heintz, filed a lawsuit in state court in order to recover the balance of the debt. The bank’s attorney sent a letter to Jenkins’s attorney, which listed the amount owed and the cost of the insurance purchased by the bank as a result of the debtor’s failure to insure the vehicle. Jenkins argued that Heintz and his law firm violated the FDCPA, because they sought to recover money that was not included in the original loan agreement. *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* (citing *Clark v. Capital Credit & Collection Servs.*, 460 F.3d 1162, 1166–79 (9th Cir. 2006).

⁶³ *Id.* (citing *Shuler v. Ingram & Assocs.*, 441 F. App’x 712, 714–21 (11th Cir. 2011)).

better clarify the FDCPA, the Consumer Financial Protection Bureau's notice of proposed rulemaking seeks to be able to provide more guidance to debt collectors on appropriate methods of communication, specifically addressing phone calls and limited content messages.⁶⁴

II. CONSUMER FINANCIAL PROTECTION BUREAU'S NOTICE OF PROPOSED RULEMAKING

A. *Limits on Phone Calls and Limited Content Messages*

In its notice of proposed rule making, the CFPB asserts that the agency's new regulations will seek to promulgate clearer standards for debt collectors when communicating with consumers through modern forms of communication, including emails, text messages, and voice mails.⁶⁵ Because these methods of communication are more sophisticated than simply placing phone calls, consumers have greater control in deciding how and when they interact with others. While these methods together provide a wider array of possibilities for contact with the consumer, they also provide easier ways to avoid communication. Consumers can choose to ignore emails, can more readily examine the identity of the person or company trying to make contact with them, and could decline contact altogether. Individuals using social media platforms can selectively choose their security settings to block contact and communication with unknown third parties, as well as restrict their ability to be identified by other users.⁶⁶

The CFPB plans to use the term, limited-content message, to identify the amount of information that a debt collector is allowed to include in messages sent to consumers without invoking the requirements of being a communication under the FDCPA.⁶⁷ This is significant since the proposed rule seeks to impose stricter requirements on the number of communications that debt collectors are permitted to make to consumers. Examples of limited-content messages include leaving voicemails or sending text messages to consumers' phones.⁶⁸ Because the proposed rule would allow leaving a limited content message, debt collectors

⁶⁴ *Consumer Financial Protection Bureau Proposes Regulations to Implement the Fair Debt Collection Practices Act*, CONSUMER FINANCIAL PROTECTION BUREAU (May 7, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-proposes-regulations-implement-fair-debt-collection-practices-act/>.

⁶⁵ *Id.*

⁶⁶ Debt Collection Practices Act (Regulation F), 12 C.F.R. pt. 1006 (2019), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf.

⁶⁷ *Id.* at 6.

⁶⁸ *Id.* at 7.

could be discouraged from engaging in continuous phone calls in efforts to convey their message to consumers.

The notice of proposed rulemaking places limits on the number of calls, or communications, that can be placed to debtors. Debt collectors would be permitted to make no more than seven attempted calls per debt within one week.⁶⁹ This provision has drawn criticism by consumer watchdog groups who are concerned that seven calls per week per debt can quickly become excessive, especially when individuals have multiple debts and have not formally opted-out of receiving text messages, e-mails, or voice-mails.⁷⁰

As will be seen below, the CFPB's notice of proposed rulemaking to limit the number of calls attempted by debt collectors to seven attempts per week⁷¹ follows in step with the FCC's opt-in call blocking system and the FTC's Do Not Call Registry. These collective efforts to greatly limit the number of calls getting through to consumers act as a major barrier for debt collectors and robocallers alike.

III. FEDERAL COMMUNICATIONS COMMISSION AND FEDERAL TRADE COMMISSION REGULATIONS

A. FCC Regulations and Efforts to Block Calls

On June 6, 2019, the Federal Communications Commission issued a declaratory ruling and notice of proposed rulemaking that allows phone companies to proactively block what they deem to be unwanted calls from reaching consumers.⁷² The decision by phone companies whether to block calls from incoming phone numbers shall be based on “reasonable call analytics.”⁷³ Reasonable call analytics could include factors such as, “large bursts of calls in a short timeframe; low average call duration; low call completion ratios . . . a large volume of complaints related to a suspect line; [and] sequential dialing

⁶⁹ *Consumer Financial Protection Bureau Proposes Regulations to Implement the Fair Debt Collection Practices Act*, CONSUMER FINANCIAL PROTECTION BUREAU (May 7, 2019), <https://www.consumerfinance.gov/about-us/newsroom/bureau-proposes-regulations-implement-fair-debt-collection-practices-act/>.

⁷⁰ *Consumer Watchdog's Proposed Debt Collection Rule Bites Consumers: Authorizes Harassment by Debt Collectors*, NATIONAL CONSUMER LAW CENTER (May 7, 2019), <https://www.nclc.org/media-center/consumer-watchdogs-proposed-debt-collection-rule-bites-consumers-authorizes-harassment-by-debt-collectors.html>.

⁷¹ *Consumer Financial Protection Bureau Proposes Regulations to Implement the Fair Debt Collection Practices Act*, *supra*.

⁷² FCC AFFIRMS ROBOCALL BLOCKING BY DEFAULT TO HELP PROTECT CONSUMERS, Federal Comm. Commission (June 6, 2019), <https://docs.fcc.gov/public/attachments/DOC-357852A1.pdf>.

⁷³ *Id.*

patterns.”⁷⁴ Companies are allowed to make these proactive call-blocking decisions on behalf of consumers as long as customers are aware of the call-blocking program and know that they have the option to opt-out.⁷⁵ Phone providers may also allow customers to opt-in to call blocking tools that would block phone calls from numbers that are not listed in a consumer’s contact list from ever reaching their phone.⁷⁶ In effect, this opt-in program permits consumers to designate who they are willing to receive calls from specifically according to the phone numbers that are identified on their contact list.

The FCC in their declaratory ruling states that it believes the benefit to consumers from offering opt-out call blocking services will exceed the costs incurred by telemarketers and businesses that try to establish communication with consumers but ultimately fail as a result.⁷⁷ The ruling cites that YouMail, a private company that collects information on call volume throughout the United States, reported that half of the top twenty spam callers were categorized as debt collection callers.⁷⁸ In addition to this finding, the Federal Trade Commission compiled reports of complaints filed by consumers and organized those complaints by category of communication. In the last fully published report issued in 2016, debt collection calls were the highest reported calls complained of by consumers.⁷⁹ Of the over 3 million complaints, debt collection calls were the highest reported complaint reaching 28% of the overall complaints filed.⁸⁰

B. FTC Regulations and the Do Not Call Registry

In 2003, the Federal Trade Commission started the National Do Not Call Registry, which provides a method for Americans to block calls from specific phone numbers.⁸¹ This service mainly serves individuals who are trying to block calls from telemarketers and salespersons. Once a phone number is added to the registry, the consumer’s phone number must be removed from the company’s

⁷⁴ Advanced Methods to Target and Eliminate Unlawful Robocalls, Call Authentication Trust Anchor, 47 C.F.R. §64 at 13 (2019), <https://docs.fcc.gov/public/attachments/FCC-19-51A1.pdf>.

⁷⁵ *Id.* at 12.

⁷⁶ *Id.* at 15.

⁷⁷ *Id.* at 14.

⁷⁸ *Id.* at 4.

⁷⁹ FTC CONSUMER SENTINEL NETWORK DATA BOOK at 78 (2016) https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2016/csn_cy-2016_data_book.pdf. The report defined debt collection calls as “repeatedly or continuously, falsely represents the amount or status of debt, fails to send written notice of debt, falsely threatens suits, uses profane language, fails to identify self as debt collections and/or violates other provisions of the Fair Debt Collection Practices Act.” *Id.*

⁸⁰ *Id.* at 3.

⁸¹ *The Do Not Call Registry*, FED. TRADE COMMISSION (last visited Nov. 27, 2019), <https://www.ftc.gov/news-events/media-resources/do-not-call-registry>.

call list within 31-day cycles.⁸² In the FTC’s Fiscal Year 2018 report, the most common complaint filed with the registry pertained to calls relating to “Reducing Debt” or debt collectors.⁸³ In 2018, 729,366 complaints were filed against debt collectors. 641,734 complaints were for debt collectors who contacted consumers via robocall. 87,632 of the complaints were filed against live callers.⁸⁴

The FDCPA and the CFPB’s notice of proposed rulemaking seek to establish clear standards for debt collectors to follow when placing debt collection calls.⁸⁵ The FCC’s 2019 declaratory ruling broadens the scope of regulation to permit phone companies to implement call-blocking technologies for phone numbers that are suspected to be fraudulent,⁸⁶ and the FTC’s Do Not Call Registry gives power to consumers to proactively halt repeated telemarketing calls.⁸⁷ Congress itself through the TCPA and the TRACED Act sought to provide clearer and stricter restrictions on placing robocalls without solely singling out debt collection calls. The overarching goals of both statutes, which will be analyzed below, are to ensure consumer privacy and protection from fraudulent and illegal robocalls.

