Petition for Redress or Telephonic Harassment? When Calling the Government Is a Crime

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PETITION FOR REDRESS OR TELEPHONIC HARASSMENT?
WHEN CALLING THE GOVERNMENT IS A CRIME

Daniel Caballero*

The telephone has enabled significant enhancements in communication. However, it has also brought with it abuses. One of these is telephonic harassment. The states and the federal government have passed laws that criminalize this inappropriate and psychologically harmful use of telephones. This Article assumes that these laws are constitutional when the caller harasses an ordinary citizen. But the First Amendment protects the right to petition the government for redress of grievances. So, what happens when the caller is both petitioning the government and intending to harass a government official? Does the First Amendment protect telephonic harassment of a public official? State and lower federal courts have responded in a variety of conflicting ways. This Article seeks to address deficiencies in those responses while recommending a refinement of the best approach to reconciling this legal conflict, the significant component test. When the test is applicable, courts should avoid examining the content of harassing calls to determine whether a matter of public concern is a significant component of the call. Instead, non-speech contextual factors should be considered.

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INTRODUCTION

In 1997, Ion Cornell Popa made seven phone calls to the office of Eric Holder, then U.S. Attorney for the District of Columbia. Popa, who had a history of mental illness, complained about “two Afro-American police officers” who had allegedly beaten him up after he had called the police to report being threatened by “an Afro-American.” He also complained to Holder’s office about the prosecution’s failure to disclose its witness list in a pending case against him for threatening a bank employee. One of Holder’s secretaries received the first call on Holder’s direct line, and Popa immediately began yelling into the phone: “[T]hat n**** Eric Holder, that n**** Holder, get him out of there, get him out of there!” The secretary put him on hold; when she returned to the line, Popa had hung up. A different secretary received another Popa call later that day: “Eric Holder is a n****.

3 Popa, 187 F.3d at 675 n.1.
4 Id.
6 Id.
Is a n****. Which is a criminal. He make a violent crime against me, violating the rights in court of the white people. [Inaudible] n****. He’s n****. Eric Holder. Criminal.”

In 2016, military veteran Robert Mark Waggy repeatedly called his local Veteran’s Affairs (“VA”) hospital with complaints. He was not calling to complain about medical services, but rather, for delusional reasons, he believed the VA owed him money. During his calls, he yelled at the receptionist, calling her a “f***ing cu**” each time she answered the phone. He demanded that she “do [her] f***ing job and to f***ing listen.” After being berated over the course of several calls, the receptionist stopped answering: “[I]t made me scared. I didn’t want to talk to him anymore.” But the calls kept coming. The receptionist felt that “it would never end.”

Both Waggy and Popa were arguably petitioning the government for redress of a grievance, an essential democratic right protected by the First Amendment. Yet, they were also intentionally harassing a government official, resulting in their criminal convictions for telephonic harassment. On appeal, courts in both cases had to grapple with the same question: Does the First Amendment protect telephonic harassment of a public official?

This Article seeks to answer that question. Part I of this Article will frame the problem. On the one hand, the historical record suggests that critical, offensive, and sometimes hostile speech targeting public officials is squarely within the First Amendment’s protection, and therefore citizens

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7 Id.
8 See United States v. Waggy, 936 F.3d 1014, 1016 (9th Cir. 2019).
9 See id. He believed that the VA was in breach of a contract that required that they pay for law school. See Brief for Appellee at 9, United States v. Waggy, 936 F.3d 1014 (9th Cir. 2019) (No. 18-30171). Although the contract was unsigned, it had a stipulation that mere receipt of the contract meant acceptance of its terms. Id. Mr. Waggy believed this was sufficient to bind the VA. Id. Accordingly, he asserted that because of a 72 percent interest rate, the VA had to pay him hundreds of millions of dollars as well as the land on which the VA facility rested. Id.
10 Waggy, 936 F.3d at 1016–17.
11 Id. at 1017.
12 Id.
13 Id.
14 Id.
15 See U.S. CONST. amend. I. The Supreme Court has incorporated the First Amendment’s protections for the freedom of speech and petition for redress of grievances against the states. See De Jonge v. Oregon, 299 U.S. 353, 364 (1937).
16 See United States v. Popa, 187 F.3d 672, 674 (D.C. Cir. 1999); see also Waggy, 936 F.3d at 1016.
17 In the Waggy and Popa cases, it is noteworthy that the caller never actually reached their intended target. Instead, they recited their grievances to a staff member. See Popa, 187 F.3d at 674; Waggy, 936 F.3d at 1016. For reasons explained infra, this distinction should not carry significance.
have a right to engage in it. Moreover, the U.S. Supreme Court has consistently held that speech criticizing public officials plays a central role in American democracy because it is a key mechanism by which citizens can keep government accountable. On the other hand, much of the legal discourse about this kind of speech assumes that the speaker intends to speak publicly and have their speech disseminated widely (i.e., is intending to engage in “one-to-many” speech). But when the speaker intends to speak privately and directly to another (i.e., “one-to-one” speech), the Supreme Court has recognized limitations on speech based on the privacy interests of the listener. As evidenced by the examples of calls above, one-to-one harassing speech can cause substantial emotional distress to recipients. Yet the Court has never applied its listener privacy jurisprudence in cases where the listener was a public official, a circumstance that presents more complex First Amendment considerations than when the audience is a private citizen.

Part II will explore how courts have tried to resolve this question by balancing the government’s interest in discouraging such harassment against an individual’s civil liberty to engage in such speech. Some courts have adopted a per se rule that when a given telephonic harassment statute proscribes calling with the intent to harass, only conduct—not speech—is regulated. Therefore, First Amendment protection in such instances is inapplicable and the statute proscribing such conduct will prevail. On the other end of the spectrum, other courts have adopted a per se rule that a person’s right to petition their government always outweighs a government official’s privacy interests, meaning that laws limiting such activities cannot stand. As a third option, since the D.C. Circuit’s 1999 holding in United States v. Popa, federal courts have mostly adopted a more flexible approach, the “significant component test.” Part III will argue in favor of the significant component test’s approach, but recommend honing the test to focus on non-speech elements.

Before digging into the subject matter, the scope of this Article must be defined. First, in addition to telephonic harassment cases, this Article will examine cases where defendants were convicted for harassment or disturbance of the peace based on written forms of one-to-one speech, such as letters and emails. The legal principles and reasoning that underlie these opinions are equally applicable to telephonic harassment. Additionally, telephonic harassment is more intrusive than those methods of communication, as a letter can be easily thrown away or an email

20 See infra Part II.C.
The physical ringing of a phone is much less easily ignored. There is also something to be said for the power and immediacy of hearing the voice of another person in real time, as opposed to reading the words on a page. The potential harms to public officials come into sharper relief and the stakes are greater.22

Second, this Article will focus on calls that harass or intend to harass.23 Criminal telephonic harassment statutes often provide a list of types of calls that are deemed unlawful. The federal telephonic harassment statute proscribes calling with intent to “abuse, threaten or harass,”24 while states’ telephonic harassment statutes proscribe even broader sets of conduct.25 While the

23 Although telephonic harassment statutes seek to proscribe harassment, they fail to define “harass.” See, e.g., 47 U.S.C. § 223; 18 U.S.C. § 2261A. Some courts have struggled with interpreting it in criminal statutes. See United States v. Yung, 37 F.4th 70, 78 (3d Cir. 2022) (noting that “harass” can include everything from “repeated annoyance to outright violence”); see also People v. Moreno, 506 P.3d 849, 844–45 (Colo. 2022) (concluding that the harassment statute is overbroad because it could include a range of protected communications including political discourse). Other courts have asserted that it has a commonly understood meaning and left it at that. See City of Seattle v. Huff, 767 P.2d 572, 576 (Wash. 1989) (en banc); see also United States v. Bowker, 372 F.3d 365, 381 (6th Cir. 2004); United States v. Eckhardt, 466 F.3d 938, 944 (11th Cir. 2006); United States v. Shrader, 675 F.3d 300, 310 (4th Cir. 2012); United States v. Conlan, 786 F.3d 380, 386 (5th Cir. 2015). Black’s Law Dictionary first defined harassment as, “[u]sed in variety of legal contexts to describe words, gestures and actions which tend to annoy, alarm and abuse (verbally) another person.” Harassment, BLACK’S LAW DICTIONARY (5th ed. 1979). The most recent edition has stayed largely consistent: “Words, conduct, or action (usu[ally] repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose; purposeful vexation.” Harassment, BLACK’S LAW DICTIONARY (11th ed. 2019). Congress has defined harassment in one place within the federal code: “[A] serious act or course of conduct directed at a specific person that (i) causes substantial emotional distress to that person and serves no legitimate purpose; purposeful vexation.” Harassment, BLACK’S LAW DICTIONARY (11th ed. 2019). Many telephonic harassment cases involve speech that can cause substantial emotional distress but others less so. This Article seeks to examine whether any of this speech, when (1) aimed at public officials and (2) not a “true threat,” can be criminalized.
25 See, e.g., 18 PA. STAT. AND CONS. STAT. ANN. § 2709(a)(4) (West 2023) (“A person commits the crime of harassment when, with intent to harass, annoy or alarm another, the person . . . communicates to or about such other person any
government may regulate speech that threatens a person because the First Amendment does not protect “true threats,” courts have found proscriptions of non-threatening intent to be constitutionally suspect. This Article will focus on the word “harass,” a common feature among these statutes that captures conduct that can cause substantial emotional distress while coming short of a “true threat.”

