IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11-3265

PATRIOTIC VETERANS, INC. Plaintiff/Appellee, v. STATE OF INDIANA EX REL. GREG ZOELLER, ATTORNEY GENERAL, and GREG ZOELLER, Attorney General, Defendants/Appellants.	Appeal from the United States District Court for the Southern District of Indiana Indianapolis Division Cause No. Below: 1:10-cv-723-WTL-TAB Hon. William T. Lawrence

BRIEF OF APPELLEE PATRIOTIC VETERANS, INC.

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

In compliance with Circuit Rule 26.1 and FED. R. APP. P. 26.1, the undersigned counsel of record for the Plaintiff-Appellee, Patriotic Veterans, Inc., provides the following information:

1. The full name of the party whom the undersigned counsel represents is "Patriotic Veterans, Inc."

2. The law firm whose partners or associates have appeared for Patriotic Veterans, Inc., in this matter is "Barnes & Thornburg LLP." Allison Hayward and Brad Smith appeared *pro hac vice* in the District Court, and they work for the Center for Competitive Politics.

3. The Appellee is a corporation but has no parent corporations, and no publicly held company owns 10% or more of the Appellee's stock.

s/ Paul L. Jefferson
Paul L. Jefferson

Dated: December 12, 2011

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JURISDICTIONAL STATEMENT

The jurisdictional summary in the Appellant's brief is complete and correct.

STATEMENT OF THE ISSUES

Indiana regulates the use of machine-dialed calls not introduced by live operator when made for some purposes but not others. Even though there is a federal law regarding this same conduct which saves from preemption only state law prohibitions (and not regulation) of these calls unless they are intrastate calls, the Indiana Attorney General seeks to regulate out-of-state callers who wish to call Hoosiers to inform them about political issues. Is the enforcement of this statute against political, interstate calls preempted, and if not does it violate the First Amendment to the United States Constitution?

STATEMENT OF THE CASE

Patriotic Veterans is satisfied with Appellant's Statement of the Case.

STATEMENT OF FACTS

Patriotic Veterans is not satisfied with the State's Statement of Facts.[1] Additional facts are included in the Argument where relevant.

The Indiana Automatic Dialing Machine Statute ("ADMS"), Ind. Code § 24-5-14-5, was passed in 1988. Prior to 2006 the Attorney General did not enforce the ADMS as to political calls and the ADMS was "widely ignored" during political campaigns. (Dist. Ct. Dkt. 34-1).

The ADMS is separate from Indiana's do-not-call law for commercial calls. In 2005, charities brought an action seeking to have the do-not-call list, or the Indiana Telephone Privacy Act (the "Privacy Act"), deemed unconstitutional as applied to calls soliciting donations on behalf of charities. *Nat'l Coalition of Prayer, Inc. v. Carter*, 2005 U.S. Dist. LEXIS 20248 (S.D. Ind., Sept. 2, 2005). The Privacy Act created a statewide do-not-call list. *Nat'l Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 784 (7th Cir. 2006). An exception to the Privacy

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[1]The State refers to the calls Patriotic Veterans seeks to make as "telemarketing" calls. (Br. 1, *passim*). Though the term is likely rooted in the FCC's rules and regulations, this term is not accurate here. The FCC uses the term "telemarketing" because it regulates only calls made for a commercial purpose. 47 C.F.R. § 64.1200(a)(2)(ii). Patriotic Veterans seeks to make political, noncommercial phone calls, thus this term is inapplicable to the calls at issue here.

Act allows for calls to be made on behalf of charities, but only if the calls are made by volunteers. *Id.* Like the ADMS, the Privacy Act does not contain an explicit carve out for political speech. *Id.* at 791. Unlike here, however, the Attorney General determined that the Privacy Act contained an implied exception for political calls. *Id.*

This Court upheld the application of the Privacy Act to charities. The Court indicated that if applied to political calls the result would be different because political speech, even when uttered by paid professionals, is part of "the touchstone of First Amendment protection in Supreme Court jurisprudence" and "courts are prone to strike down legislation that attempts to regulate it." *Id.* at 790-92. Thus, it was "not surprising that the Indiana Attorney General has fashioned an 'implicit exception' for political speech, even if that speech comes from professional telemarketers." *Id.* Only because the Attorney General implied a political call exception did the Privacy Act "sharply curtail[] telemarketing – the speech that was most injurious to residential privacy – while excluding speech that historically enjoys greater First Amendment protection." *Id.* at 792

On the heels of this Circuit's admonition that Indiana's Privacy Act raised constitutional concerns as applied to political calls, the

attorney general sought to ban the calls outright. (Dkt. 34-3). The application of the ADMS to organizations like Patriotic Veterans eliminates their ability to engage in the political process through this effective technology.