IV. CONGRESSIONAL RESPONSE TO TELEMARKETING AND DEBT COLLECTION: THE TCPA AND THE TRACED ACT

A. *The Creation of the TCPA*

In an attempt to combat growing issues relating to telemarketers, Congress passed the Telephone Consumer Protection Act in 1991.⁸⁸ The TCPA restricts telemarketing calls made by automated dialing systems and pre-recorded voices

⁸² *Do Not Call Registry Data Book 2018: About the National Do Not Call Registry*, FED. TRADE COMMISSION (last visited Nov. 27, 2019), <https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/national-do-not-call-registry-data-book-fy-6>.

⁸³ *Do Not Call Registry Data Book 2018: Complaint Figures for FY 2018*, FED. TRADE COMMISSION (last visited Nov. 27, 2019), <https://www.ftc.gov/policy/reports/policy-reports/commission-staff-reports/national-do-not-call-registry-data-book-fy-6>.

⁸⁴ *Id.*

⁸⁵ See KURT R. MATTSON, *FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION* § 1.01 (2019), LEXISNEXIS.; See *Debt Collection Practices Act (Regulation F)*, 12 C.F.R. pt. 1006 (2019), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf.

⁸⁶ *Advanced Methods to Target and Eliminate Unlawful Robocalls, Call Authentication Trust Anchor*, 47 C.F.R. § 64 (2019), <https://docs.fcc.gov/public/attachments/FCC-19-51A1.pdf>.

⁸⁷ *The Do Not Call Registry*, *supra*.

⁸⁸ *FCC Actions on Robocalls, Telemarketing*, FCC, <https://www.fcc.gov/general/telemarketing-and-robocalls> (last visited Feb. 5, 2020).

from reaching consumers.⁸⁹ The 1991 law makes it unlawful for any person⁹⁰ to place a call using automatic dialing or artificial prerecorded voices without the prior express consent of the consumer.⁹¹ A telemarketing call is defined as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.”⁹²

B. Consent Requirements and Exemptions

The FCC’s 2013 enforcement rule implementing the TCPA required companies to obtain written consent before placing auto-dialed and pre-recorded calls to consumers. The 2013 rule also removed an exception that allowed businesses with an established business relationship with the consumer to place prerecorded telemarketing calls to consumers’ residential landlines.⁹³ Regardless of whether there was an existing business relationship, the 2013 rule required the business to obtain written consent before a pre-recorded call could be placed to the residential landline.⁹⁴ The rule also mandated that when the automated call is made, businesses are required to provide consumers with an automated opt-out feature, allowing them to immediately block the telemarketer from calling them.⁹⁵ Congress later changed the written consent requirement in the Bipartisan Budget Act of 2015 to exempt robocalls that were “made solely to collect a debt owed to or guaranteed by the United States” from the consent requirements.⁹⁶

The FCC justified this rollback of the consent requirements for debt collection services by highlighting that if debt collectors cannot contact consumers, debtors are at a greater threat of accumulating larger quantities of

⁸⁹ *Id.*

⁹⁰ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 16-72 (2016) (Declaratory Ruling), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf. The TCPA defines “person” as an individual, partnership, association, joint-stock company, trust, or corporation. *Id.* at 2.

⁹¹ Michael P. Daly et al., *New Telephone Consumer Protection Act of 1991 (TCPA) Rules Take Effect on October 16, 2013*, THE NATIONAL LAW REVIEW (Oct. 16, 2013), <https://www.natlawreview.com/article/new-telephone-consumer-protection-act-1991-tcpa-rules-take-effect-october-16-2013>.

⁹² 47 U.S.C.S. § 227(a)(4) (2019).

⁹³ Daly et al., *supra*.

⁹⁴ *Id.*

⁹⁵ FCC Actions on Robocalls, Telemarketing, FCC, <https://www.fcc.gov/general/telemarketing-and-robocalls> (last visited Feb. 5, 2020).

⁹⁶ Bipartisan Budget Act of 2015, Pub. L. No. 114-74, §301, 129 Stat. 584 (2015) (amending 47 U.S.C. § 227(b)).

debt.⁹⁷ These debt collection calls for debts owed to the United States government were limited to three calls within a 30-day period.⁹⁸ The Bipartisan Budget Act of 2015 made this exemption before the FCC had the opportunity to address whether government contractors were subject to the TCPA. The Bipartisan Budget Act of 2015 pre-empted agency rulemaking by ensuring that debt collection calls placed by government contractors were exempt from TCPA consent requirements, regardless of future agency rulemaking that would attempt to regulate government contractors under the purview of the TCPA.⁹⁹

In a 2016 declaratory ruling issued by the FCC, the agency clarified the TCPA rules applying to prerecorded phone calls and text messages placed by the government and directed to consumers.¹⁰⁰ In one of three petitions filed, Broadnet Teleservices LLC asked the FCC to order that federal, state, and local governments are not labeled as “persons” for the purposes of the TCPA.¹⁰¹ If the government qualifies as a person under the TCPA, then it cannot place pre-recorded or autodialed calls without following the statute’s consent requirements. The Commission agreed with Broadnet and reasoned that if Congress intended to define the government as a “person” under the TCPA, the statute would have included the government in its definition. Including the government in the TCPA’s definition of a person would place the government under TCPA restrictions and would significantly inhibit the government’s ability to make contact with citizens.¹⁰²

In addition to government exemptions, the FCC ordered that the term “person” does not include a contractor who is working on behalf of the federal government.¹⁰³ In order to claim the same exemption as the government under the TCPA, the contractor must be authorized to act as a government agent, act within the scope of its contractual relationship with the government, and the

⁹⁷ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 16-99, 1, 2 (2016) (Report and Order).

⁹⁸ *Id.* The idea behind the exemption is that if consumers cannot be contacted and informed of their debts, then consumers will continue to be uninformed about what they owe, leading to greater financial burden. *Id.*

⁹⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 16-72, 1, 12 n.96 (2016) (Declaratory Ruling), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf.

¹⁰⁰ *Id.* at 6–11.

¹⁰¹ *Id.* at 8.

¹⁰² *Id.* at 8. Types of communication that could be inhibited would include telephone calls to collect data for policy determinations, conducting phone surveys, and disseminating information regarding government assistance programs. *Id.*

¹⁰³ *Id.* at 9.

government must have given the contractor the authority to make the prerecorded or autodialed calls.¹⁰⁴

To support its narrowed definition of “person” under the TCPA, the FCC relied on the Supreme Court’s ruling in *Campbell-Ewald Co. v. Gomez*.¹⁰⁵ Plaintiff claimed that Campbell-Ewald, a government contractor recruiting for the United States Navy, violated the TCPA by sending automated text messages to recruits who did not consent to receiving them.¹⁰⁶ The Court maintained that the government and federal agencies are not subject to TCPA prohibitions, and government contractors may claim derivative immunity when they act based on authority properly designated to them by the federal government.¹⁰⁷ In *Campbell-Ewald*, however, Campbell-Ewald Co. did not have derivative immunity because Campbell-Ewald Co. sent unauthorized text messages, which exceeded the scope of the company’s authority from the government. The Navy gave Campbell-Ewald Co. specific instructions to “send text messages only to individuals who had ‘opted in’ to receive solicitations.”¹⁰⁸ Campbell-Ewald also promised to only use an opt-in list for sending out the text messages.¹⁰⁹ The company failed to follow its grant of authority and uphold its promises to the government and therefore lacked derivative immunity from TCPA violations.¹¹⁰

The Court in *Campbell-Ewald* did not hold that federal contractors categorically have the same immunity from liability under the TCPA. The Court also did not answer the question of whether federal contractors are “persons” under the TCPA. The Court’s holding, that federal contractors who act as agents of the federal government under agency law have derivative immunity from the TCPA,¹¹¹ is consistent with the FCC’s 2016 declaratory ruling. The FCC ruled that federal contractors, or those who act as agents of the federal government, are not “persons” subject to TCPA requirements.¹¹² In *Campbell-Ewald*,

¹⁰⁴ *Id.* The FCC was concerned that based on principles of agency law, the federal government could be held vicariously liable for the calls placed by a hired contractor. In the FCC’s DISH Declaratory Ruling, the FCC allowed a third party placing a call under the direction of the principle to claim the same privilege belonging to the principle. By allowing the contractors to be liable in the case, the federal government could incur vicarious liability, which could lead to increased litigation and lawsuits. *DISH Network, LLC* Declaratory Ruling, 28 FCC Rcd. 6574 6589, ¶ 38 (2013).

¹⁰⁵ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 16-72, at 11.