Third, this Article will assume that regulation of harassing one-to-one speech is constitutional when aimed at ordinary citizens. Although state courts have struck down state telephonic harassment laws for violating the First Amendment when the victims were ordinary citizens, federal appellate courts have consistently upheld both state and federal telephonic harassment laws in this scenario. This assumption will help to assess whether telephonic harassment of public officials (a) requires a unique legal analysis or (b) should trigger the same legal rules, regardless of the

27 See Moreno, 506 P.3d at 854 (finding that speech intended to harass “encompasses a substantial amount of protected speech.”); see also Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001) (“There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”); Bowker, 372 F.3d at 379, vacated on other grounds, 543 U.S. 1182 (2005) (acknowledging that the federal telephonic harassment statute could have unconstitutional applications “if interpreted to its semantic limits”).
28 For the purposes of this Article, one-to-one speech is intended to be said to one person; one-to-many speech is intended to be said to more than one person. Although telephonic speech is often one-to-one, it can be one-to-many in explicit and implicit ways. An example of explicit one-to-many telephonic speech would be a conference call. An example of implicit one-to-many telephonic speech would be a person speaking to one person on the phone but doing so loudly in a public place. In such a scenario, inferring that the caller intends to communicate with a larger audience could be reasonable. Another vital consideration in classifying telephonic speech as one-to-one or one-to-many is the caller’s intent. Someone could call a particular person intending to only speak to them but not realize that the intended listener has the call on speakerphone with others listening. Although the result is speech being broadcasted to multiple listeners, the caller’s intent makes this one-to-one speech. This Article focuses on the constitutionality of harassing telephonic one-to-one speech, not harassing telephonic one-to-many speech. See Eugene Volokh, One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking”, 107 NW. U. L. REV. 731 (2013), for a deeper inquiry into the regulation of one-to-one and one-to-many speech aimed at ordinary citizens.
29 See Bolles v. People, 189 Colo. 394, 399 (1975); see also Klick, 362 N.E.2d at 331–32; State v. Vaughn, 366 S.W.3d 513, 519–21 (Mo. 2012).
30 See United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978); see also Bowker, 372 F.3d at 376, 390; United States v. Eckhardt, 466 F.3d 938, 943–44 (11th Cir. 2006); Gormley v. Director, Conn. State Dep’t of Prob., 632 F.2d 938, 941 (2d Cir. 1980).
recipient’s governmental role.\textsuperscript{31}

Finally, this Article defines a “public official” as anyone who works for the government and acts under the color of law.\textsuperscript{32} Nationally known public officials like Eric Holder or Mitch McConnell fall within this definition, and so does the receptionist of a small-town mayor. For better or worse, government support staff are often the recipients of harassing speech. But any evaluation of telephonic harassment of public officials must recognize that most of the public cannot directly call high-level public officials. Instead, constituents must go through intermediaries. Therefore, although support staff are not making policy, their duties require them to be telephonic representatives for those who do. A bright line rule here also provides simpler guidance to courts in a gray area of the law.\textsuperscript{33} Unfortunately, this means these civil servants must often bear the real burden of the First Amendment’s protections.

I. DEFINING THE BOUNDS OF THE PROBLEM

A. The Early Republic and Protection of Speech Critical of Public Officials

Prohibitions against speech critical of public officials have a long history in Anglo-American law, the most notable example being seditious libel laws. Seditious libel is often framed as punishing the undue disruption of government operations, particularly in wartime contexts.\textsuperscript{34} But these laws have also been applied to target speech that public officials could find harassing.\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{31} Again, this Article does not seek to assess whether telephonic harassment can be constitutionally proscribed at all.
\item \textsuperscript{32} \textit{Cf.} Polk Cnty. v. Dodson, 454 U.S. 312, 321–22 (1981) (holding that when public defenders act in their capacity as a lawyer adverse to the state, their professional decisions cannot be considered state action).
\item \textsuperscript{33} Appointments Clause jurisprudence provides an illustration of how categorization of public officials adds significantly more layers of complexity. \textit{See}, e.g., Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 641–647 (N.D. Tex. 2022) (finding that unpaid volunteer members of a small medical board within the Department of Health and Human Services became executive officers because a provision in the Affordable Care Act transformed the board’s advisory recommendations into binding regulations).
\item \textsuperscript{34} \textit{See, e.g.,} Sedition Act of 1918, ch. 75, § 3, 40 Stat. 553–54 (repealed 1948) (“W[h]oever, when the United States is at war, . . . shall willfully by utterance, writing, printing, publication, or language spoken, urge, incite, or advocate any curtailment of production in this country of any thing or things, product or products, necessary or essential to the prosecution of the war in which the United States may be engaged, with intent by such curtailment to cripple or hinder the United States in the prosecution of the war . . . shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.”).
\item \textsuperscript{35} \textit{See} Abrams v. United States, 250 U.S. 616, 619–20 (1919) (upholding
1. Pre-Colonial and Colonial History of Seditious Libel

As developed by the English common law courts, seditious libel prohibited the publication of statements that were critical of a sovereign (i.e., the regent) or his agents.\(^{36}\) The premise of such laws was that the sovereign, as the source of justice, was above common reproach.\(^{37}\) To be critical of the sovereign was to undermine justice itself, which the public had no right to do.\(^{38}\) Importantly, truth was not a defense.\(^{39}\) In fact, it was quite the opposite—“the greater the truth, the greater the libel.”\(^{40}\) What could undermine a government more than making its true failures public?

Colonial America did not outright reject seditious libel laws, but enforcement decreased substantially. The last prosecution for seditious libel by colonial authorities was the famous trial of Peter Zenger in 1735.\(^{41}\) Zenger published several articles critical of New York’s governor. At trial, Zenger’s attorney argued for a recognition of the defense of truth. The judge was unpersuaded, but the jury was convinced—after ten minutes of deliberations, it returned a verdict of not guilty, nullifying the law.\(^{42}\) With growing colonist discontentment over British rule came growing resentment of seditious libel laws and increasingly expansive understandings of freedom of speech.\(^{43}\)

2. The Sedition Act of 1798

An expansive right to freely criticize public officials was challenged during the early years of the United States government. In 1793, Great Britain and Revolutionary France went to war.\(^{44}\) Hoping to protect the burgeoning American republic from being pulled into a European conflict, President Washington issued the Neutrality Proclamation.\(^{45}\) Many Americans believed it constituted convictions of activists under the Sedition Act of 1918 for printing and distributing leaflets that called President Wilson a “shameful coward” for sending troops to Russia to fight against the Bolsheviks).

\(^{36}\) See Ronald Rotunda & John E. Nowak, Treatise on Constitutional Law § 20.3(b) (2022).
\(^{37}\) See id.
\(^{38}\) See id.
\(^{39}\) Id.
\(^{40}\) Id. (citation omitted).
\(^{41}\) See id. at § 20.4(a).
\(^{42}\) See id.
\(^{43}\) Id.; see also Thomas I. Emerson, Colonial Intentions and Current Realities of the First Amendment, 125 U. Pa. L. Rev. 737, 738 (1977).
\(^{45}\) Id.
an acquiescence to British interests.\textsuperscript{46} The same year he issued the Neutrality Proclamation, Washington sent Chief Justice John Jay to Britain to negotiate a normalization of trade and foreign relations.\textsuperscript{47} Jay was successful, and in 1795, a Federalist-led Senate ratified what became known as “Jay’s Treaty.”\textsuperscript{48}

Many in the United States believed the treaty was another humiliating submission to British interests.\textsuperscript{49} Criticism was intense, and enmity between political factions grew. The political polarization between those who supported the British and those who supported the French became a dividing line for America’s first political parties—the Federalists and the Democratic-Republicans.\textsuperscript{50} Chief Justice Jay became the symbolic dartboard for those opposing the eponymous treaty and the foreign policy it represented.\textsuperscript{51} Critical graffiti famously appeared: “Damn John Jay! Damn everyone that won’t damn John Jay!! [D]amn everyone that won’t put lights in his windows and sit up all night damning John Jay!!!”\textsuperscript{52} An effigy of Jay was a common prop at protests that erupted around the country.\textsuperscript{53} At some protests, he was lit on fire; at others, he was guillotined.\textsuperscript{54}

As intense public criticism of Jay’s Treaty continued and a quasi-war with France began,\textsuperscript{55} Federalist President John Adams signed the Sedition Act of 1798.\textsuperscript{56} The law infamously made it a crime for a person to “write, print, utter or publish . . . false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government . . . or to bring them . . . into contempt or disrepute . . . .”\textsuperscript{57} Adams proceeded to suppress Democratic-Republican criticism of his administration.\textsuperscript{58} In one especially

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{49} Id.
\textsuperscript{51} Id. at 78.
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Lash & Harrison, supra note 44.
\textsuperscript{56} Pub. L. No. 5-74, 1 Stat. 596 (1798).
\textsuperscript{57} Id. at § 2, 596–97.
\textsuperscript{58} Enforcement of the law led to twenty five arrests, fifteen indictments, and ten convictions. Peter McNamara, Sedition Act of 1798 (1798), FIRST AMEND. ENCYCLOPEDIA (Feb. 11, 2024), https://firstamendment.mtsu.edu/article/sedition-act-of-1798/
noteworthy case, Vermont Congressman Matthew Lyon was imprisoned under the Act for accusing President John Adams of having “an unbounded thirst for ridiculous pomp.”

Although in some ways progressive for its time, \textsuperscript{60} the law came under immediate attack as blatantly unconstitutional. In a letter to James Madison, Thomas Jefferson criticized the law as “so palpably in the teeth of the constitution as to [show] they mean to pay no respect to it.”\textsuperscript{61} It also proved controversial to an American public who had recently ratified the Constitution and the Bill of Rights.\textsuperscript{62} Kentucky and Virginia famously passed resolutions arguing for the nullification of the law.\textsuperscript{63} Protests erupted around the country.\textsuperscript{64} Citizens from various corners of the nation sent critical petitions to Congress.\textsuperscript{65}

After two years, the Act expired on March 3, 1801.\textsuperscript{66} Adams lost reelection, and Jefferson was inaugurated as the third United States President on March 4, 1801.\textsuperscript{67} Congress did not renew the law, and thus it was never subject to judicial scrutiny by the Supreme Court.\textsuperscript{68}
Historian Douglas Bradburn has argued that the popular movement against the Sedition Act represented a revolutionary shift in the understanding of speech rights.\(^{69}\) Eighteenth-century jurisprudence regarding freedom of speech and press was limited to forbidding the government from instituting licensure procedures for publishing rights.\(^{70}\) But contemporary protestors believed that the right to speech was broader: It protected the common person’s voice as much as it protected the publishing house. In their view, every person had a fundamental right to “criticize, censure, and opine on any subject relating to the operation of the government without fear of governmental reprisal.”\(^{71}\) The First Amendment did not provide new protections from government censors or create a right to petition the government; rather, it enshrined what already existed.\(^{72}\)

James Madison would express a similarly expansive interpretation of the First Amendment in his 1800 report on the Virginia Resolutions but would frame the Amendment as a practical necessity for democratic governance.\(^{73}\) According to Madison, the American constitutional order recognizes that the People are sovereign, not the state.\(^{74}\) They created the federal government through the Constitution.\(^{75}\) Moreover, they continue to exercise dominion over the government through the electoral process.\(^{76}\) But an effective electoral process requires that people consider what they want from the government and whether the government is acting justly.\(^{77}\) This consideration happens through regular debate, which can, at times, result in “hatred” of a public official.\(^{78}\) For

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69 Bradburn, supra note 62, at 587.