SUMMARY OF ARGUMENT

Automated political calls are among the most widely-used, inexpensive and effective forms of political speech. Fortunately for those Hoosiers that wish to receive these calls, the Constitution of the United States protects this right. First, the preemptive effect of the Telephone Consumer Protection Act ("TCPA") does not allow the State to regulate interstate automated political calls. The ADMS, as the Attorney General seeks to enforce it, would allow automated calls for certain types of communications the State deems worthy (such as commercial calls with a person who has a preexisting relationship), while leaving automated political calls subject to criminal penalties. Congress preempted this type of regulation.

Similarly, the State has incorrectly determined that a phone can ring as often as the caller wishes for a political purpose, so long as the caller has the economic means and time to pay a live operator to deliver the message. But those unfortunate groups like Patriotic Veterans that do not have the financial means to place those calls cannot deliver their messages to voters. The State's entire justification for imposing those requirements on automated political calls is that it will suppress the number of calls made. This is not a constitutionally valid reason.

STANDARD OF REVIEW

Patriotic Veterans is satisfied with Appellant's articulation of the Standard of Review.

ARGUMENT

I. The Automatic Dialing Machine Statute.

The ADMS makes it illegal for Patriotic Veterans to make prerecorded, interstate telephone calls to citizens of the State of Indiana, including those that communicate a political message. The ADMS provides:

> 24-5-14-5. Conditions for using automatic dialing-announcing device – exceptions.
>
> (a) This section does not apply to messages:
>
> (1) From school districts to students, parents, or employees;
>
> (2) To subscribers with whom the caller has a current business or personal relationship; or
>
> (3) Advising employees of work schedules.
>
> (b) A caller may not use or connect to a telephone line an automatic dialing-announcing device unless:
>
> (1) The subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or
>
> (2) The message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered.

Patriotic Veterans, Inc. is a not-for-profit Illinois corporation. (App. 11, Dkt. 34-4 ¶ 2). Its purpose is to inform voters of the positions taken by candidates and officeholders on issues of interest to veterans. (Id. ¶ 3). In disseminating this information, Patriotic Veterans has used, and found effective, automatically dialed phone calls which deliver a political message related to a particular candidate or issue.

If Indiana's law did not exist, Patriotic Veterans would place automated phone calls related to its mission to Indiana veterans and voters. It has not done so because of Indiana's ban on automated political phone calls. (App. 11-12, Dkt. 34-4).

Patriotic Veterans cannot afford to place live-operator phone calls and still convey its message broadly or effectively. The cost of live operator calls is about eight times more expensive using the vendor that Patriotic Veterans has used. (App. 12, 16; *Id.* ¶ 6; Dkt. 34-5 ¶ 11). Moreover, the majority of the people who receive its messages either listen to the entire message, or the message is placed on an individual's answering machine. Thus, automated phone calls are effective in delivering the messages of Patriotic Veterans and appear to be of interest to the majority of those called. (App. 12; Dkt. 34-4 ¶ 6).

Sometimes, Patriotic Veterans wishes to send messages in a short period of time, such as on the eve of an election or before a significant vote in Congress. In those instances, live operator calls are simply not able to be made fast enough for the messages to be delivered in the time allotted. (App. 13; Dkt. 34-4 ¶ 7).

Patriotic Veterans places automated phone calls in jurisdictions which allow such calls on behalf of Patriotic Veterans. Generally, Patriotic Veterans' calls consist of a short voice recording in their spokespersons' own voice. These calls are then delivered to a predetermined list in a predetermined time period. (App. 15; Dkt. 34-5 ¶ 7). Patriotic Veterans has experienced that between 20 to 30 percent of the calls will be heard, in their entirety, by a person who picks up the receiver. In addition, approximately 35 to 50 percent of calls are left on answering machines, in their entirety. Thus, 55 to 80 percent of all automated calls are completely delivered. (App. 16; Dkt. 34-5 ¶ 10).