¹⁰⁶ *Id.* at 11

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 11 (quoting *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673–74. (2016))

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 5 (citing *Campbell-Ewald Co.*, 136 S. Ct. at 673–74).

¹¹¹ *Id.* at 11–12.

¹¹² Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 16-72, 1,

because the government contractor violated the government’s instructions, the company violated the authority granted to it by the government and therefore lost its immunity from TCPA liability.¹¹³ Therefore, the contractor would be considered a “person” under the TCPA.¹¹⁴

The TCPA’s consent requirements for individuals to place auto-dialed or prerecorded calls created stricter minimum standards for robocalls to be placed. These statutory barriers to contacting consumers through robocalls raise First Amendment questions as to whether the law unconstitutionally inhibits one’s freedom of speech to make contact with consumers through these means.

V. FIRST AMENDMENT CHALLENGES TO THE TCPA

Due to the sweeping effect that the Telephone Consumer Protection Act has on preventing robocallers from reaching citizens, there are mounting First Amendment concerns that the statute stifles the freedom of speech. In *Martin v. Struthers*, a landmark First Amendment decision, the Supreme Court held that a city ordinance that made it unlawful for a person to distribute “handbills, circulars, or other advertisements to ring the door bell, sound the door knocked, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars, or other advertisements” violated the First Amendment.¹¹⁵ The Court was forced to balance the interests of the homeowner in deciding whether they would receive the message against the interests in protecting citizens. The Court held that evaluating the dangers of accepting the distributed materials should be left to each homeowner to decide and that the “stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.”¹¹⁶

To decide whether a statute too greatly restricts the freedom of speech, the appropriate level of scrutiny must be applied to evaluate the law. The first step in applying the appropriate level of scrutiny requires courts to examine whether the statute is content-based or content-neutral.¹¹⁷ A content-based law is presumed to be unconstitutional, because it regulates speech based on its subject

8 (2016) (Declaratory Ruling), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf.

¹¹³ *Id.* at 12.

¹¹⁴ *Id.*

¹¹⁵ *Martin v. Struthers*, 319 U.S. 141, 142 (1943).

¹¹⁶ *Id.* at 146–47.

¹¹⁷ Minch Minchin, Article, *A Doctrine at Risk: Content Neutrality in a Post-Reed Landscape*, 22 COMM. L. & POL’Y 123, 123–24 (2017).

matter.¹¹⁸ Content-based laws are subject to strict scrutiny from the court, which is the toughest form of judicial scrutiny to overcome.¹¹⁹ To pass a strict scrutiny standard of review, the law must “further a ‘compelling governmental interest,’ and must have narrowly tailored the law to achieve that interest.”¹²⁰ Justice Thomas in *Reed v. Town of Gilbert* explained the standard for content-based regulation of speech as “apply[ing] to particular speech because of the topic discussed or the idea or message expressed.”¹²¹ This standard “requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”¹²² If the court cannot determine if the statute is facially content-based, then the court is permitted to examine the purpose and effects of the statute.¹²³

Content neutral laws regulate speech by limiting expression without concern for the substance of the speech itself.¹²⁴ These laws are subject to intermediate scrutiny.¹²⁵ Content neutral laws oftentimes address the time, place, or manner of the speech.¹²⁶ In order to pass intermediate scrutiny, the law must “further an important government interest . . . and must do so by means that are substantially related to that interest.”¹²⁷

U.S. federal courts have applied this framework to determine whether the TCPA is constitutional. First, a reviewing court must determine whether the statute is content-based or content-neutral. Second, the appropriate level of scrutiny is applied to the statute to determine whether its speech regulations are permissible.

¹¹⁸ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224–33 (2015). In *Reed*, the Supreme Court invalidated an Arizona ordinance that treated directional signs differently based on the content of the sign. For example, if the sign gave directions to a local church or espoused a political view, then that type of sign was regulated differently than a non-ideological sign. The majority held that content-based laws are subject to strict scrutiny from the Court. *Id.*

¹¹⁹ Minchin, *supra* at 124.

¹²⁰ *Strict Scrutiny*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/strict_scrutiny (last visited Feb. 5, 2020).

¹²¹ *Reed*, at 2227.

¹²² *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 564–66 (2011)).

¹²³ *Id.* at 2227.

¹²⁴ David L. Hudson, Jr., *Content Neutral*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/937/content-neutral> (last visited Feb. 5, 2020).

¹²⁵ *Id.*

¹²⁶ *Id.* An example of content neutral speech is in *Heffron v. International Society for Krishna Consciousness*, where Minnesota prohibited the sale of any merchandise or printed materials in parks. *Id.* (citing *Heffron v. International Soc’y for Krishna Consciousness*, 452 U.S. 640 (1981)).

¹²⁷ *Intermediate Scrutiny*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Feb. 5, 2020).

A. *Declaring the Debt Collection Exception Unconstitutional*

In March 2019, the Ninth Circuit Court of Appeals in *Duguid v. Facebook, Inc.* declared that the 2015 debt-collection exception to the TCPA is unconstitutional. In *Duguid*, Facebook began to send *Duguid* text messages in January 2014, even though *Duguid* did not have a Facebook account. *Duguid* tried to opt-out of the messages by sending an email requesting Facebook cease sending the text messages. The messages continued to be sent to *Duguid*. Facebook argued that the pleadings should be dismissed, because the messages fall under the emergency purpose exception under the TCPA.¹²⁸ The FCC has defined the emergency purpose exception to mean “calls made necessary in any situation affecting the health and safety of consumers.”¹²⁹

Along with its emergency purpose defense, the Ninth Circuit held that Facebook has standing to challenge the constitutionality of the TCPA and the amendments made to the Act in 2015. The first inquiry in a First Amendment analysis is whether the TCPA is a content neutral or content-based statute.¹³⁰ The Ninth Circuit Court of Appeals in *Gomez v. Campbell-Ewald Co.* held that the pre-2015 amended TCPA was content-neutral and passed intermediate scrutiny.¹³¹ The court in *Duguid* followed its own precedent that the TCPA was narrowly tailored and advanced the “‘government’s significant interest in residential privacy’ and left open ‘ample alternative channels of communication.’”¹³² Yet, the court further held that adding the debt-collection exception to the consent requirements for robocalls changes the nature of the TCPA and the First Amendment analysis framework.¹³³ With the debt collection exception, the TCPA places favor in speech whose purpose is to collect a debt owed to or guaranteed by the United States. This exception makes the statute content-based, because it examines speech for exemptions based on its content. Therefore, the statute is subject to strict scrutiny.¹³⁴

Under a strict scrutiny analysis, the government must demonstrate that differentiating between robocalls to collect debts owed to or guaranteed by the United States is a compelling interest and that the statute is narrowly tailored to

¹²⁸ *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1149–57 (9th Cir. 2019). An example of an emergency relevant to Facebook would be a Facebook account security problem. *Id.* at 1152.

¹²⁹ 47 C.F.R. § 64.1200 (2020).

¹³⁰ *Duguid*, at 1153.

¹³¹ *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014).

¹³² *Duguid* at 1153 (quoting *Moser v. FCC*, 46 F.3d 970, 973–74 (9th Cir. 1995); see also *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014)).

¹³³ *Id.* at 1153.

¹³⁴ *Id.* at 1153–54.

further that interest.¹³⁵ The government argues that its compelling interest is in the protection of personal privacy.¹³⁶ The court did not find this convincing since robocalls to collect debts infringe on the debtor's privacy, and robocalls in general are typically considered to be invasive of privacy regardless of the purpose. The court reasoned that when citizens consent to robocalls, they are typically less intrusive of people's privacy. The notion of giving consent to receive the call begins to lessen any heightened expectation of privacy that one may normally have.¹³⁷ By not requiring consent for robocalls to collect debts owed to or guaranteed by the United States, the government's own stated interest is not being met.¹³⁸

The government also offers an alternative interest aimed at protecting the public's financial interests.¹³⁹ Even if this is a compelling interest, the court does not believe that the debt collection exception is the least restrictive means to achieve its goals.¹⁴⁰ The 2015 statute could have addressed the nature of the relationship between the debt collector and the debtor, instead of the content of the call, which would have made the statute content-neutral.¹⁴¹ By creating an exemption based on the relationship between the government and the debtor, instead of based on speech relating to debt collection, the statute would have avoided regulating the content of the speech. The court also asserts that the government could have either had live callers contacting debtors or could have decided to place the calls itself.¹⁴²

The Ninth Circuit held that because the debt-collection exception is content-based and is not narrowly tailored to the government's compelling interest, it violates the First Amendment.¹⁴³ Some courts also examine whether the regulated speech constitutes commercial speech, which is a form of speech that is recognized as reflecting the economic interests of the parties. It is subject to intermediate scrutiny due to the government's higher interest in regulating economic information directed to consumers.¹⁴⁴ An explanation and analysis of commercial speech will be provided below.