70 These were called “prior restraints.” See Rotunda & Nowak, supra note 36, § 20.3(c).

71 Bradburn, supra note 62, at 587.

72 Id. This human rights understanding of the Bill of Rights also came into sharp relief in the criticisms of the Alien Act, which deprived non-citizens of the right to trial by jury. Id. at 588. Federalists argued that non-citizens had no guaranteed rights under the Constitution. Id. Protestors argued that non-citizens were still people, and therefore could not be deprived of the fundamental rights that were recorded in the Constitution. Id.


74 James Madison, Madison’s Report on the Virginia Resolutions, in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 546, 569 (2d ed. 1901).

75 Id.

76 See id. at 570–71.

77 Id. at 575–76.

78 Id. at 574.
Madison, this was not a bug in the system, but a feature of it. If public officials are doing unjust things, it is productive for the people to hate them. Strong emotions, according to Madison, would ensure that the people would vote them out of office. Without free and open debate—including, at times, nasty debate—the electoral process would be undermined, and the government would lose accountability to the people. Madison did not entirely discount that there would be adverse side effects of an expansive freedom of speech in this context. But ultimately, he thought it better to leave a few “noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigor of those yielding the proper fruits.”

The Sedition Act debates reveal how those in the Founding Era greatly valued speech that was critical of government officials. Indeed, their views continue to have vitality in the present day as modern commentators have continued to criticize the Act as a blatant violation of the First Amendment. Professors Ronald Rotunda and John Nowak have described the law as “the epitome of an unconstitutional abridgment of free speech.” Justice Brennan, in *New York Times v. Sullivan*, found that “the attack upon [the Act’s] validity has carried the day in the court of history.” From the Founding era to now, the First Amendment has been understood as protecting a public right to openly, and aggressively, criticize government officials.

**B. The Supreme Court’s Jurisprudence on Speech About Public Officials and the Right to Exclude Speech**

Consistent with the history of the Sedition Act of 1798, the Supreme Court has interpreted the First Amendment as providing strong protections for speech about public officials and public figures. In *New York Times v. Sullivan*, the Court held that ordinary

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79 Id.
80 Id.
81 Id. at 576. Madison also made the argument that the federal government lacks the authority to limit speech. As a government of enumerated powers, the federal government can exercise only power it has been given. According to Madison, the lack of any explicit speech regulation provision in the Constitution means the federal government lacks the power to regulate speech. Moreover, the Constitution itself makes a broad prohibition against the federal government regulating speech in the First Amendment. This argument is not explored here because we assume for the purposes of this Article that the federal government does have the authority to regulate some speech. The question is where the line ought to be drawn regarding telephonic harassment of public officials. *Id.* at 572–73.
82 Id. at 571.
83 ROTUNDA & NOWAK, supra note 36, § 20.5(b)
libel laws—state laws that make speakers strictly liable for falsehoods—could not be applied to speech about public officials.\textsuperscript{85} The Court’s chief concern with such laws was the chilling effect they could have on speech that is either true or believed to be true by the speaker, and the role the state would necessarily take as a censor on matters of public concern.\textsuperscript{86} The risk of this is simply too significant given the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”\textsuperscript{87} To mitigate libel laws’ chilling effect on speech, the Court recognized a new constitutional requirement when public officials seek redress for libel: the speaker’s knowledge or recklessness regarding the falsity of their statements, also known as “actual malice.”\textsuperscript{88}

In \textit{Hustler Magazine, Inc. v. Falwell}, the Court further held that public figures and public officials could not recover for the tort of intentional infliction of emotional distress based on the falsity of published materials without satisfying the “actual malice” standard.\textsuperscript{89} Echoing the ethos of \textit{Sullivan}, the Court emphasized the “fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”\textsuperscript{90} In doing so, the Court affirmed that public figures are not entitled to the same protection from intentionally harmful speech as ordinary citizens.

But the Court has recognized situations where the public’s interest in a free flow of ideas can be outweighed by an unwilling listener’s desire to exclude unwanted speech. In \textit{Rowan v. U.S. Post Office Department}, several businesses challenged a federal law that allowed householders to have their addresses removed from mailing lists.\textsuperscript{91} The Court had to balance “the right of every person ‘to be let alone’ . . . with the right of others to communicate.”\textsuperscript{92} Because a mailbox is part of the home, the Court concluded that denying a

\textsuperscript{86} \textit{Sullivan}, 376 U.S at 279.
\textsuperscript{87} \textit{Id.} at 270.
\textsuperscript{88} \textit{Id.} at 279–80.
\textsuperscript{89} 485 U.S. 46, 56 (1988).
\textsuperscript{90} \textit{Id.} at 50.
\textsuperscript{91} 397 U.S. 728, 729–34 (1970). The law’s text required that the recipient have their name removed because they found the mail “erotically arousing or sexually provocative.” \textit{Id.} at 729–30. But the Court found that this requirement was a vestige from an earlier version of the bill that empowered the Postmaster General to unilaterally determine obscenity. \textit{Id.} at 732–33. Out of concern that the law would be struck down by courts as unconstitutional censorship, Congress gave recipients unfettered discretion to determine what was obscene. \textit{Id.} at 733. Without an objective test for obscenity, the Court concluded that the law effectively gave householders the right to exclude any unwanted mailings regardless of its content. \textit{Id.} at 734.
\textsuperscript{92} \textit{Id.} at 736.
person the right to stop unwanted mailings would effectively grant the mailer a right of trespass.\textsuperscript{93} Such a holding would lead to an absurd result where “a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home.”\textsuperscript{94} Thus, \textit{Rowan} held that the householder’s right to exclude was greater than the mailer’s right to communicate as “no one has a right to press even ‘good’ ideas on an unwilling recipient.”\textsuperscript{95}

One year later, the Court more fully expressed the essence of \textit{Rowan}’s exclusionary rule, providing a basis for its expansion beyond the home. In \textit{Cohen v. California}, California convicted a man for violating a state law prohibiting “maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct.”\textsuperscript{96} His offense was wearing a jacket that bore the phrase “F*** the Draft” at a courthouse.\textsuperscript{97} California argued that the defendant’s speech could be limited because of the burden it placed on “unwilling or unsuspecting viewers.”\textsuperscript{98} But the Court disagreed.\textsuperscript{99} The mere fact that people may be offended by someone’s speech does not justify its exclusion—that is often just the price of going outside.\textsuperscript{100} The government, the Court reasoned, may only exclude speech for the benefit of the unwilling listener when “substantial privacy interests are being invaded in an essentially intolerable manner.”\textsuperscript{101}

In \textit{Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York}, the Court further refined \textit{Rowan}’s rule of exclusion.\textsuperscript{102} New York had prohibited the inclusion of political speech in consumers’ monthly electric bills sent via the mail.\textsuperscript{103} Con Edison, seeking to distribute an informational insert about the benefits of nuclear power along with its clients’ monthly bills, challenged the law, arguing that the prohibition constituted an unlawful content-based restriction.\textsuperscript{104} Among other things, New

\begin{flushleft}
\textsuperscript{93} Id. at 737.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 738.
\textsuperscript{96} Cohen v. California, 403 U.S. 15, 16 (1971).
\textsuperscript{97} Id. (asterisks added).
\textsuperscript{98} Id. at 21.
\textsuperscript{99} Id. at 26.
\textsuperscript{100} Id. at 21 (quoting Rowan v. U.S. Post Office Dep’t, 397 U.S. 728, 738 (1970)).
\textsuperscript{101} Id.
\textsuperscript{102} 447 U.S. 530, 541–42 (1980). It is worth noting that the Court in \textit{Rowan} did emphasize the importance of notice in safeguarding the constitutional rights of the sender, although it was aimed at addressing the claimant’s due process claim. \textit{Rowan}, 397 U.S. at 738–39.
\textsuperscript{103} Id. at 532.
\textsuperscript{104} Id. at 532–33. Content-based restrictions are those that proscribe speech or expressive conduct because of disapproval of the ideas expressed. See R.A.V. v.
York argued that the prohibition was necessary to protect captive recipients from having Con Edison’s views imposed on them in their homes. But the Court rejected New York’s argument for two reasons: First, householders are not particularly captive to mail inserts—they can easily throw them away. Second, whereas the statutory scheme in Rowan empowered householders to determine what speech to receive and which to exclude, New York left no decision up to individual recipients. The Court suggested that if the law had allowed householders to opt out of receiving inserts, as opposed to prohibiting them altogether, it would have passed constitutional scrutiny.

Consolidated Edison implicitly recognized the Rowan exception as applicable in two situations where speech does not fall within a recognized content-based exception to the First Amendment. The first situation is where a person is a “captive audience” and cannot avoid speech that may be unwanted. In this scenario, the government can preemptively intervene to exclude speech, but it must do so without regard to the speech’s content.

The second situation is where a person has substantial privacy

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City of St. Paul, 505 U.S. 377, 382 (1992). Such restrictions are presumptively invalid and subject to strict scrutiny unless the restriction falls within a narrow list of exceptions. See id. at 382–83; see also Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 98–99 (1972) (stating that regulations of “expressive conduct within the protection of the First Amendment” must be “necessary to further significant governmental interests” and “carefully scrutinized”).

Consol. Edison, 447 U.S. at 540.

Id. at 542. But cf. FCC v. Pacifica Found., 438 U.S. 726, 749 (1978) (stating in dictum that although one may easily avert their ears from an indecent phone call by hanging up, “that option does not give the caller a constitutional immunity or avoid a harm that has already taken place”).

Consol. Edison, 447 U.S. at 542 n.11 (citing Rowan v. U.S. Post Office Dep’t, 397 U.S. 728, 737 (1970)).

Id.