II. The Federal Laws At Issue.

The Communications Act of 1934, 47 U.S.C. §§ 151–614 ("Communicators Act") regulates many aspects of telecommunications and specifically grants the FCC jurisdiction over all interstate calls. See id. § 152(a) (the provisions of the Act "shall apply to all interstate

and foreign communications by wire"). Section 227(b) of the Communications Act, as amended by the TCPA of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) ("TCPA"), provides:

> It shall be unlawful for any person within the United States:
>
> > (B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes *or is exempted by rule or order by the Commission under paragraph (2)(B).*

47 U.S.C. § 227(b)(1)(B) (emphasis added).

Paragraph 2(B), provides, in pertinent part:

> In implementing the requirements of this subsection, the Commission – ... (B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe – (i) *calls that are not made for a commercial purpose ... .*

47 U.S.C. § 227(b)(2)(B) (emphasis added).

In the findings to the TCPA, Congress explained its reasoning for authorizing the FCC to exempt certain types of noncommercial calls:

> While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for these types of automated or

> prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution.

TCPA § 2(13), 105 Stat. 2395.

In 1992, the FCC exercised the authority granted by Congress in Section 227(b)(2)(B), and adopted a rule that exempted all prerecorded calls made for a noncommercial purpose from any prohibition that otherwise may apply. The rule provides:

> (a) No person or entity may: ... (2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call: ... (ii) *Is not made for a commercial purpose*. ...

47 C.F.R. § 64.1200(a)(2)(ii) (emphasis added). In creating this exemption, the FCC stated that "[w]e find that the exemption, for noncommercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, *political polling* or similar activities which do not involve solicitation as defined by our rules." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 7 FCC Rcd 8752, 8774 ¶41 (1992) (emphasis added). In a further rulemaking decision

issued in July 2003, the FCC expressly reaffirmed the exemption for prerecorded, noncommercial calls. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order*, 18 FCC Rcd 14014, 14095 ¶136 (2003) ("2003 Report and Order") at ¶ 136.

III. Other Courts Have Held The TCPA Preempts State Law.

Describing the District Court Decision (Lawrence, J.) ("Decision") as fundamental error that "no other court has done . . . . since the TCPA was first enacted," (Br. 11, 14), the State of Indiana ignores the holdings of other courts and conflates preemption and statutory construction arguments in an apparent attempt to brand the Decision novel and unique. It is not. The Decision is well-grounded in the law, canons of statutory construction, and common sense. It describes the only sensible interpretation of 47 U.S.C. § 227(f)(1)[2] as it relates to the ADMS, Ind. Code § 24-5-14-5(b).

Indeed, the State does not cite or analyze the caselaw relied upon by the Decision showing preemption. (Short App. 5). In *Gottlieb v. Carnival Corp.*, 367 F. Supp. 2d 301 (E.D.N.Y. 2005), *vacated on other grounds,* the court dismissed a claim related to the TCPA for numerous

[2] This section was recodified, and was formerly 227(e)(1).

reasons, including because the language and legislative history of Section 227(f)(1) support the holding that "Congress enacted the TCPA to supplement similar state legislation to protect the privacy interests of residential phone subscribers against unwanted interstate phone and facsimile solicitations '*because states do not have jurisdiction over interstate calls.*'" *Id.* at 310 (quoting *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Servs., Ltd.,* 156 F.3d 432, 437 (2d Cir. 1998) (emphasis in original)).

Similarly, in *Klein v. Vision Lab Telecommunications*, Inc., 399 F. Supp. 2d 528 (S.D.N.Y. 2005), the court dismissed certain claims related to interstate faxes because it held the TCPA preempted a New York law prohibiting them. It reached this conclusion for the same jurisdictional reason. *Id.* at 542 (citing *Gottlieb,* 367 F.Supp.2d at 310). *See also Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal., Feb. 27, 2006) (holding the TCPA preempted a California law that imposed more stringent restrictions on interstate fax advertisements).

IV. The TCPA Expressly Preempts The ADMS.

The TCPA is part of the comprehensive Communications Act of 1934, 47 U.S.C. §§ 151-614, which regulates many aspects of telecommunications and specifically grants the FCC jurisdiction over all

interstate calls. 47 U.S.C. § 152(a)). Under the longstanding allocation of authority established by the Communications Act, the States are, with certain exceptions, permitted to regulate *intra*state calls, but have no jurisdiction to regulate *inter*state calls. By contrast, the FCC has authority to regulate all interstate calls and some intrastate calls.