¹³⁵ *Id.* at 1154–56.

¹³⁶ *Id.*

¹³⁷ *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1154–56 (9th Cir. 2019).

¹³⁸ *Id.* at 1155.

¹³⁹ *Id.* at 1156.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1156 (9th Cir. 2019).

¹⁴³ *Id.*

¹⁴⁴ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 558–73 (1980).

VI. FIRST AMENDMENT CONCERNS: COMMERCIAL SPEECH

When applying the First Amendment to determine whether a statute or regulation violates a person’s freedom of speech, the Supreme Court has recognized commercial speech as have its own category of regulated speech. The Supreme Court in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York* defined commercial speech and set forth the applicable First Amendment test for regulating commercial speech.¹⁴⁵ The Supreme Court defined commercial speech as an “expression related solely to the economic interests of the speaker and its audience.”¹⁴⁶ Commercial speech serves the speaker’s economic interests as well as society’s interest in receiving the “fullest possible dissemination of information.”¹⁴⁷ The Supreme Court in *Central Hudson* also decided that commercial speech receives an intermediate level of scrutiny.¹⁴⁸ In deciding to apply an intermediate level of scrutiny, the Court recognized that in traditional commercial speech, such as providing information through advertising, there is a greater governmental interest in suppressing messages that do not accurately inform consumers of relevant information.¹⁴⁹

The Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* held that for commercial speech, “a different degree of protection is necessary to ensure that the flow of truthful and legitimate commercial information is unimpaired.”¹⁵⁰ In crafting its own intermediate scrutiny analysis to determine whether a statute or regulation improperly infringes on commercial speech, a court must examine:

- (1) Does the speech constitute a misleading or unlawful activity?
 - a. If the speech is misleading or unlawful, then it is not protected under the First Amendment.
- (2) Does the state have a substantial interest in regulating the speech?

¹⁴⁵ *Id.* at 558–66.

¹⁴⁶ *Id.* at 561.

¹⁴⁷ *Id.* at 561–62.

¹⁴⁸ *Id.* at 573. (Blackmun, J., concurring) (noting agreement with the majority that an intermediate level of scrutiny for commercial speech is appropriate).

¹⁴⁹ *Id.* at 560–72.

¹⁵⁰ *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 772 n. 24 (1976)). In *Friedman*, the Supreme Court held that a Texas state statute prohibiting optometrists from using a trade name did not violate the First Amendment. The Court held that a trade name is a type of advertising for the types of services and goods that an optometrist provides its patients. The statute was upheld since it merely requires that the information portrayed to customers is accurate and not deceptive. This restriction does not prevent informational advertising to consumers. *Id.*

- (3) Does the regulation directly advance the state's interest?
- (4) Does the regulation achieve its goal by proportionate measures?

Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). In Central Hudson, the Public Service Commission of the State of New York issued an order in December 1973 stating that all electric utilities across the state must stop all advertising that promotes electricity use.¹⁵¹ At the time of the order, the Commission found that the state did not have enough fuel to meet customer demands. Three years later, the fuel shortage eased and the Commission extended the prohibition to include promotional advertising.¹⁵² In making this decision, the Commission relied on the nation's interest in preserving energy and its own interest in saving costs associated with energy production.¹⁵³

In applying its four-factor analysis, the Court in Central Hudson first recognized that the electric utilities' speech is neither misleading nor unlawful.¹⁵⁴ Second, the state's interests in banning promotional advertising includes energy conservation and preventing extra energy costs for consumers during peak periods of energy use. Both of these concerns represent substantial government interests.¹⁵⁵

Third, the Court examines whether the regulation directly advances the state's interests. The state's interest in protecting energy costs has too indirect and speculative of a connection between the banned advertising and the perceived harm.¹⁵⁶ On the other hand, the state's interest in conserving energy use has an "immediate connection between advertising and demand for electricity."¹⁵⁷ Under the fourth criteria, the Court held that the total ban on

¹⁵¹ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 558 (1980).

¹⁵² Id. at 559.

¹⁵³ Id. at 558–60.

¹⁵⁴ Id. at 566–68. One example of speech that does not receive First Amendment protection from the court is someone proposing to sell illegal drugs to another person. Because this is an unlawful activity, the commercial speech does not receive First Amendment protection and the Central Hudson test is not applied. A second example of unprotected speech is when a website author presents their site as collecting donations for hurricane relief when the money is actually going to a college student. This second example demonstrates misleading speech that would not receive First Amendment protection. Andrew L. Sullivan, *Leave Me Alone! The Delicate Balance of Privacy and Commercial Speech in the Evolving Do-Not-Call Registry*, 61 FED. COMM. L.J. 251, 258–59 (2008–2009).

¹⁵⁵ Id. at 568–69.

¹⁵⁶ Id. at 569. The court highlighted that there are other factors that could impact energy costs outside of promotional advertising. The link between promotional advertising during off-peak energy use periods and increased energy use during peak-use periods is too indirect of a link to justify regulating commercial speech.

Id.

¹⁵⁷ Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 569 (1980).

promotional advertisements is more extensive than necessary to achieve the state's goal.¹⁵⁸ The appellant in this case argues that it would advertise products that are energy efficient, and the Commission failed to discredit those efficient alternative energy sources. In addition, the Commission could have only restricted the content of the advertising by requiring certain information to accompany the promotional materials so that consumers are more aware of energy concerns and energy prices.¹⁵⁹ For these reasons, the regulation of the commercial speech violates the First Amendment.¹⁶⁰

Even though Central Hudson reviews commercial speech under intermediate scrutiny, there is uncertainty regarding whether the Supreme Court's decision in *Reed v. Town of Gilbert* forces commercial speech into a strict scrutiny standard of review. In *Reed*, the Court held that facially content-based regulations are subject to strict scrutiny regardless of the government's motive or content-neutral justification.¹⁶¹ One school of thought is that the Court in *Reed* did not signal that it intended to subsume Central Hudson's commercial speech test, did not reference Central Hudson in its reasoning, and that the sign regulations in *Reed* did not involve commercial speech.¹⁶² In a decision from the Northern District of California, the opinion stated, "The Supreme Court has clearly made a distinction between commercial speech and noncommercial speech, and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid."¹⁶³

Even though subsequent case law has distinguished commercial speech from a content-based strict scrutiny standard of review, other courts have held that strict scrutiny applies as long as the commercial speech is also content-based. Because the TCPA prohibits the use of autodialers when the express consent of the consumer is missing, this limitation is more likely to affect conveying certain types of information.¹⁶⁴ Autodialers could relay telemarketing calls that qualify as commercial speech or could place calls relating to an individual's financial information or personal health information.¹⁶⁵ One could argue that because

¹⁵⁸ *Id.* at 569–70.

¹⁵⁹ *Id.* at 569–71.

¹⁶⁰ *Id.* at 558.

¹⁶¹ *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1986–87 (2016) (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

¹⁶² *Id.* at 1990–92.

¹⁶³ *Id.* at 1991–92 (quoting *CTIA - The Wireless Ass'n v. City of Berkeley*, 139 F. Supp. 3d 1048, 1061 (N.D. Cal. 2015)).

¹⁶⁴ Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: FIRST AMENDMENT LESSONS FROM THE FCC'S TCPA RULES*, 84 BROOKLYN L. REV. 1, 50–51 (2018).

¹⁶⁵ *Id.* Using automated calls to relay this information is preferred since it reduces the chances that a

certain messages are better suited for autodialers, the content of speech relayed by autodialers is being regulated by the TPCA's requirements.¹⁶⁶ Because this is a content-based restriction, a court that is unwilling to differentiate between commercial speech and content-based speech would treat this provision under a strict scrutiny standard of review. In *Sorrell v. IMS Health Inc.*, a Vermont statute "restricts the sale, disclosure, and use for pharmacy records that reveal the prescribing practices of individual doctors."¹⁶⁷ The Court reasoned that on its face, the law is a content-based restriction on the "sale, disclosure, and use of prescriber-identifying information."¹⁶⁸ Because the statute bars the sale or disclosure of the information for marketing purposes, which demonstrates a disfavor of marketing, the statute is regulating "particular content."¹⁶⁹ The Court points to legislative findings to demonstrate that due to the law's purpose of "diminish[ing] the effectiveness of marketing by manufacturers of brand-name drugs,"¹⁷⁰ coupled with the content restriction on a type of speech, that Vermont is engaging in content-based view-point discrimination.¹⁷¹

Along with the statute's restrictions on marketing-related speech, *Sorrell* asserts that content-based regulation on commercial speech is justified to get a higher level of scrutiny when the government has a "legitimate interest in protecting consumers from 'commercial harms.'"¹⁷² The Supreme Court in *Bolger v. Youngs Drug Products Corp.* asserted that because of the greater risk for confusion or deception in advertising messages, statutes can impose content-based restrictions on commercial language.¹⁷³ In *Bolger*, a federal law prohibited the unsolicited mailing of advertisements for contraceptives.¹⁷⁴ The Court in *Bolger* relies on four factors taken together to hold that the mailings constitute commercial speech: (1) the speech proposes a commercial transaction, (2) the mailers consist of advertisements, (3) the advertisements refer to a specific product, and (4) the senders had an economic motivation for mailing the materials.¹⁷⁵ The Court maintained that the appellants' argument for shielding

consumer's personal information is leaked. Having a live person placing the call risks the confidentiality of the consumer's personal information. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011). The law prohibits pharmacies and health insurers from selling prescriber information and bars pharmacies from allowing prescriber-identifying information from being sold for marketing purposes. *Id.*

¹⁶⁸ *Id.* at 564.