See Frisby v. Schultz, 487 U.S. 474, 486–88 (1988) (upholding a law that proscribed “focused picketing” outside of a home in a residential area); see also Hill v. Colorado, 530 U.S. 703, 716 (2000) (upholding a statute that proscribed knowingly approaching a person near a medical facility, without that person’s consent, for the purpose of engaging in private speech); Kovacs v. Cooper, 336 U.S. 77, 87–89 (1949) (upholding a municipal ordinance proscribing the use of speakers attached to vehicles to emit “loud and raucous” noises while on public streets or in public places); Lehman v. Shaker Heights, 418 U.S. 298, 307–08 (1974) (Douglas, J., concurring) (stating that commuters on public transportation are captive audiences to what may be unwanted speech because they may not have access to alternative commuting methods). In FCC v. Pacifica Foundation, the Court created a narrow exception for this situation and allowed a content-based restriction because of the State’s special interest in the welfare of children and supporting parental rights. 438 U.S. 726, 748–50 (1978). The Court emphasized the narrowness of its holding to broadcasting speech and that it did not implicate two-way conversations. Id. at 750.
interests in a given place but can easily disregard or avoid unwanted speech, such as with the nuclear power informational inserts in Consolidated Edison. In this situation, the person must (1) have a right to exclude trespassers and (2) give notice to the government or the speaker that they wish to exclude certain speech. In either situation, the government cannot act as a content-based censor.

C. The Problem of Criminalizing Telephonic Harassment of Public Officials

Congress and state legislatures have determined that harassing telephonic speech harms recipients. When legislators were considering a federal telephonic harassment statute in 1968, they noted that states had passed laws proscribing telephonic harassment and urged the federal government to do the same: “It is hard to imagine the terror caused to an innocent person when she answers the telephone, perhaps late at night, to hear nothing but a tirade of threats, curses, and obscenities, or equally frightening, to hear only heavy breathing.” In 2000, members of Congress again highlighted the harms that can come from harassing one-to-one speech and the need for police protection: “There is little worse than the feeling of helplessness a person can get if he or she is being terrorized and just cannot get help from the police.”

Recognizing the serious harms of telephonic harassment, federal courts have universally upheld telephonic harassment statutes when ordinary citizens were the victims. But in the limited instances where the government used the laws to prosecute someone for harassing a public official, the results in the lower federal courts are murkier.

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112 Cf. Martin v. City of Struthers, 319 U.S. 141, 147–49 (1943) (striking a municipal ordinance that proscribed approaching strangers’ doors to distribute handbills, circulars, or other advertisements because householders could easily do so themselves with the aid of trespass laws).
115 146 CONG. REC. S10211-01 (2000).
considered the constitutionality of criminal telephonic harassment statutes, it has expressed concern about restrictions on speech that intentionally inflict emotional distress on public figures.\textsuperscript{118}

But telephonic harassment is different than the intentionally abusive public speech the Court dealt with in \textit{Falwell}. Telephonic speech is targeted and private, not open and public.\textsuperscript{119} During the Founding, debates over the First Amendment’s free speech clause were principally concerned with public speech and the free exchange of ideas.\textsuperscript{120} The free expression of critical speech was considered essential to the survival of a fledgling democratic government.\textsuperscript{121} But, as the Court noted in \textit{Rowan}, these objectives are not at serious risk when a speaker tries to impose ideas on an unwilling listener in private.\textsuperscript{122} Federal courts reviewing the constitutionality of the federal telephonic harassment statute have pointed out this significant difference.\textsuperscript{123}

However, special considerations exist when evaluating the constitutionality of criminalizing telephonic harassment of a public official. First, the First Amendment itself expresses a particular concern with speech directed at the government: “Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.”\textsuperscript{124} The Supreme Court has held that the Petition Clause does not elevate speech directed at government officials over any other speech protected by the First Amendment.\textsuperscript{125} But the clause suggests that political speech is a subject matter that the Framers wanted to protect from government proscription.\textsuperscript{126} The history of the Sedition Act of 1798 confirms that Americans at the dawn of the Republic believed that biting criticism of public officials fell within the purview of the First

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\textsuperscript{118} See Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 46 (1988).
\textsuperscript{119} See United States v. Bowker, 372 F.3d 365, 379 (6th Cir. 2004).
\textsuperscript{120} See supra Part I.A.2.
\textsuperscript{121} See Madison, supra note 74, at 569–72, 574–76.
\textsuperscript{123} See United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978); see also Bowker, 372 F.3d at 379.
\textsuperscript{124} U.S. CONST. amend. I. The Supreme Court has incorporated the First Amendment’s protections for the freedom of speech and petition for redress of grievances against the states. See De Jonge v. Oregon, 299 U.S. 353, 364 (1937).
\textsuperscript{125} See McDonald v. Smith, 472 U.S. 479, 485 (1985) (holding that letters sent to the President about a candidate for Attorney General were not categorically immune from libel claims).
Amendment and was pivotal to effective democratic governance.\textsuperscript{127}

Secondly, public officials have voluntarily assumed the risk of being subject to greater scrutiny.\textsuperscript{128} The Supreme Court has held that this choice comes with the expectation that as a public official, one must be ready to face more hateful speech than the ordinary person.\textsuperscript{129}

Finally, concerns of causing a chilling effect on First Amendment freedoms of speech militates against restrictions on speech.\textsuperscript{130} If the government over-regulates certain types of petitions to the government, then citizens may become overly cautious in exercising their rights, circumscribing the Constitution’s protections and threatening a core tenet of American democracy.

II. HOW COURTS HAVE ADDRESSED THE PROBLEM

A. The “No Protection” Rule

Some courts have found that the First Amendment does not protect an individual’s right to engage in the telephonic harassment of public officials. In so holding, these courts have primarily reasoned that telephonic harassment is not speech, but rather conduct incidental to speech.\textsuperscript{131} Under this logic, the recipient’s status as a private individual or public official is irrelevant since telephonic harassment is simply outside the ambit of the First Amendment.

In \textit{State v. Thorne}, the Supreme Court of Appeals of West Virginia reviewed the conviction of a civil rights activist and student at Marshall University, a public institution.\textsuperscript{132} After being suspended from the school for disruptive class behavior and failing

\textsuperscript{127} See \textit{supra} Part I.A.2.

\textsuperscript{128} See \textit{Gertz v. Robert Welch, Inc.}, 418 U.S. 323, 344 (1974) (explaining that “[a]n individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties.”); \textit{see also} \textit{Beauharanais v. Illinois}, 343 U.S. 250, 263 n.18 (1952) (“[P]ublic men, are, as it were, public property.”).

\textsuperscript{129} See \textit{Lewis v. City of New Orleans}, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (finding that a properly trained officer should be expected to exercise a “higher degree of restraint” when faced with “fighting words”); \textit{see also} \textit{City of Houston v. Hill}, 482 U.S. 451, 462 (1987) (echoing Justice Powell’s assertion in \textit{Lewis}).

\textsuperscript{130} See \textit{Madison}, \textit{supra} note 74, at 571; \textit{see also} \textit{Hustler Mag., Inc. v. Falwell}, 485 U.S. 46, 52 (1988).


\textsuperscript{132} \textit{Thorne}, 333 S.E.2d at 818.
grades, the defendant repeatedly called various administrators to request a second chance.\textsuperscript{133} Although the calls started in a “civil manner,” they all eventually devolved into insults.\textsuperscript{134} In one call to the Dean of Students, the defendant called her a “bigot” and a “racist pig.”\textsuperscript{135} In another call, he told the answering secretary that the former President had been “barbecued” (likely a reference to the President’s recent resignation), and that “for the drippings, they’re going to fry the little piggies who have been left behind.”\textsuperscript{136}

With a split vote, the state’s highest court affirmed the conviction, mainly on the basis that “[p]rohibiting harassment is not prohibiting speech, because harassment is not a protected speech.”\textsuperscript{137} Writing for the two affirming justices, Justice Brotherton reasoned that, to be protected by the First Amendment, speech must be communicative.\textsuperscript{138} Since harassing phone calls—according to Justice Brotherton—are not “communicative,” they are not protected.\textsuperscript{139} Establishing this straightforward rule, he pushed aside concerns that his opinion threatened speech directed at the government for a redress of grievances.\textsuperscript{140} He stated that, if telephonic harassment aimed at the government were protected, the state’s effective operations would be seriously threatened.\textsuperscript{141} In effect, the court ruled that calls made to the government for a “legitimate” purpose are protected, intimating that calls made for the sole purpose of harassment are not protected because they are not legitimate: “There comes a point where one cannot repeatedly call a public servant and threaten to fry him in oil.”\textsuperscript{142}

Dissenting, Chief Justice Miller disagreed with Justice Brotherton’s characterization of the defendant’s calls as non-communicative and therefore outside the First Amendment’s ambit.\textsuperscript{143} “It seem[ed] to [Justice Brotherton] where conversation ensues, First Amendment protection must come into play in making any analysis of what is a harassing telephone call.”\textsuperscript{144} Moreover, he pointed out that, although Justice Brotherton’s reasoning was that speech intended \textit{solely} to harass is not protected, the facts at hand demonstrated that the defendant initially called the public school

\textsuperscript{133} See id. at 818–19.
\textsuperscript{134} Id. at 819.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. The West Virginia Supreme Court only had four justices sitting at the time. Accordingly, a split vote resulted in an affirmance of the conviction. Id. at 455 n.1 (Miller, C.J., dissenting).
\textsuperscript{138} Id. at 820
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} See id.
\textsuperscript{142} Id.
\textsuperscript{143} See id. at 824.
\textsuperscript{144} Id.
officials with “legitimate,” purposes.\textsuperscript{145} So even though the defendant’s calls may have devolved into harassment, harassment was not his \textit{sole} purpose.\textsuperscript{146} Therefore, even under Justice Brotherton’s logic, the defendant could not be convicted.\textsuperscript{147}

After the U.S. Supreme Court denied certiorari,\textsuperscript{148} the defendant filed a federal habeas petition challenging the constitutionality of his conviction.\textsuperscript{149} The U.S. District Court for the Southern District of West Virginia affirmed the state’s ruling,\textsuperscript{150} and the U.S. Court of Appeals for the Fourth Circuit did the same.\textsuperscript{151}

The Fourth Circuit held that West Virginia’s telephonic harassment statute proscribed conduct—not speech.\textsuperscript{152} Therefore, the defendant’s actions were not owed First Amendment protection. Moreover, the court rejected the defendant’s argument that the Petition Clause conferred First Amendment protections independent of the Freedom of Speech Clause.\textsuperscript{153} Because the Petition Clause does not extend the umbra of freedom of speech, the fact that the defendant was harassing a public official did not change the court’s prior analysis.\textsuperscript{154}