The TCPA savings clause, 47 U.S.C. § 227(f)(1), allows the states to continue to impose their own requirements on *intrastate* calls that were more stringent than the federal rules. Nothing in the TCPA in any way suggests that this savings clause is designed to provide authority to the states to regulate interstate calls.

A. Congress Intended to Preempt Laws Like The ADMS To The Extent It Regulates Interstate Political Calls.

Congress expressly preempted some state laws in enactment of the TCPA. The existence of a savings clause "preserves from pre-emption" those state laws falling within its scope. *Chamber of Commerce of the United States v. Whiting*, 131 S. Ct. 1968, 1998 (2011). "[S]tate laws outside of that defined universe" are preempted. (Short App. 5). The language of the respective statutes, legislative and regulatory history, and the absurd results that would exist if the State's

interpretation were adopted confirm the intent of Congress to preempt the ADMS.

1. The Language and Legislative History Of The Respective Statutes Confirm Express Preemption.

The savings clause states:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt *any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits* –
>
> ...
>
> (C) the use of artificial or prerecorded voice messages . . .

47 U.S.C. § 227(f)(1) (emphasis added).

Patriotic Veterans and the District Court's reading of the savings clause preserves the States' historic power to impose more stringent restrictions on *intra*state calls (up to and including prohibiting them) and the FCC's longstanding authority over interstate calls, while avoiding unneeded conflict with the First Amendment.

Consistent with the legislative history confirming states have no jurisdiction over interstate calls, and while the grammatical structure of the savings clause is awkward, its text is consistent with the notion that interstate call regulation is a federal, and not state, power. Indeed,

the word "interstate" does not even appear in Section 227(f). The natural reading of this provision is that in extending federal authority, Congress accommodated the States by preserving more stringent local statutes governing *intrastate* calls. If Congress intended to upset the long-standing division of authority between the States and the federal government over interstate calls, it would have done so more clearly. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("[Congress] does not, one might say, hide elephants in mouseholes").

The language of the savings clause requires consideration of extrinsic sources because its language is awkward. The word "that" introduces a restrictive clause, and the word "which" signals a nonrestrictive clause. *The Chicago Manual of Style* § 5.42 (14th rev. ed. 1993). "Which" is "used as a relative pronoun in a clause that provides additional information about the antecedent." *Webster's II New College Dictionary* 1257 (1995).

The logical reading – though not grammatically perfect – is that the antecedent of "which" is not "any State law," but rather the entire phrase "any State law that imposes more restrictive intrastate requirements or regulations on the use of artificial or prerecorded messages." The clause introduced by "which" provides additional

information about the kinds of measures that a State is permitted to adopt for intrastate calls – *i.e.*, it may prohibit them as well as restrict them. The comma is necessary grammatically to separate "or which prohibits" from the phrase "requirements or regulations," in which two words already are joined by a disjunctive conjunction. This interpretation follows the principle of giving meaning to Congress' use of the different words "that" and "which" to introduce the two clauses. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Thus, properly construed, the term "intrastate" applies to both clauses.

Despite the State's characterization of the Decision as unique, other courts have reached the same result. In resolving a statute of limitations issue, the Second Circuit recently reviewed the purpose of the TCPA. It noted that the "purpose of the TCPA was to assist those states—then numbering forty—that had enacted legislation to protect their residents from unsolicited commercial telecommunications by filling a perceived jurisdictional gap for *interstate* communications that states might not otherwise be able to reach." *Giovanniello v. ALM Media, LLC*, 660 F.3d 587, 592 (2d Cir. 2011) (emphasis added) (citing TCPA, Pub. L. No. 102-243, § 2(7), 105 Stat. 2394, 2394 (1991) (codified as a note to 47 U.S.C. § 227) ("Over half the States now have statutes

restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices."); *see also* S. Rep. No. 102-178, at 3 (1991), reprinted in 1991 U.S.C.C.A.N. 1968, 1970 ("States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls.")