¹⁶⁹ *Sorrell*, 564 U.S. at 563–64.

¹⁷⁰ *Id.* at 565.

¹⁷¹ *Id.* 564–65.

¹⁷² *Id.* at 579 (quoting *Cincinnati v. Discovery Network*, 507 U.S. 410, 426 (1993)).

¹⁷³ *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61 (1983).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 66–67.

people from getting these mailed materials because they may be found offensive is “classically not a justification validating the suppression of expression protected by the First Amendment.”¹⁷⁶

As will be seen below, the Ninth Circuit Court of Appeals in *Duguid* refused to apply intermediate scrutiny, because Facebook’s messages did not amount to commercial speech. When reviewing the constitutionality of the TCPA with the debt collection exemption, the *Duguid* court applied a strict scrutiny standard of review to the TCPA. This decision was ultimately based on whether the statute on its face regulates or restricts forms of speech.¹⁷⁷

VII. TCPA: IS STRICT SCRUTINY OR INTERMEDIATE SCRUTINY PROPER?

Without the 2015 debt collection exception to TCPA consent requirements, the TCPA was viewed as a content-neutral law designed to protect consumer privacy.¹⁷⁸ In *Duguid*, the plaintiffs argued that the exception for debt-collection calls made on behalf of the government is a content-based regulation subjecting the TCPA to strict scrutiny.¹⁷⁹ The United States District Court for the Southern District of New York also followed this trend in its *Mejia v. Time Warner Cable* decision, in which the court also decided to apply strict scrutiny to the TCPA when examining the exemption for autodialed calls made in relation to debts guaranteed by the United States.¹⁸⁰ Notably, the court recognized that the TCPA makes several distinctions between calls beyond just the debt collection exemption, such as between pre-recorded and autodialed calls versus live callers, as well as between calls made to wireless phones versus calls made to residential landline phones.¹⁸¹ These distinctions amount to content-based regulations of speech.

Before applying a strict scrutiny standard of review, the definition of commercial speech can be applied to determine whether TCPA communications constitute commercial speech. In *Duguid* under a TCPA analysis, the Ninth Circuit rejected applying intermediate scrutiny to Facebook’s messages because the speech did not satisfy its court’s own definition of commercial speech used

¹⁷⁶ *Id.* at 71 (quoting *Carey v. Population Servs. Int’l*, 431 U.S. 678, 681 (1977)).

¹⁷⁷ *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1149–57 (9th Cir. 2019).

¹⁷⁸ *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876–77 (9th Cir. 2014); see *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1153 (9th Cir. 2019) (quoting *Moser v. FCC*, 46 F.3d 970, 973–74 (9th Cir. 1995)).

¹⁷⁹ *Duguid*, 926 F.3d at 1153.

¹⁸⁰ Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech*, 84 BROOKLYN L. REV. at 46–47 (citing *Mejia v. Time Warner Cable, Inc.*, No. 15-CV-6445 (JPO), 2017 U.S. Dist. LEXIS 120445, at *45 (S.D.N.Y. Aug. 1, 2017)).

¹⁸¹ *Id.* at 50

in *Hunt v. City of Los Angeles*.¹⁸² The Ninth Circuit in *Hunt* stated that commercial speech is “‘defined as speech that does no more than propose a commercial transaction’ Where the facts present a close question, ‘strong support’ that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation.”¹⁸³ In *Duguid*, the plaintiff did not have a Facebook account, was alerted to nonexistent account activity, and the messages did not advertise or relate to any product for purchase.¹⁸⁴ Therefore, these security messages sent by an automated system do not constitute commercial speech.

The primary goal of the TCPA is to protect home privacy interests and one’s interests in being free from unwanted communications.¹⁸⁵ Under the *Reed* analysis, after determining if a statute on its face regulates content, the congressional intent or preference for speech can be inferred.¹⁸⁶ Congress arguably had a preference for live speakers over pre-recorded telemarketers, which revealed a content preference against advertising and solicitations.¹⁸⁷ Yet, Congress did not fully consider the utility of auto-dialed or pre-recorded calls. As the prevalence of wireless phones has increased and as businesses have more strongly relied on automated calls or pre-recorded calls to relay personal information, growing portions of content-based speech are being infringed upon by statute.¹⁸⁸ For example, pre-recorded calls may seek to deliver sensitive information in a secure manner.¹⁸⁹ In examining whether the calls constitute commercial speech, many of these pre-recorded calls do not propose a commercial transaction. Instead, they relay pertinent messages to consumers to keep them informed of various aspects of their lives. Because of the utility of these calls in relaying personal information to consumers in a secure manner, the trend in applying a strict scrutiny level of analysis should continue for TCPA regulated calls and FCC regulations that implement the TCPA.

¹⁸² *Duguid*, 926 F.3d at 1154 n.4.

¹⁸³ *Id.* (citing *Hunt v. City of L.A.*, 638 F.3d 703, 715 (9th Cir. 2011)).

¹⁸⁴ *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1149–57 (9th Cir. 2019).

¹⁸⁵ Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech*, 84 BROOKLYN L. REV. at 16–18.

¹⁸⁶ *Id.* at 33.

¹⁸⁷ *Id.* at 51–52.

¹⁸⁸ *Id.* at 52–53.

¹⁸⁹ *Id.* Examples of these calls could include updates on personal finances, travels information, medical information (including prescriptions or appointment reminders), or civic information. *Id.*

VIII. TRACED ACT

A. *The Creation of the TRACED Act*

On December 31, 2019, President Trump signed the Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act).¹⁹⁰ The law amends the TCPA to give power to the federal government to produce stronger response mechanisms and solutions to combat robocalls. The Act allows the FCC to have a longer statute of limitations to pursue illegal robocallers and permits imposing larger fines that will create a greater deterrent effect on robocallers.¹⁹¹ Specifically, the FCC is permitted to prosecute first-time robocallers for up to four years after the call. Fines for an intentional violation can total up to \$10,000.¹⁹²

The Act calls on the FCC to establish an interagency task force to address the prosecution of illegal robocalls and the enforcement of robocall statutes.¹⁹³ Section 5 of the Act gives authority to the Department of Justice to prosecute robocalling violations that cause “economic harm, physical danger, or erosion of an inhabitant’s peace of mind and sense of security.”¹⁹⁴ The interagency working group is to be composed of the Attorney General, and representatives from the Department of Commerce, the Department of State, the Department of Homeland Security, the Federal Communications Commission, and Federal Trade Commission, and the Consumer Financial Protection Bureau.¹⁹⁵ The Attorney General is also permitted to include non-federal stakeholders with relevant expertise in the working group as they see fit.¹⁹⁶ The working group is tasked with submitting a report to Congress on recommendations regarding the “(1) prevention and prosecution of such violations; and (2) a description of what progress . . . relevant Federal departments . . . have made.”¹⁹⁷

¹⁹⁰ Mitchell Brecher & Debra McGuire Mercer, *TRACED Act Subjects Robocallers to Increased Penalties, Outlines Regulatory and Reporting Requirements to Deter Violations*, THE NATIONAL LAW REVIEW (Jan. 8, 2020), <https://www.natlawreview.com/article/traced-act-subjects-robocallers-to-increased-penalties-outlines-regulatory-and>.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, § 5(a), 113 Stat. 3274.

¹⁹⁴ TRACED Act § 5(b)(g).

¹⁹⁵ TRACED Act § 5(c).

¹⁹⁶ TRACED Act § 5(d). An example as a non-federal stakeholder with relevant expertise is a representative from the National Association of Attorneys General. *Id.*

¹⁹⁷ TRACED Act § 5(e).