The West Virginia Supreme Court stands out for its bare assertion that harassment is conduct and not speech. Many courts, including the Fourth Circuit, have reached the same conclusion based on statutory interpretation.\textsuperscript{155} These courts have held that because the statutes before them proscribe \textit{making calls with the intent} to harass, these laws primarily regulate conduct, not speech. A person could be guilty of the offense without saying a single word on a call, as long as the dialer had harassing intent. Therefore, the law is indifferent to and does not regulate the speech that follows.\textsuperscript{156} Yet, some of these courts take no issue with using the defendant’s speech as evidence of intent to harass.\textsuperscript{157}

\textsuperscript{145} \textit{Id.} at 821.
\textsuperscript{146} \textit{See id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{149} Thorne v. Bailey, 846 F.2d 241, 242 (4th Cir. 1988).
\textsuperscript{151} \textit{Thorne}, 846 F.2d at 242.
\textsuperscript{152} \textit{Id.} at 243.
\textsuperscript{153} \textit{See id.} at 244–45 (citing McDonald v. Smith, 472 U.S. 479, 482 (1985)).
\textsuperscript{154} \textit{See id.}
\textsuperscript{156} \textit{But see} United States v. Popa, 187 F.3d 672, 679 (D.C. Cir. 1999) (Randolph, J., concurring) (disagreeing with the argument that the intent requirement transforms a telephonic harassment statute into a regulation of conduct instead of speech).
\textsuperscript{157} \textit{See Gormley}, 632 F.2d at 943; \textit{see also} State v. Gattis, 730 P.2d 497, 503 (N.M.
B. Complete Protection Where There is Any Political Speech

Based on public officials’ special place in the constitutional framework, one could argue that criminal telephonic harassment statutes should not apply to them, so long as the harassment involves some political speech. Courts have adopted this position largely based on public officials’ diminished privacy interests and the importance of speech regarding matters of public concern.158

In State v. Drahota, the Nebraska Supreme Court reviewed the conviction of a man who sent multiple unwanted emails to William Avery, a state legislature candidate.159 The two men had a heated email exchange that culminated in Avery telling the defendant not to contact him again.160 Four months later, the defendant anonymously emailed Avery, rehearsing the same criticisms: “I have a friend in Iraq that I told all about you and he referred to you as a Benedict Arnold . . . I’d like to puke all over you . . . Remember that Libs like yourself are the lowest form of life on this planet.”161 Avery reported the emails to the police, and soon thereafter, the defendant was arrested and convicted of disturbing the peace.162

The state supreme court vacated the conviction, finding that the speech did not fall within any of the exceptions to the First Amendment, so the speech was protected. In its holding, the court repeatedly emphasized two key facts: the political nature of the defendant’s emails and Avery’s political candidacy.163 According to the court, political speech deserves the greatest First Amendment protection.164 The prosecution argued that the defendant’s speech fell within either the “fighting words” exception or the Rowan privacy exception.165 But the court rejected the “fighting words” argument because that exception only applies to language that would likely lead to an immediate breach of the peace.166 As the

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159 788 N.W.2d 796, 798 (Neb. 2010). Although Drahota does not involve telephonic harassment, it implicates the same issues concerning distant, private one-to-one communications with a public official.
160 See id. at 799–800.
161 Id.
162 Id. at 800. Following a bench trial, the punishment was a $250 fine. Id.
163 See id. at 804–06.
164 Id. at 805.
165 See id. at 804–05.
166 See id. at 801–04.
exchange happened over email, it was impossible for the speech to incite Avery to immediately attack the defendant.167

The court then rejected the Rowan exception’s applicability because of Avery’s political candidacy.168 “The ability of a constituent to voice his concerns and opinions to his elected representatives, and to those who wish to become his representatives, is the cornerstone of republican government.”169 Thus, the public’s interests in the free flow of “ideas and political discussion between the people and their representatives” trump political candidates’ diminished privacy interests.170 The court noted that the result could have differed if Avery were a private citizen: “[W]e recognize that balancing free speech rights against the privacy rights of a private citizen may yield a different result.”171

In Commonwealth v. Bigelow, the Massachusetts State Supreme Court adopted the same clear rule as Nebraska but drew the contrast between the privacy interests of public officials and private citizens into sharper relief.172 The defendant in the case had sent several letters to Michael Costello, his local selectman, and Michael’s wife, Susan Costello.173 The letters were mainly directed at the selectman and included a mixture of insults and complaints about his performance in that role: “The biggest f***ing loser I have ever met . . . you will be arrested at town meeting, relieved of all your town positions, and ultimately be sent to prison as a [two] time loser convicted felon . . . Sound good you f***ing a**hole . . . You really f***ed up this time Mikey boy.”174 The letters addressed to Susan had a similar tenor: “Hey Sue—why don’t you come to the meeting on Mon[day] . . . [w]ord about town is that he is screwing the assistant town clerk or treasurer, or maybe both. There are pictures being circulated that prove it.”175

The court vacated the defendant’s convictions for criminal harassment and only ordered a new trial for the charges related to the letters sent to Susan.176 According to the court, First Amendment protections differ based on the recipient’s identity.177 Elected town officials, like the selectman, should expect to receive mail from “disgruntled constituents.”178 So although a

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167 Id. at 804.
168 Id. at 804–05.
169 Id. at 805.
170 Id. at 806.
171 Id. at 805.
173 Id. at 1108–09.
174 Id. at 1108 (asterisks added).
175 Id. at 1109.
176 Id. at 1121.
177 See id. at 1113–18.
178 Id. at 1113. In fact, the selectman said himself that this type of mail was unsurprising. See id.
“homeowner’s privacy is itself entitled to constitutional protection,” Costello’s privacy interests—given his political position and the political nature of the criticism in the letters—were not substantial enough to outweigh the defendant’s constitutional rights to speech.\(^{180}\)

However, the calculus changed with regard to Susan.\(^{181}\) Because Costello’s wife was not a public office holder, the court concluded that the speech directed at her was not entitled to the same political speech protections as the speech directed at her husband.\(^{182}\) Given this contextual difference, the court found that a jury could reasonably consider the letters as “true threats” because they had the potential to instill fear of future harm to Susan.\(^{183}\) Further, an important part of the court’s analysis focused on the fact that the defendant sent messages to the home where she, unlike her husband, had substantial privacy interests.\(^{184}\)

Yet three judges strongly disagreed with the majority’s interpretation of the “true threat” exception.\(^{185}\) Firstly, the dissent found the court’s expansion of the exception to include speech not containing a clear threat of physical harm was improper.\(^{186}\) Secondly, the dissent argued that it was an absurd result that an unprotected “true threat” to one person could be protected speech when addressed to another.\(^{187}\) According to the dissent, a threat is a threat regardless of the recipient’s identity.

C. The Significant Component Test

In lieu of a “no protection” rule that classifies all harassing calls as unprotected conduct or a “complete protection” rule that classifies harassing calls to public officials as protected speech, most federal courts have adopted a middle ground when reviewing charges or convictions for telephonic harassment of public officials—the “significant component test.” The test considers the recipient’s identity, whether the alleged telephonic harassment included discourse about a matter of public concern, and whether that discourse was a significant component of the call.\(^{188}\)

\(^{179}\) Id. (citing Rowan v. U.S. Post Off. Dep’t, 397 U.S. 728, 736, 738 (1970)).
\(^{180}\) See id.
\(^{181}\) See id. at 1115–18.
\(^{182}\) Id. at 1115.
\(^{183}\) Id. at 1116.
\(^{184}\) See id. at 1117.
\(^{185}\) See id. at 1122 (Duffly, J., dissenting).
\(^{186}\) Id. (citing O’Brien v. Borowski, 961 N.E.2d 547, 556 (Mass. 2012)).
\(^{187}\) See id. at 1123–24.
\(^{188}\) See infra Sections II.C.1–2.
1. Creation of the Test

In *United States v. Popa*, the U.S. Court of Appeals for the District of Columbia Circuit considered whether harassing calls to Eric Holder’s office, the U.S. Attorney for the District of Columbia at the time, could be constitutionally criminalized under the federal telephonic harassment statute.\(^{189}\) Echoing other courts’ holdings, prosecutors argued that the law proscribed the act, or the conduct, of calling with the intent to harass; therefore, the law was content-neutral and only an incidental restriction on speech.\(^{190}\) The court disagreed.\(^{191}\) But even if it were inclined to accept the government’s argument, the court would still find the law unconstitutional as applied to the defendant.\(^{192}\)

The D.C. Circuit identified the government’s asserted interest in proscribing telephonic harassment to protect “innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives.”\(^{193}\) But it expressed concern that “[t]he statute sweeps within its prohibitions telephone calls to public officials where . . . the caller has an intent to . . . ‘harass’ [the public official] until he addresses problems previously left unaddressed.”\(^{194}\) The court agreed with the defendant that “the statute could have been drawn more narrowly, without any loss of utility to the Government, by excluding from its scope those who intend to engage in public or political discourse.”\(^{195}\) Accordingly, punishing a person who “intends both to communicate his political message and to annoy his auditor . . . from whom the speaker seeks redress” was not essential to the government’s asserted interests in proscribing harassing telephone calls.\(^{196}\) Moreover, such a carveout would be “substantially ‘less intrusive on a speaker’s First Amendment interests.’”\(^{197}\)

Because there was no evidence to support a finding that the defendant intended to threaten Eric Holder, the court decided that the jury must have found the defendant intended “to annoy, to abuse, or to harass” when they found him guilty.\(^{198}\) Because “complaints

\(^{189}\) 187 F.3d 672, 673 (D.C. Cir. 1999). For a summary of the facts, see INTRODUCTION.

\(^{190}\) See id. at 675.

\(^{191}\) See id.

\(^{192}\) See id. at 676.

\(^{193}\) Id. at 677 (quoting United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978)).

\(^{194}\) Id. at 676–77.

\(^{195}\) Id. at 677.

\(^{196}\) Id at 678.

\(^{197}\) Id. (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 217–18 (1994)).

\(^{198}\) See id. at 678.
about the actions of a governmental official were a significant component of [defendant’s] calls,” the court held that the telephonic harassment statute was unconstitutionally applied to him and vacated the conviction.