In *Gottlieb v. Carnival Corp.*, then-Judge Sotomayer reviewed the legislative history of the TCPA and also relied upon S. Rep. No. 102-178, at 3 and concluded that states do not have jurisdiction over interstate calls. 436 F.3d 335, 341-42 (2d Cir. 2006), *rev'd on other grounds.*

As *Giovanniello, Gottlieb*, and similar cases have noted, "[s]tates do not have the jurisdiction to protect their citizens against those who use these machines to place interstate calls," and jurisdiction over interstate telephone calls is reserved for federal, not state, law. *Gottlieb,* 436 F.3d at 342 (noting "many states have passed laws that seek to regulate telemarketing through various time, place and manner restrictions . . . . However, telemarketers can easily avoid the

restrictions of State law, simply by locating their phone centers out of state," and citing H.R. Rep. No. 102-317, at 9-1 (1991)). The central justification for the TCPA is that the federal government could regulate what the states could not -- interstate phone calls.

Indiana attempts to turn this on its ear and argue that the savings clause, in fact, *allows* states to regulate interstate phone calls. (Br. 15-18).[3] Indeed, the State boldly proclaims the text of the savings clause to be "plain" and easily applicable to a literal application on this point. (Br. 15-16). But it is entirely unclear how the application advanced by the State would allow the savings clause to preempt any state law under Indiana's cramped interpretation. Such a construction would render Section 227(f)(1) a dead letter, which is neither what Congress intended nor how statutes should be construed. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (words have meaning, and are not superfluous). Indiana's interpretation frustrates Congress' goal of

[3] The State of Indiana also ignores that Congress enacted the TCPA pursuant to its commerce power found in U.S. Const. Art. I, § 8, cl. 3. *See Gottlieb v. Carnival Corp.*, 635 F. Supp. 2d 213, 222 (E.D.N.Y. 2009). The States have no similar ability to regulate commerce, and thus Indiana's interpretation that it can regulate commerce by regulating interstate calls would implicate additional constitutional concerns not raised below.

uniformity of its telecommunications laws and is precisely the opposite goal of statutory construction.

2. The ADMS Falls Outside the Language of the Savings Clause.

In addition to the holding that Congress did not intend for states to regulate interstate calls, the ADMS falls outside the scope of the savings clause because Indiana's law does not prohibit autodialed calls (as Indiana agrees the text of the statute requires, Br. 16). (Short App. 8). Instead, the ADMS attempts to regulate them, which is impermissible.

While the ADMS does eliminate all autodialed political calls, it expressly allows other autodialed calls. A caller can use an autodialer and prerecorded message if they are willing and able to shoulder the significant added expense of a live operator. In addition, Indiana has recognized the benefits of autodialed calls of a certain subject matter, and thus allows calls:

> (1) From school districts to students, parents, or employees;
>
> (2) To subscribers with whom the caller has a current business or personal relationship; or
>
> (3) Advising employees of work schedules.

Ind. Code § 24-5-14-5. Allowing calls to employees or students, or for some commercial purposes, means that the technology is not prohibited but regulated. The effect of regulation is that such a statute is not "saved" from preemption.

The State relies on *State ex. Rel. Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828 (N.D. 2006), *cert denied*, for its "simply incorrect" argument. However, that case never considered whether the term "prohibit" in the TCPA applies to statutes like Indiana's which have chosen to allow autodialed calls for some reasons and not others.

A recent decision finding no preemption for a commercial autodialed call is instructive. In *Meilleur v. AT & T Inc.* 2011 WL 5592647 (W.D. Wash. Nov. 16, 2011), the Western District of Washington interpreted RCW 80.36.400 and held it was not preempted by the TCPA. The Washington statute is different from the Indiana statute, and provides in pertinent part that "(2) No person may use an automatic dialing and announcing device for purposes of commercial solicitation. This section applies to *all* commercial solicitation intended to be received by telephone customers within the state." (emphasis added). The court did not analyze whether this was a regulation or prohibition. But the court noted the purpose of the savings clause was

to "encourage[] states to continue to ban automated dialers, while discouraging possibly inconsistent regulatory schemes that might conflict with the TCPA's dictates on such activity." *Id.* at *14.

Indiana's statute is different. It does not prohibit autodialed calls, or even all commercial autodialed calls, but instead makes selections of particular types of calls that it will allow. The State's interpretation of 227(f)(1)(B) stands in stark contrast to its construction arguments related to interstate calls. On the one hand, the State wants to interpret the statute broadly so it can regulate interstate calls. On the other hand, it wants the term "prohibit" to be interpreted as narrowly as possible.