B. *Barriers to Contact*

Along with its enforcement directives for federal agencies, the TRACED Act calls on all phone carriers to implement a STIR/SHAKEN Authentication Framework.¹⁹⁸ This framework seeks to combat spoofing, which disguises an incoming phone number on caller-ID as a local number, making it more likely that someone answers the call.¹⁹⁹ The FCC is required to mandate that phone providers implement the STIR/SHAKEN authentication framework in areas with Internet access or to take reasonable steps to implement a similar call authentication system in areas without Internet access within 18 months of the passage of the Act.²⁰⁰ In areas with internet access, the FCC is instructed that if a phone provider has not adopted the STIR/SHAKEN authentication framework, has not agreed to participate in the STIR/SHAKEN framework, has not begun to implement the STIR/SHAKEN framework, or will not be capable of implementing the STIR/SHAKEN framework no later than 18 months after the passage of the Act, then the FCC shall penalize the carrier no later than 12 months after the passage of the Act.²⁰¹

The TRACED Act includes a Safe Harbor provision, which charges the FCC to promulgate rules no later than one year after the passage of the Act that protect carriers from mistakes they may make when blocking calls.²⁰² A phone provider is excused from liability for inadvertent call blocking when a call is misidentified due to their call authentication frameworks. In addition, the party that is adversely affected by the authentication framework may pre-emptively seek to verify the authenticity of their calls.²⁰³ The Safe Harbor provision also ensures that a carrier's implementation of its call blocking framework cannot be added as an additional line item charge on a customer's monthly phone bill.²⁰⁴

¹⁹⁸ SHAKEN/STIR are standards employed when a call is travelling through "interconnected phone networks . . . [and] are 'signed' as legitimate by originating carriers and validated by other carriers before reaching consumers. SHAKEN/STIR digitally validates the handoff of phone calls passing through the complex web of networks, allowing the phone company of the consumer receiving the call to verify that a call is from the person making it." *Combating Spoofed Robocalls with Caller Id Authentication*, FCC, <https://www.fcc.gov/call-authentication> (last visited Feb. 5, 2020).

¹⁹⁹ "Spoofing is when a caller deliberately falsifies the information transmitted to your caller ID display to disguise their identity. Scammers often use neighbor spoofing so it appears that an incoming call is coming from a local number, or spoof a number from a company or a government agency that you may already know and trust." *Caller ID Spoofing*, FCC, <https://www.fcc.gov/consumers/guides/spoofing-and-caller-id> (last visited Feb. 6, 2020).

²⁰⁰ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, §§ 4(b)(1)-4(b)(2), 113 Stat. 3274.

²⁰¹ TRACED Act § 4(b)(2)(A).

²⁰² TRACED Act § 4(c).

²⁰³ *Id.*

²⁰⁴ *Id.*

In conjunction with the FCC’s June 2019 Declaratory Ruling permitting consumers to opt-out of their phone carrier from proactively blocking robocalls,²⁰⁵ the TRACED Act stipulates that no later than 1 year after the passage of the Act, the Commission is charged with issuing a rule that ensures that robocall blocking services are provided to consumers with an opt-in or opt-out option.²⁰⁶ The law requires that these services be provided at no additional charge to the consumer and that carriers should “make all reasonable efforts to avoid blocking emergency public safety calls.”²⁰⁷

Section 8 of the TRACED Act states that there may be parties who are exempt from the statute’s consent requirements.²⁰⁸ Under the TCPA, FCC regulations, and Supreme Court holdings, auto-dialed and pre-recorded calls placed by the government and authorized government agents are exempt from having to secure written consent to contact individuals.²⁰⁹ Previously, this has been reasoned by emphasizing that the purpose of these calls, which is oftentimes to relay important information to citizens, is too important of a message to subject to further regulation.²¹⁰ Section 8 stipulates that for any exemptions to robocall requirements, the FCC shall ensure that those calls are regulated as to “(1) the classes of parties that may make such calls; (ii) the classes of parties that may be called; and (iii) the number of such calls that a calling party may make to a particular called party.”²¹¹

IX. DISCUSSION

While it is important that consumers are protected from deceptive debt collection practices, it is also important to ensure that debt collection communications are not effectively eliminated altogether. Debt collection serves a valid purpose in ensuring that creditors are paid back for their loans. Ultimate failure by the debtor to repay these loans could have a dire impact on businesses that need to recover their loaned funds. In the discussion section, this Comment

²⁰⁵ Advanced Methods to Target and Eliminate Unlawful Robocalls, Call Authentication Trust Anchor, 47 C.F.R. §64 (2019), <https://docs.fcc.gov/public/attachments/FCC-19-51A1.pdf>.

²⁰⁶ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, § 10(b), 113 Stat. 3274.

²⁰⁷ TRACED Act § 10(b)(j)(1)(C).

²⁰⁸ TRACED Act § 8.

²⁰⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, FCC 16-72, 1, 8 (2016) (Declaratory Ruling), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf; see *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 673–74. (2016)).

²¹⁰ Justin Hurwitz, *Telemarketing, Technology, and the Regulation of Private Speech: FIRST AMENDMENT LESSONS FROM THE FCC’S TCPA RULES*, 84 BROOKLYN L. REV. 1, 50–51 (2018).

²¹¹ TRACED Act § 8.

will address FCC and CFPB regulatory shortcomings and solutions to these problems. Then, First Amendment analyses of the FDCPA and the TRACED Act will be conducted to determine whether the statutes withstand a First Amendment analysis by a reviewing court.

A. *Regulatory Concerns*

The FCC's June 2019 declaratory ruling permitting opt-in call blocking tools bases its utilization of the tools on over-broad standards.²¹² Phone carriers deciding whether to block a call from a phone number is based on factors that include, "large bursts of calls in a short timeframe; low average call duration; low call completion ratios . . . a large volume of complaints related to a suspect line, [and] sequential dialing patterns."²¹³ Phone calls from debt collectors could have these characteristics, such as short call times and low call completion ratios, by virtue of the topic of the call. A consumer evading payment on a debt may hang up the phone once they hear that it is a debt collector or an automated voice on the other end of line. In addition, consumers having the option to block all calls from unknown numbers limits contact with debt collectors but also has wide ranging repercussions for other businesses with similar call characteristics.²¹⁴

Along with these regulatory limitations, the FDCPA has also greatly limited whom consumers speak with. Under the FDCPA, debtors are entitled to tell debt collectors that they wish to cease communication.²¹⁵ The Supreme Court in *Heintz v. Jenkins* assured that a debtor would not be able to cut off litigation by ceasing communications, because the debt collector could argue that their communication with the debtor qualified as an effort to discuss either a special remedy or the pending litigation.²¹⁶ Yet, contact by the debt collector's lawyers to the creditor relating to the debt may result in further violation of the FDCPA.²¹⁷ The Supreme Court is mistaken with its proposed defenses. Discussing the pending litigation, which could address settling a case or requesting documents for discovery, inherently relates to the debt collection

²¹² Advanced Methods to Target and Eliminate Unlawful Robocalls, Call Authentication Trust Anchor, 47 C.F.R. §64 ¶25 (2019), <https://docs.fcc.gov/public/attachments/FCC-19-51A1.pdf>.

²¹³ *Id.* at §64 ¶35 (2019), <https://docs.fcc.gov/public/attachments/FCC-19-51A1.pdf>.

²¹⁴ For example, a health care provider or a local municipality with pre-recorded or autodialed calls could experience similarly low call completion rates and low average call durations.

²¹⁵ KURT R. MATTSON, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

²¹⁶ Mattson, *supra* §1.06. (citing *Heintz v. Jenkins*, 514 U.S. 291, 292–99 (1995)).

²¹⁷ *Romine*, 155 F.3d at 1146 (quoting *Heintz v. Jenkins*, 514 U.S. 291, 297–98 (1995)) ("Litigation . . . seems simply one way of collecting debt.").

efforts. These FDCPA limitations could make it nearly impossible to communicate about a case without invoking additional FDCPA liability.

To address these issues, the CFPB's final rule should include clear exceptions for debt collection agencies that are trying to communicate with debtors on matters regarding official recourse and pending litigation. An example of permissible contact should include all communications between the attorneys of both parties. If the CFPB was actually concerned that litigation could qualify as communication with the debtor to retrieve owed debts, the rule would provide a total bar for communication between the creditor's attorney and the debtor. As a solution, the rule could mandate that if communication directly with the debtor was absolutely necessary, or if the debtor is representing pro se, then communication must be done before a judge, mediator, or court appointed officer to ensure fair communication practices. By allowing necessary communication in a controlled and specific manner, debt collectors will be able to seek redress for harms suffered with less concern for whether they are exposing themselves to additional liability.

In order to resolve the issue of consumers becoming completely unreachable to debt collectors, a reporting system could be created that would require debt collectors to submit annual data to the FCC, the CFPB, and Congress to demonstrate a good faith basis for communicating with consumers. If these entities list their legitimate purposes in contacting consumers within reasonable constraints imposed by statute or regulation, such as only placing calls during normal day-time hours and not dialing debtors while they are working at their place of employment, then they should enjoy greater leeway from the federal government in not having their communications limited or blocked from reaching consumers. Including call times and the number of completed calls will also provide concrete and accurate data for the FCC's measure of reasonable analytics.²¹⁸ By allowing debt collectors greater leeway based on good behavior mechanisms, collectors will have greater incentives to comply with federal regulations and regain public trust.