Popa’s significant component test can be reduced to the following: If the defendant is charged or convicted under a criminal telephonic harassment statute for speech directed at a public official where a significant component of the discourse was about a matter of public concern, then the statute is unconstitutional as applied to them.

2. Applications of the Test

Since Popa, courts have applied the significant component test in only three cases. Their applications of the test suggest that courts are unsure as to what constitutes a “significant component.” Moreover, courts vary in what information they examine in making that determination. While some restrict themselves to the speech itself, others look to a broader set of non-speech factors.

In United States v. Waggy, the United States Court of Appeals for the Ninth Circuit reviewed the conviction of a man who repeatedly called his VA hospital making unreasonable demands using abusive and vulgar language. The court found that, although there was some criticism of the government, this did not constitute a significant component of the defendant’s speech. Dissenting, Judge Tashima argued that public or political speech was a significant component of the defendant’s calls because they were (1) made to a government office, (2) made during business hours, and (3) included complaints about “actions and inactions of the government.”

In United States v. Juncaj, the government charged the defendant with four counts of violating the federal telephonic

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199 Id. at 677 (emphasis added).
200 Id. at 678.
201 See United States v. Waggy, 936 F.3d 1014, 1018–19 (9th Cir. 2019); see also United States v. Weiss, 475 F. Supp. 3d 1015, 1030–34 (N.D. Cal. 2020), rev’d on other grounds, 2021 WL 6116629, at *1 (9th Cir. Dec. 27, 2021); United States v. Juncaj, 2023 WL 1447354, at *13–14 (D. Nev. Jan. 31, 2023). Other courts have discussed the significant component test, but they have not applied it because the offending calls in those cases were not directed at a public official nor did a significant component of the speech concern public or political matters. See, e.g., United States v. Bowker, 372 F.3d 365, 379 (6th Cir. 2004), rev’d on other grounds, 543 U.S. 1182 (2005); see also United States v. Eckhardt, 466 F.3d 938, 945–46 (11th Cir. 2006).
202 936 F.3d at 1016–18. For a more detailed accounting of the facts, see INTRODUCTION.
203 Id. at 1019.
204 Id. at 1021–22 (Tashima, J., dissenting).
harassment statute. On January 7, 2021, the defendant made four calls to the Nevada Secretary of State’s Elections Division in the space of twenty-five minutes. During those calls, he complained about how the 2020 presidential election had allegedly been stolen: “I want to thank you for such a great job you all did on stealing the election. I hope you all go to jail for treason. I hope your children get molested. You are all going to f***ing die.” After being charged with multiple counts of telephonic harassment, the defendant moved to dismiss the indictment because the statute was unconstitutional. Magistrate Judge Youchah recommended that the district court deny the defendant’s motion. The judge acknowledged that the defendant’s speech was directed at the government and related to government activity. The calls, however, occurred one day after the January 6th riots and paralleled the beliefs of the rioters, which could reasonably suggest that the defendant was threatening to engage in the same type of violence. The defendant also repeatedly stated that every Elections Division employee would die and that he hoped their children would be molested. Although Judge Youchah believed that the defendant’s statements did not “at first blush, suggest a matter of public concern or political speech,” she concluded that a jury should decide whether the defendant communicated a “true threat” or “protected political hyperbole.” Judge Youchah’s recommendation implied that if the defendant’s speech were not a “true threat,” a conviction based on harassment alone would be unconstitutional because a significant component of the speech was political and aimed at a public official.

In United States v. Weiss, the United States District Court for the Northern District of California reviewed an indictment charging a man with violating the federal telephonic harassment statute. On eight separate occasions over a few months, the defendant used fictitious aliases to complete an online contact form posted on

205 2023 WL 1447354, at *1.
206 Id.
207 Id. (asterisks added).
208 Id. at *14.
209 Id. at *13–14.
210 See id. at *13–14.
211 See id. at *14.
212 Id.
213 Id.
214 See id. at *13 (“The Court must determine whether Defendant’s statements constitute protected political speech . . . and, if so, were they true threats and thus not shielded from liability by their political nature?”) (citing United States v. Popa, 187 F.3d 672, 676–77 (D.C. Cir. 1999); United States v. Waggy, 936 F.3d 1014, 1019 (9th Cir. 2019)).
Senator Mitch McConnell’s official website. His messages included the following:

[T]urtle c*m drinker, The yelling resistance should have put a bullet in your head and then kill all the people you love! . . . You motherf***ing scumbag crook turtle[.] Go f*** yourself. I have been furloughed and you heartless bastard could give a s**t. You f***ing criminal. Someone needs to kill you! You are going to lose next election and we will get rid of your satanic evil a** you loser f***head . . . You mother***ing chin* lover, [R]ussian paid scumbag. With your f***ing chin* father-in-law bank rolling you. You f***ing animal better get ready for the biggest loss of your s**tty heartless evil toxic life.

During interactions with police, the defendant stressed that he intended to harass Senator McConnell, “because the Senator made political decisions with which he disagreed.”

In reviewing the facts, the court found that “[w]hile the messages to Senator McConnell were certainly vile, they were also often political, much like the messages that Popa left for Holder.” It found that the defendant’s messages were political in nature because (1) a significant component of his messages were about “[his] frustration with the Senator’s performance as a government representative,” (2) he referred to a political movement that opposed President Trump’s agenda, and (3) he sent the messages through a form on the Senator’s website that solicited political feedback. Applying the significant component test, the court found that the statute was unconstitutionally applied to the defendant’s speech.

III. WHAT PROTECTIONS SHOULD PUBLIC OFFICIALS HAVE FROM TELEPHONIC HARASSMENT?

Courts have varied widely in how much protection they are willing to give people for telephonically harassing public officials. As this Part will show, the “no protection rule” is problematic because telephone calls cannot be fairly characterized as pure conduct unprotected by the First Amendment. Conversely,
providing complete protection for speech because the speaker expresses some political idea turns public officials into privacy-less rhetorical punching bags. The significant component test gets closer to striking the proper balance between regulating harmful speech and First Amendment consideration. But the test must be reevaluated within the Rowan framework to more precisely weigh the competing interests of (a) an individual’s right to political speech and redress from the government and (b) government officials’ privacy interests.

A. Telephone Calls are Communicative Acts

A telephone call is not pure conduct unprotected by the First Amendment. Courts, however, have held that telephonic harassment statutes that require an intent to harass are regulations of conduct, not speech.\textsuperscript{222} Dissenting in \textit{Cohen v. California}, which did not involve a call, but the message “F*** the Draft” on the back of Cohen’s jacket, Justice Blackmun took a similar position: “Cohen’s absurd and immature antic, in my view, was mainly conduct and little speech.”\textsuperscript{223} But the Court rejected this argument on the simple fact that Cohen was not convicted because he wore a jacket in a courthouse—he was punished because of written words he used to express himself and communicate a message.\textsuperscript{224} \textit{Cohen} illustrates the difficulty of disentangling speech from conduct. Similarly, it is difficult to untangle speech from telephone calls, which are communicative mediums.

Some courts have argued that where a telephonic harassment statute includes specific intent elements—i.e., calling with the intent to harass—then the statute can be interpreted as a regulation of conduct, not speech.\textsuperscript{225} But this reasoning is problematic. All speech could be criminalized if that was allowed. Under these courts’ reasoning, a hypothetical statute that proscribes speaking in public with an intent to harass would be a regulation of conduct, thus, no First Amendment analysis would be required. This is an absurd result and one that the Supreme Court has already addressed. Courts must examine the regulated activity to determine if it is “sufficiently imbued with elements of communication.”\textsuperscript{226} Where (1) “[a]n intent to convey a particularized message [is] present” and (2) there is a great likelihood that the message will be understood by


\textsuperscript{223} 403 U.S. 15, 27 (1971) (Blackmun, J., dissenting) (asterisks added).

\textsuperscript{224} See \textit{id.} at 18.


recipients, First Amendment speech protections apply.\textsuperscript{227} With limited exceptions,\textsuperscript{228} phone calls necessarily involve an intent to convey a particularized message that is likely to be understood by the recipient.\textsuperscript{229} That courts rely heavily on the speech in calls to determine whether they constitute harassment is evidence of this fact.\textsuperscript{230}

A noteworthy difference between the statute at issue in \textit{Cohen} and telephonic harassment statutes is that the former proscribed “offensive conduct,” and the latter proscribes conduct generally without reference to its offensive or harassing character.\textsuperscript{231} Under telephonic harassment laws, someone could violate the law even if they are extremely courteous on the call, so long as they intend to harass. But such an abstraction belies the reality of how these laws are applied.

\textit{State v. Fratzke} illustrates the reality.\textsuperscript{232} After being convicted of speeding, the defendant sent his payment to the court with a letter addressed to the court clerk and the state trooper who stopped him.\textsuperscript{233} In the letter, the defendant accused the trooper of being a “thief disguised as a protector” and enjoying “stealing people’s money so he can show everyone what a red-necked m*th*r-f*ck*r he is.”\textsuperscript{234} The letter clarified that it was not a threat, but that the defendant still hoped that the trooper would “have an

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\item \textsuperscript{227} \textit{Id.} at 410–11; \textit{see also} Texas v. Johnson, 491 U.S. 397, 404 (1989).
\item \textsuperscript{228} Exceptions would be where no words are spoken, nonsensical strings of words are spoken, or unintelligible noises are made. \textit{See Gormley v. Dir., Conn. State Dep’t of Prob.}, 632 F.2d 938, 943 (2d Cir. 1980) (Mansfield, J., concurring) (noting that a telephonic harassment statute that only prohibited speechless calls would be constitutional); United States v. Popa, 187 F.3d 672, 679 (D.C. Cir. 1999) (Randolph, J., concurring) (reasoning that “[a] hang-up call could . . . be characterized as conduct only. So too perhaps calls consisting only of a grunt or a moan.”).
\item \textsuperscript{229} \textit{See Popa}, 187 F.3d at 679 (Randolph, J., concurring) (explaining that “[t]he act of speaking on the phone is also a form of conduct but it still is ‘speech’”); \textit{see also} \textit{State v. Thorne}, 333 S.E.2d 817, 823–24 (W.Va. 1985) (Miller, C.J., dissenting) (“There are several cases where courts have . . . characterize[d telephonic harassment] statutes as regulating harassing conduct and not the speech itself. These cases have a sophistry that I find repugnant where, as here, legitimate communication ensues. It seems to me where conversation ensues, First Amendment protection must come into play in making any analysis of what is a harassing telephone call.”).
\item \textsuperscript{230} \textit{Cf. Gormley}, 632 F.2d at 944 (Mansfield, J., concurring) (“Labelling the statute as one prohibiting ‘conduct’ does not resolve this constructional dilemma [of overbreadth]. In most cases the ‘conduct’ punished is the oral communication rather that the ringing of the telephone bell.”).
\item \textsuperscript{232} 446 N.W.2d 781 (Iowa 1989).
\item \textsuperscript{233} \textit{Id.} at 782.
\item \textsuperscript{234} \textit{Id.} (asterisks in the original).
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early and particularly painful death hopefully at the side of the road somewhere where he’s robbing someone else.”

At trial, the trooper testified that he believed people have a right to complain about police conduct, but that personal attacks are unwarranted. The magistrate judge agreed, finding the defendant guilty of harassment because his language was unlikely to change government operations. The district court affirmed on the basis that “there was no legitimate purpose for the language and terms used by the defendant in his letter.” The defendant had to take his appeal to the state’s court of last resort to have it reversed. The Iowa Supreme Court correctly pointed out that courts have no place criminalizing petitions for redress because offensive language was used.

As Fratzke illustrated, the reality is that courts are unconstitutionally determining what language may be used when individuals democratically petition their government. Mean-spirited language is a common thread among cases where courts have upheld convictions for telephonic harassment of public officials. Indeed, courts have held that the type of language used is an important consideration when assessing whether the defendant had an intent to harass. But the Supreme Court in Cohen warned against censorship based on what language is or is not permissible. Similarly, what constitutes a “legitimate” petition to redress grievances is unclear. Is only friendly language allowed? That cannot be the case—political speech is often vitriolic, but that does not move it outside the bounds of the First Amendment. This understanding of the First Amendment’s scope traces back to the Founders and comports with a long history of judicial

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235 Id.
236 Id.
237 Id. at 782–83.
238 Id. at 783.
239 Id. at 785.
240 Id. at 784.
244 Id. at 26 (“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”).
245 See Madison, supra note 74, at 570–71; see also Barron v. Kolenda, 203 N.E.3d 1125, 1136 (Mass. 2023) (“There was nothing respectful or courteous about the public assemblies of the revolutionary period. There was also much that
interpretation.246

This leaves open the question: Is there ever a point where a person’s telephonic petitioning for redress crosses into criminal harassment? The answer ought to be yes.

B. Public Officials Deserve Some Protection from Telephonic Harassment

Telephonic harassment statutes should be understood as protecting substantial privacy interests. Whereas a caller may have constitutional protections to engage in speech, the recipient of the call has a privacy interest and therefore enjoys some protection from certain types of calls.247 But in many situations, these protections can be content-based in their application as the recipient is often wishing to exclude these calls because of their harassing content. Yet content-based regulations are presumptively invalid and limited to a narrow band of exceptions.248 Non-threatening telephonic harassment does not fall within these exceptions.249 Accordingly, courts have regularly considered whether the Rowan privacy exception may be applied to save the statute at issue.250 Should public officials have a right to exclude unwanted speech? Some courts have answered “no,” arguing that public officials’ privacy interests are per se diminished.251 Therefore, one-to-one harassment of public officials related to an issue of public concern cannot be outweighed by the official’s privacy interests.

But these courts go too far in depriving public officials of their privacy interests. It is true that once a person becomes a public official or even a candidate for public office, they run the risk of greater public scrutiny.252 It is also true that speech about public issues should be “uninhibited, robust, and wide-open” even when it includes “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”253 But government
officials do not give up all privacy rights because of their employment.254 Accordingly, a per se rule of protection where a person speaks about a political issue to a public official is not in accord with Rowan or constitutional conceptions of public officials’ privacy rights.255 Further, on a practical level, harassment can lead to increased spending on security and psychological trauma to the intended recipient or their staff, cutting in favor of some regulation.256 A more tailored examination is required.

C. Honing the Significant Component Test

The significant component test comes closer to the proper privacy inquiry when telephonic harassment of public officials occurs. Instead of merely adopting a per se rule, the test asks whether a matter of public concern was a significant component of the call. In effect, the test attempts to balance the political speech interests of the speaker against the privacy interests of the public official. If a significant component of the call is about a matter of public concern, the speaker’s interests prevail.

But key questions regarding the test remain unanswered: When should the test be triggered? Where can public officials claim sufficient privacy interests? What does a “significant component” mean and what factors should courts consider when making that determination?

1. Triggering the Test and the Presumption of Protection

The significant component test is only triggered if the caller raises matters of public concern while speaking with a public official.257 Where matters of purely private concern are the subject

254 See Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (holding that policemen “are not relegated to a watered-down version of constitutional rights”); Lindke v. Freed, No. 22-611, 2024 WL 1120880, at *6 (U.S. 2024) (“While public officials can act on behalf of the State, they are also private citizens with their own constitutional rights.”); see also L.A. Police Protective League v. Gates, 907 F.2d 879, 886 (9th Cir. 1990) (holding that police could not discipline an officer for refusing to give consent to a search of his garage); Lesher v. Reed, 12 F.3d 148, 151 (8th Cir. 1994) (holding that dismissal of police officer’s § 1983 claim against his employer for seizing his dog without a warrant for the purposes of euthanasia was improper).
255 See supra Part I.B.
of the phone call, the speaker is not petitioning the government for a redress of grievances. But the bar for what constitutes matters of public concern should be set low so that only a cursory examination would be required to identify it. Simply put, when public officials receive calls, the significant component test should be on a hair trigger. The reason is two-fold. First, reviewing the speech for its content can raise constitutional concerns about government censorship. But unlike California’s censoring of “offensive conduct” in Cohen, the purpose of the inquiry is not to determine what is excludable. The objective is to determine whether the significant component test should be applied or if another analysis is required. Second, greater scrutiny of the speech’s content risks an undue chilling effect. Speech on matters of public concern is essential to the First Amendment. Therefore, that speech ought to be carefully guarded.

Once triggered, courts should consider the significant component test as creating a strong, but rebuttable, presumption of First Amendment protection. Per the Rowan exception, speech can only be excluded where substantial privacy interests are invaded in an intolerable manner. This construction of the test respects the kind of speech that is of the highest importance in the eyes of the First Amendment. This speech should be provided strong

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260 See, e.g., Hill v. Colorado, 530 U.S. 703, 721–22 (2000) (holding that a law that prohibited approaching a person near a medical facility, without that person’s consent, for the purpose of “engaging in oral protest, education, or counseling” was content-neutral even though it required a cursory examination of the speech to determine if it fell within the proscribed categories or not).
263 See supra Part I.
265 See Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).
266 See Cohen, 403 U.S. at 21.
protection within reasonable, but generous bounds.

2. Defining the Bounds of Public Officials’ Privacy

Although the genesis of the Rowan exception was based around the home, public officials’ privacy should not be limited to calls received there. While it is the traditional zenith of privacy interests, the home is not the only place where the right to exclude is recognized.\(^{268}\) When expanding the right, the Supreme Court requires a context-specific balancing of competing interests.\(^{269}\)

Mobile phones provide an important example of a context-specific expansion of the Rowan right to exclude speech. Before the advent of cell phones, telephonic harassment would likely target a person in their home or place of work. In the case of the former, the Rowan exception would apply neatly as a harassing call could easily be understood as an invasion of a person’s home, traditionally a person’s most private place. But cell phones’ displacement of the home phone complicates what was once a simpler application of the law.\(^{270}\) Now, the likelihood of a person suffering telephonic harassment outside the home has increased significantly. But modern smartphones do more than merely replace traditional telephones. They have expanded what phones can do.\(^{271}\) This expansion in technical capabilities has led to unique expectations of privacy in their contents and use.\(^{272}\) As the Supreme Court aptly stated in Riley v. California, modern cell phones are “now such a pervasive and insistent part of daily life that the proverbial visitor

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\(^{268}\) See FCC v. Pacifica Found., 438 U.S. 726, 749 n.27 (1978) (“Outside the home, the balance between the offensive speaker and the unwilling audience may sometimes tip in favor of the speaker, requiring the offended listener to turn away.”)(emphasis added); see also Hill v. Colorado, 530 U.S. 703, 734–35 (2000) (holding that the state could regulate private speech near hospitals where speakers attempted to dissuade people from getting an abortion); Lehman v. City of Shaker Heights, 418 U.S. 298, 306–07 (1974) (Douglas, J., concurring) (stating that the speaker did not have a right to force his message on public transportation commuters because they were incapable of declining to receive it).

\(^{269}\) See Hill, 530 U.S. at 716 (explaining that “[t]he recognizable privacy interests in avoiding unwanted communications varies widely in different settings”).


\(^{271}\) See Riley v. California, 573 U.S. 373, 393 (2014) (“The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”).

\(^{272}\) See id. at 403 (holding that police cannot search phones incidentally to an arrest but need a separate search warrant because of the substantial privacy interests in smartphones that are at least comparable to the home); see also Carpenter v. United States, 138 S. Ct. 2206 (2018) (holding that police need a search warrant to secure long-term cell site location information because of unprecedented degree of intrusion on privacy that such information provides).
from Mars might conclude they were an important feature of human anatomy.\footnote{Riley, 573 U.S. at 385.} Given the modern social context, cell phones should generally be considered at least comparable to traditional home phones in the context of telephonic harassment. In fact, privacy concerns are likely greater, as keeping a cell phone on one’s person at all times is almost a practical necessity.

To be clear, this Article is not arguing that harassing calls to cell phones, or even home phones, are per se proscribable. Rather, the mere fact that a person can answer their cell phone in areas traditionally considered public does not preclude an invasion of substantial privacy interests.\footnote{See Carpenter, 138 S. Ct. at 2216–17 (stating that Fourth Amendment protections do not cease simply because a person moves about in public while being passively tracked by cell phone companies).} A deeper inquiry into other contextual factors is required.