Federal agencies could also move to require debt collectors to make live phone calls whose contents are recorded for monitoring purposes. Monitoring these calls could help to ensure that collectors do not employ harassment techniques. By forcing collectors to only use live phone calls, the number of

²¹⁸ The FCC's 2019 declaratory ruling permitted phone companies to utilize reasonable analytics to determine whether a call should be blocked from a consumer's phone. FCC AFFIRMS ROBOCALL BLOCKING BY DEFAULT TO HELP PROTECT CONSUMERS, Federal Comm. Commission (June 6, 2019), <https://docs.fcc.gov/public/attachments/DOC-357852A1.pdf>.

deceptive and harassing pre-recorded or auto-dialed calls could decrease, debt collectors could work to ensure that they are paid back in full, and debt collection calls would still be able to reach debtors for their intended purpose.

In addition, the CFPB should take more seriously the issue of regulating limited content messages.²¹⁹ The CFPB's notice of proposed rulemaking fails to provide clear protections to consumers on how they can protect themselves and opt-out of receiving text messages, e-mails, and voicemails from debt collectors.²²⁰ The notice lacked guidance to the public on whether the agency is leaning towards favoring a cap on the number of limited content messages that can be sent to consumers within a given period.²²¹ The National Consumer Law Center highlights that the CFPB should ensure that consumers are able to directly opt-out of receiving limited content messages on the platform from which they receive messages, instead of requiring formal and time consuming opt-out procedures via written mail.²²² Consumers should be able to send a reply text message or dial a callback number to indicate that they wish to opt-out of receiving further limited content messages. In addition, the CFPB should commit to placing maximum caps on the number of limited content messages sent to debtors. By allowing an unlimited number of messages to be sent, individuals will be inundated with communications that will make rectifying their debts even more confusing and cumbersome.²²³

In conclusion, the FCC and CFPB should work to create clearer measures and tools to aid debt collectors in recovering debts without incurring additional liability from federal agencies. Congress has enacted statutes that seek to both regulate debt collection practices and restrict robocalls. Robocalls encompass a wider array of solicitation calls beyond just debt collection. By strictly regulating these calls, greater First Amendment concerns arise over whether the statutes violate the freedom of speech. The FDCPA and the TRACED Act will both be analyzed. For each statute, this Comment will examine whether the statutes are

²¹⁹ Limited-content message is a term used to identify the amount of information that a debt collector is allowed to include in messages sent to consumers without invoking the requirements of being a *communication* under the FDCPA. Examples typically include text messages, e-mails, and voicemails. Debt Collection Practices Act (Regulation F), 12 C.F.R. pt. 1006 at 6 (2019), https://files.consumerfinance.gov/f/documents/cfpb_debt-collection-NPRM.pdf.

²²⁰ The notice only proposes that limited content messages provide instructions to consumers on how to opt-out of receiving the messages. The notice fails to outline simple or modern methods on how consumers should be allowed to opt-out. Debt Collection Practices Act (Regulation F), *supra* at 7.

²²¹ Debt Collection Practices Act (Regulation F), *supra* at 6–7.

²²² *CFPB Debt Collection Rule Must Protect Consumers, Not Abusive Collections May 2019*, NATIONAL CONSUMER LAW CENTER 1, 1 (2019), https://www.nclc.org/images/pdf/debt_collection/cfpb-debt-collection-rule-summary-2019.pdf.

²²³ *Id.*

content-based, content-neutral, or constitute commercial speech. Then the appropriate level of scrutiny will be applied to the statutes to determine whether the statutes are constitutionally permissible under the First Amendment.

B. First Amendment Statutory Concerns

The policies set forth by the FDCPA and TRACED Act both restrict callers and include provisions that allow phone carriers and consumers to implement and utilize systems that would block robocalls from reaching consumers' phones. With governmental authority to both preemptively block calls and implement the STIR/SHAKEN framework, the issue arises of whether these call-blocking technologies stifle speech. Each of these laws will be evaluated based on their content and whether they constitute commercial speech.²²⁴ To determine whether the statutes violate the First Amendment, the appropriate level of scrutiny will be applied to the laws. The FDCPA will be evaluated first and the TRACED Act will be evaluated second.

1. First Amendment and the FDCPA

It is important to examine the FDCPA to determine whether the statute sets forth permissible constraints on speech relating to debt collection under the First Amendment. First, to determine whether the FDCPA's requirements violate the First Amendment, one must decide whether the statute is content-neutral or content-based.²²⁵ There is a strong argument that the statute is content-based and violates the First Amendment. The statute on its face directly limits speech relating to debt collection. It does so by specifically regulating the manner by which debt collection calls are made, prohibiting inappropriate and harassing content, and granting debtors the ability to end all communication relating to the debt.²²⁶ The intended individuals affected by the statute are debt collectors. Because the statute on its face expresses a preference disfavoring debt collection

²²⁴ Because the constitutionality of the TCPA was challenged under a First Amendment framework in *Duguid v. Facebook, Inc.* and *Mejia v. Time Warner Cable, Inc.*, the statute is omitted from the First Amendment analysis.

²²⁵ *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1153 (9th Cir. 2019); *See Reed v. Town of Gilbert*, 135 S. Ct. at 2224–33 (explaining that content-based statutes are presumed to be unconstitutional, because they regulate speech based on its subject matter; *See* (David L. Hudson, Jr., *Content Neutral*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/937/content-neutral> (last visited Feb. 5, 2020) (explaining that content-neutral statutes regulate speech by limiting expression without concern for the substance of the speech itself, oftentimes by regulating the time, place, and manner of the speech)).

²²⁶ KURT R. MATTSO, FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION §1.06 (2019), LEXISNEXIS.

calls and singles out a specific class of individuals,²²⁷ the statute is content-based and is analyzed under a strict scrutiny standard of review.²²⁸

Even though the statute appears to be content-based, one could argue that the regulated speech qualifies as commercial speech. The debt collection calls being placed represent the economic interests of the creditor, and public policy favors consumers having an expansive knowledge of information that directly relates to their financial interests.²²⁹ Under a Central Hudson intermediate scrutiny analysis,²³⁰ we will first presume that the debt collection practices are not misleading or unlawful activity. Second, the state arguably has a substantial interest in regulating this speech to prevent harmful debt collection practices. However, under the third prong of the Central Hudson commercial speech analysis, the regulations limiting the manner through which the calls are placed do not directly advance the state's interest in regulating harmful debt collection practices. The FDCPA asserts that people who collect consumer debts that are not at default at the time of purchase of the debt are not held as debt collectors under the meaning of the statute. By failing to regulate debt collectors who are taking advantage of debtors who are unaware of whether their debt is actually in default, the statute is under inclusive in preventing harmful debt collection practices and fails to directly advance the state's interest.

Under the fourth prong of the Central Hudson analysis,²³¹ the FDCPA does not achieve its goal by proportionate means. Under the statute, debt collectors cannot cause the phone to ring repeatedly and continuously with the intent to “annoy, abuse, or harass” the person who is called.²³² The consumer is also permitted to notify the debt collector that they either refuse to pay the debt or express their wish for the debt collector to stop further communication.²³³ These provisions are not proportionate to the goals of the Act. Determining whether a caller had the intent to annoy or harass a debtor seems like an entirely subjective analysis that cannot be found by a trier of fact without some form of call logging by the debt collector. In addition, allowing a debtor to cut off all communication

²²⁷ The Supreme Court in *Reed v. Town of Gilbert* recognized that singling out a particular group via statute is not dispositive of a statute being content-based. Rather, this factor should be analyzed with the totality of the statute. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230–31 (2015).

²²⁸ *Id.* at 2227.

²²⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–62 (1980).

²³⁰ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980).

²³¹ *Id.*

²³² 15 U.S.C.S. § 1692(d) (LexisNexis 2019).

²³³ KURT R. MATTSON, *FAIR DEBT COLLECTION PRACTICES: FEDERAL AND STATE LAW AND REGULATION* §1.06 (2019), LEXISNEXIS.

from a debt collector, who may have good reason to regularly contact a debtor, is an overly broad moratorium on creditor-debtor contact that precludes productive and informative conversations between the two sides. Because the statute is not able to satisfy the Central Hudson four-part inquiry, the FDCPA would fail a commercial speech First Amendment analysis.

If the speech does not constitute commercial speech and is held as being content-based, then under a strict scrutiny analysis, it would fail.²³⁴ The government could argue that there is a compelling government interest to protect individuals from debt collection calls that harass debtors. However, the statute is not narrowly tailored to achieve this goal. The statute is over-inclusive, because it permits individuals to cut off communication with creditors.²³⁵ For example, attorneys for the debt collector, after being notified of debtor's wishes to end communications, have to avoid communications with the debtor that are not specifically related to the unfolding litigation, which puts the debt collector in a difficult position to decipher whether the communication regarding litigation actually relates to the subject of debt collection. This is very nuanced and easily subject to error by even the most careful of attorneys or parties. In addition, repeated phone calls can easily be viewed as harassment. In reality, a debt collector who is trying to reach a debtor may have called back after the phone line was disconnected. The debt collector may have the purpose of making honest and well-intentioned contact with a debtor. However, the statute presupposes mal-intent, placing debt collectors immediately in the realm of harassment and liability. Because the statute is over-inclusive and is not narrowly tailored to achieve its goal, it should fail a strict scrutiny analysis by the court.

2. *First Amendment and the TRACED Act*

The TRACED Act must first be evaluated to determine whether the statute is content-neutral or content-based. The TRACED Act would most likely be considered a content-neutral statute, because unlike the TCPA, the law does not make specific exceptions for particular types of calls. The statute is concerned with stopping illegal robocalls and implements frameworks to prevent spoofing, which is a deceptive practice that does not constitute a particular type of

²³⁴ One could argue that the regulated speech does not constitute commercial speech, because under the Supreme Court's commercial speech factor analysis in *Bolger*, the reviewing court would need to know that the regulations restricts speech relating to advertisements and products for sale. Collecting debts may not necessarily qualify as satisfying either of these two categories. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983).

²³⁵ Mattson, *supra*.

protected speech.²³⁶ Because the statute is content-neutral, it will fall under an intermediate scrutiny analysis.²³⁷ To pass intermediate scrutiny, the statute must further an important government interest and must do so by means that are substantially related to that interest.²³⁸ Here, the government's interest in preventing robocalls that harass and invade the privacy of consumers is likely to be viewed as an important goal. In addition, the government's mandate to carriers to adopt the STIR/SHAKEN frameworks is substantially related to that interest. Under an intermediate scrutiny analysis, the statute would most likely not violate the First Amendment.

The issue of whether the calls constitute commercial speech is immaterial. First, the statute is content-neutral, which ensures an intermediate level of scrutiny. Second, the TRACED Act seeks to curb illegal robocalls and combats fraudulent spoofing calls from reaching consumers. The Supreme Court in *Central Hudson* asserted that the First Amendment does not protect illegal speech,²³⁹ and the TRACED Act is concerned with combatting illegal calls and preventing callers from fraudulently hiding their identities from consumers.²⁴⁰ *Central Hudson* defined commercial speech as, "expression related solely to the economic interests of the speaker and its audience."²⁴¹ If the robocall is placed for fraudulent purposes, then call does not pertain to a true economic interest of the audience and should not be considered commercial speech. Because the statute is mainly concerned with illegal robocalls that serve no utility and deceive the consumer into answering the phone, the calls do not elevate to the status of constituting commercial speech.²⁴²

Section 8 of the TRACED Act grants the FCC the authority to implement additional protections for consumers from robocalls that can be placed without

²³⁶ *Combatting Spoofed Robocalls with Caller Id Authentication*, FCC, <https://www.fcc.gov/call-authentication> (last visited Feb. 5, 2020).

²³⁷ David L. Hudson, Jr., *Content Neutral*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://mtsu.edu/first-amendment/article/937/content-neutral> (last visited Feb. 5, 2020).

²³⁸ *Id.*

²³⁹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 563–64, 100 S. Ct. 2343, 2351 (1980).

²⁴⁰ Mitchell Brecher & Debra McGuire Mercer, *TRACED Act Subjects Robocallers to Increased Penalties, Outlines Regulatory and Reporting Requirements to Deter Violations*, THE NATIONAL LAW REVIEW (Jan. 8, 2020), <https://www.natlawreview.com/article/traced-act-subjects-robocallers-to-increased-penalties-outlines-regulatory-and>.

²⁴¹ *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

²⁴² Because the calls do not constitute commercial speech, one could not rely on the argument in *Bolger*, that due to the greater risk for confusion or deception in advertising messages, the statute could be analyzed as being content-based restrictions on commercial speech. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61 (1983).

the consent of the consumer,²⁴³ which post-Duguid could include exemptions for the federal government and authorized third parties under agency law. One could argue that by including the exempted robocalls by reference, Section 8 of the TRACED Act is content-based. Like the debt collection exemption, these exemptions could continue to permit favoring certain forms of speech, such as government communications, over other forms of speech. This provision of the statute could be viewed as an implicit content-based regulation and should then be reviewed under strict scrutiny.

Under a strict scrutiny analysis, a court could follow the same arguments set forth in *Duguid*, that either the goal is not compelling or that the statute is not narrowly tailored to achieve its goals.²⁴⁴ If the exempted calls are placed for emergency communications, then the government has a stronger case for a compelling interest to overcome a strict scrutiny analysis. If the purpose of the communication is for a government contractor to reach a citizen, the government may have a more difficult time arguing that the statute is narrowly tailored to achieve that goal or that there is no less intrusive means to reach that goal. An example of a less intrusive means to achieve this communication without an exemption would be to require a live person to place the call or to get consent from the individual. The government could have also achieved its goal through a content-neutral means by permitting auto-dialed calls for pre-existing relationships with the federal government. If a reviewing court finds that Section 8 of the TRACED Act violates the First Amendment, then the statute has a severability clause that states that the section may be held to be invalid and that the remainder of the Act shall be unaffected.²⁴⁵

In October 2019, Facebook Inc. asked the Supreme Court to review the Ninth Circuit's decision in *Duguid v. Facebook Inc.*²⁴⁶ The Ninth Circuit invalidated the debt collection exception but left the rest of the TCPA intact.²⁴⁷ On appeal, the Court may have the opportunity to strike down the entire TCPA. The Supreme Court would also have the opportunity to examine the additional TCPA exemptions. Striking down the exemptions or the whole of the TCPA would

²⁴³ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, § 8, 113 Stat. 3274.

²⁴⁴ *Duguid v. Facebook, Inc.*, 926 F.3d 1146, 1154–55 (9th Cir. 2019).

²⁴⁵ Pallone-Thune Telephone Robocall Abuse Criminal Enforcement and Deterrence (TRACED) Act, Pub. L. No. 116-105, § 15, 113 Stat. 3274.

²⁴⁶ Alexis Kramer, *Facebook Asks Supreme Court to Decide Robocall Law's Validity (1)*, BLOOMBERG LAW (Oct. 17, 2019), https://www.bloomberglaw.com/document/X8BJRGVC000000?bna_news_filter=tech-and-telecom-law&jcsearch.

²⁴⁷ *Duguid*, 926 F.3d at 1156–57.

likely impact the future of the TRACED Act, which includes exemption provisions and seeks to limit similar forms of speech.

CONCLUSION

In conclusion, Congress, the CFPB, and the FCC need to work together to create clearer guidelines for regulating debt collection practices. The FCC's call blocking services based on reasonable analytics are overbroad and do not take into account that the nature of debt collection calls inherently have some of the key characteristics that the agency looks for in fraudulent calls. The CFPB in its final agency rule should create good faith frameworks that permit debt collectors to make contact with debtors, regardless of debtors' wishes to cut off communication, for litigation and appropriate debt collection purposes. The CFPB should also seriously address the issue of limited content messages and put in place meaningful and protective measures for consumers that are also fair to debt collectors trying to make contact with debtors. The FDCPA should be amended to include meaningful limits on the ability of a debtor to cut off nearly all communication with the debt collector or the debt collector's attorney. By creating safeguards for appropriate communication, debt collectors will not risk additional FDCPA liability for simply trying to contact the debtor on matters related to litigation or settling the dispute. These safeguards would both protect the debt collector's interest in being able to recover their funds as well as the debtor's interests in not being pressured or treated unfairly by the debt collector and their attorney.

First Amendment concerns relating to the FDCPA and the TRACED Act are valid. Under a First Amendment analysis, the FDCPA would most likely fail a content-based strict scrutiny standard of review by any court, because its means are not narrowly tailored to its compelling interest. Under a commercial speech analysis, the FDCPA could also fail a First Amendment analysis since the regulation does not directly advance the state's interest and does not achieve the government's goal by proportionate means. The TRACED Act, with the exception of Section 8 recognizing the exemptions to consent requirements, would most likely pass a First Amendment analysis under a content-neutral intermediate scrutiny standard of review. Yet, the Supreme Court has not yet reviewed the entirety of the TCPA. The Supreme Court's ruling on the

constitutionality of the entire TCPA could have a major impact on deciding whether the TRACED Act could withstand a First Amendment analysis by a reviewing court.

RACHEL HARRISON*

* J.D. Candidate (2021), Emory University School of Law.