The office phone is another important place where a context-specific inquiry is required. Although public officials have diminished privacy interests in the workplace, they are not de minimis.\footnote{Cf. O’Connor v. Ortega, 480 U.S. 709, 725 (1987) (“[P]rivacy interests of government employees in their place of work which, while not insubstantial, are far less than those found at home or in some other contexts.”) (O’Connor, J., plurality opinion); see also L.A. Police Protective League v. Gates, 907 F.2d 879, 886 (9th Cir. 1990).} But given the relative weight of the privacy interests at stake, the significant component test will demand that the speaker’s intrusion be greater and thus more intolerable than in other contexts for the presumption of protection to be rebutted.\footnote{See, e.g., infra Part III.C.4.}

3. Defining a “Significant Component”

Once the significant component test is triggered, courts should refrain from further examination of the content of the call at issue for several reasons. First, content-based government censorship is generally avoided.\footnote{See Cohen v. California, 403 U.S. 15, 24–26 (1971).} Second, the Supreme Court has shaped the Rowan exception as applying in only two circumstances: (1) where a person is a “captive audience” and cannot avoid speech that may be unwanted and (2) where a person has substantial privacy interests in a given place, but can easily disregard or avoid unwanted speech.\footnote{See supra Part I.B.} In neither of those circumstances is the government allowed to act as a content-based censor.\footnote{Where a public official has substantial privacy interests in a place and can easily disregard or avoid unwanted speech, one could argue that the decision to exclude speech is de facto government censorship because the official is an agent.

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\footnote{Riley, 573 U.S. at 385.}{273}
consider the content of speech, the door opens for regulation based on offensiveness—which, as discussed, is at odds with constitutional principles, rather than on the basis of an invasion of substantial privacy interests, which may be constitutionally legitimate.

Courts should consider contextual factors to determine whether a matter of public concern is a significant component of the call instead of looking at the content of the speech. Whether a contextual detail is “significant” is inherently a test of relativity. What may be significant in one context can be insignificant in another. For example, calling a restaurant to inquire about its hours is likely a forgettable conversation for the owner who answers. On the other hand, calling the restaurant owner on his personal cellphone to ask about his restaurant’s hours is more likely to be memorable as an out-of-place conversation. Similarly, speech about a matter of public concern that is insignificant in one call to a public official may be significant in another. Context matters.

To evaluate the context of the call and determine if a matter of public concern is a significant component of it, courts should consider the following non-exhaustive list of factors: (1) whether the caller had been warned not to call again,280 (2) whether multiple calls were placed in a relatively short period,281 (3) if the number of the government. But public officials are not expected to be acting as government agents at all times. Decisions about what to allow into the home are personal decisions that are functionally equivalent to those made by private citizens who wish to keep unwanted speech out of private places. Otherwise, every act of a government employee could be labeled as “state action,” yet that is obviously not the case. See Lindke v. Freed, No. 22-611, 2024 WL 1120880 (U.S. 2024) (holding that a city manager’s posts on his personal social media account were not state action even though the posts sometimes discussed city policy); Redding v. St. Eward, 241 F.3d 530, 533 (6th Cir. 2001) (holding that off-duty police officer calling 9-1-1 was not state action because it was “functionally equivalent” to that of any private citizen calling for police assistance); see also Hughes v. Meyer, 880 F.2d 967, 972 (7th Cir. 1989) (holding that a state conservation warden did not engage in state action when describing an encounter to police because it was “functionally equivalent” to that of any private citizen reporting to the police the details of an alleged criminal act); cf. Polk County v. Dodson, 454 U.S. 312, 322 (1981) (holding that when public defenders act in their capacity as a lawyer adverse to the state, their professional decisions cannot be considered state action).

280 See People v. Smith, 392 N.Y.S.2d 968, 969–970 (N.Y. App. Div. 1977) (affirming defendant’s conviction for aggravated harassment after he (1) called the Desk Officer at the White Plains Police Department twenty-seven times in less than three and a half hours with the same identical request and (2) was told repeatedly not to call again because he was tying up the police lines).

281 Id.; accord State v. Thorne, 333 S.E.2d 817, 820 (W.Va. 1985) (“A great deal of legitimate government business is done over the phone. If people were allowed to make repeated calls for the sole purpose of harassing government employees, this would tie up the phone for those who wish to reach their government on
was listed as a channel for constituents to provide feedback, whether the number called is publicly available or only privately distributed, (5) if the call was to a government office or phone number, (6) whether the call was to a private home or personal cell phone, (7) whether the call occurred during business hours, and (8) if the government has provided adequate alternative channels for communication. No single factor should be dispositive in finding that speech about a matter of public concern is a significant component. Again, the inquiry is context specific.

4. Applying the Honed Significant Component Test

The following examples illustrate how the test ought to function. If a person were to (1) use a non-publicly available number to (2) call the personal cell phone of a public official to discuss that official’s performance, the significant component test would probably be satisfied, and the speech would qualify as protected. Within the Rowan framework, this would be the situation where a person has substantial privacy interests but can easily disregard unwanted speech by hanging up. Now suppose the

282 See United States v. Weiss, 475 F. Supp. 3d 1015, 1032 (N.D. Cal. 2020), rev’d on other grounds, 2021 WL 6116629, at *1 (9th Cir. Dec. 27, 2021) (holding that federal telephonic harassment statute was unconstitutionally applied to defendant who engaged in harassing political discourse using feedback form listed on Senator McConnell’s official website); see also U.S. Post Serv. v. Council of Greenburgh Civil Ass'ns, 453 U.S. 114, 152 (1981) (holding that the mere fact that the government controls mailboxes does not transform them into a public forum that the public has a right to access).

283 See United States v. Waggy, 936 F.3d 1014, 1021 (9th Cir. 2019) (Tashima, J., dissenting) (finding that complaints about government action and inaction were a significant component of defendant’s calls and noting they were all made to a government office during business hours); see also Hott v. State, 400 N.E.2d 206, 207 (Ind. Ct. App. 1980) (affirming a conviction for making an indecent phone call to the homes of the local chief of police and prosecutor at 11:00 PM, asking them to arrest a local police officer, and then “impugning canine ancestry with tendencies en fellatio” after they rejected his request).

284 See Hott, 400 N.E.2d at 206.

285 See Waggy, 936 F.3d at 1021 (Tashima, J., dissenting).

286 See Perry Educ. Ass'n v. Perry Local Educators’ Ass'n, 460 U.S. 37, 45 (1983). This issue has arisen in the context of time, place, and manner restrictions for speech in public forums. However, this factor should also be considered in telephonic communications. In urban areas, a clear alternative to calling a public official is going to the public square to protest or demonstrate. But in rural areas with low density, more private means of communication may be the only effective means of petitioning the government. If the government provides few or no channels for communication, then the interests of the petitioner to encroach on the privacy of government officials become weightier.

287 See supra Part I.B.
public official instructed the person not to call again because this was her personal cell phone, and the person did so anyway. In this case, the call could be considered an intolerable intrusion on substantial privacy interests. The case against the person becomes stronger if the caller rings outside of business hours.

The number of factors should not be considered dispositive either. Take the scenario where a person called (1) the office of a public official, (2) during business hours, (3) using a publicly available phone number to talk about that official’s performance. But assume (1) he did so every seven minutes for three and a half hours (2) after being told repeatedly to stop because he was disrupting office operations and tying up phone lines. In this case, a court could find that the caller was intruding on substantial privacy interests in an intolerable manner.288 The office does not have the same substantial privacy interests as a personal cell phone.289 Yet within the Rowan framework, the plethora of calls within a short period makes the case closer to the situation where a person is a “captive audience” and cannot avoid unwanted speech.290 Additionally, it is important to consider that the speech is unwanted because of its physical disruption to government operations, not because of its content.

CONCLUSION

Early Anglo-American history demonstrates that speech critical of public officials lies at the heart of the First Amendment and our nation’s democratic values.291 Over the last century, the Supreme Court has repeatedly affirmed the particular importance of this speech.292 But harassing phone calls fall within a narrow band of speech that has created a gray area of First Amendment jurisprudence.293 Predictably, the result has been a wide range of outcomes from state and federal courts.294

But the problem of unwanted communications is not a new one.295 In Rowan and its progeny, the Supreme Court created a framework that can apply to public officials as much as private citizens so long as courts consider public officials’ unique position.

290 See supra Part I.B. If the official had the ability to block specific phone numbers for a period of time, then this may make it less of a “captive audience” situation. In that case, the court may find that substantial privacy interests were not being invaded in an essentially intolerable manner.
291 See supra Part I.A.
292 See supra Part I.B.
293 See supra Part I.C.
294 See supra Part II.
295 See supra Part I.B.
Unlike private citizens, speech with public officials can reasonably be presumed to implicate political discourse, and its value in a democratic system of governance is higher. The significant component test provides an appropriate means of accounting for these differences. The test, however, needs further refinement to better assess the interests at stake.\(^{296}\)

Once a matter of public concern is identified, courts should avoid looking closely at the content of callers’ speech. This kind of inquiry invites arbitrary determinations about what is or is not legitimate political speech. It is a strength of American democracy that debate about the nation’s most important issues is robust and largely uninhibited. Yet, the First Amendment does not immunize all speech from government regulation.\(^{297}\) The local selectman should face intense scrutiny at the town hall hearing.\(^{298}\) But when she goes home and turns off her work phone for the evening, she should be entitled to some degree of privacy that legally protects her from unwanted phone calls on her personal phone number.\(^{299}\) When the selectman’s secretary answers the office phone, he should not have to suffer a constant flood of calls from the same caller raising the same issue.\(^{300}\)

In *Waggy*, the majority focused on the content of the speech and found that there wasn’t enough political content to constitute a significant component.\(^{301}\) Without much explanation, the dissenting judge responded by saying complaints about public officials’ activities were a significant component.\(^{302}\) Although the dissenting judge pointed to some contextual factors that suggested the presence of political speech (number called and time of call),\(^{303}\) neither side had a particularly principled basis for saying that political discourse was or was not a significant component of the defendant’s calls. Hopefully, this Article provides a more defined framework for making that challenging fact-specific judgment.

\(^{296}\) *See supra* Part III.C.


\(^{298}\) *See* Barron v. Kolenda, 203 N.E.3d 1125, 1134–39 (Mass. 2023) (striking a town’s civility code for public town council meetings based on Massachusetts’ state constitutional right to petition the government).


\(^{301}\) United States v. Waggy, 936 F.3d 1014, 1019 (9th Cir. 2019).

\(^{302}\) *See id.* at 1021 (Tashima, J., dissenting).

\(^{303}\) *See id.*