The plain text of the ADMS seeks to control the use of automatic dialing devices through restrictions on their use by increasing their cost, while at the same time not forbidding or preventing their use. *See* Br. 44 at 51 (where state concedes Patriotic Veterans is "free" to use prerecorded and autodialed calls so long as they are introduced by a live operator, making them unduly burdensome and expensive). However, Indiana's restriction is found nowhere in the language of section 227(f) and confirms that the ADMS is a regulation, not a prohibition, and thus outside the savings clause.

3. The State's Construction Would Lead to Absurd Results.

Indiana's interpretation of the savings clause is grammatically incorrect and produces absurd results:

- An interpretation that reads "intrastate" to apply only to "requirements or regulations" and not to "which prohibits" would use the terms "that" and "which" to mean the same thing and would thereby create two parallel clauses. This interpretation also would be grammatically inconsistent.
- An interpretation that reads Section 227(f)(1) to grant the States the lesser authority to impose "requirements or regulations" on intrastate calls, but to have the greater power to "prohibit" interstate calls, would conflict with the basic allocation of authority in the Communications Act, under which the States have always had authority to regulate intrastate calls but have never had the greater authority to regulate interstate calls.

The structure of the Communications Act and the longstanding regulatory context in which authority to regulate interstate calls has rested exclusively with the FCC strongly support an interpretation that the State's ability to prohibit prerecorded calls is limited to intrastate calls.

Any interpretation of the savings clause that grants States authority over interstate calls would make the second clause serve as an affirmative grant of power to the States, a delegation that is reflected nowhere else in the TCPA. In *Locke*, the Court cautioned

against interpreting language in a savings clause in a manner that would upset a settled regulatory framework and allow the States to regulate matters long regulated by the federal government.

> We think it quite unlikely that Congress would use a means so indirect as the savings clauses ... to upset the settled division of authority by allowing states to impose additional unique substantive regulation. ... We decline to give broad effect to savings clauses where doing so would upset the careful regulatory scheme established by federal law.

U.S. v. Locke, 529 U.S. 89 106 (2000).

An interpretation of the savings clause that grants States the authority to prohibit both inter- and intrastate calls also would ignore the Supreme Court's warning in *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 508 U.S. 439 (1993):

> [T]he meaning of a statute will typically heed the commands of its punctuation. But a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. ... No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning.

508 U.S. at 454-455 (internal citation omitted). Thus, the proper application of the clause is obviously to preempt regulation of interstate autodialed calls.

B. The Legislative History and Regulations of The FCC Conflict With the ADMS, And Confirm Congress's Intent to Preempt Similar State Laws.

"Where state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2577 (2011) (citing U.S. Const., Art. VI, cl. 2). Because the calls Patriotic Veterans seeks to make are interstate political calls subject to exclusive regulation by the FCC, the ADMS is preempted by the FCC's regulations. The regulations of the FCC, which prohibit most prerecorded messages, specifically permit noncommercial prerecorded messages. The FCC crafted these regulations under express authority – indeed instruction – from Congress to consider the important First Amendment issues surrounding the use of recorded messages for political purposes.

A state law conflicts with federal law where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000). Here, any presumption is rebutted by Congress's clear intention. *McHon v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003). Further, the statutorily authorized regulations of a federal agency preempt any state law that conflicts with those rules or would frustrate accomplishment of their purposes. *City of N.Y. v. F.C.C.*, 486 U.S. 57,

64 (1988) (FCC rule establishing technical standards for cable television signals preempts more stringent local requirements); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 704 (1984) (preempting state regulation that "plainly reaches beyond the regulatory authority reserved to local authorities ... and trespasses into the exclusive domain of the FCC"). The existence of a savings clause "does not bar the ordinary working of conflict preemption principles." *Geier*, 529 U.S. at 869.

"In determining whether state law stands as an obstacle to the full implementation of federal law, it is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach the goal." *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (*quoting Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992)).

The State conflates statutory construction with conflict preemption, asserting that if any ambiguity exists in the statutory language then there can be no clear conflict. (Br. 17, 20, 23-24.) The ADMS conflicts with the federal statutory scheme because it interferes with national uniformity and frustrates Congressional desire to protect

noncommercial speech. The FCC's regulations are consistent with Congress. *See* 2003 Report and Order at § 73.

Immediately before passage of the TCPA, Senator Hollings, chairman of the Commerce Committee and co-sponsor of the TCPA, explained that, "[p]ursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, *including interstate communications initiated for telemarketing purposes*, is preempted." 137 Cong. Rec. S18781, S18784 (daily ed. Nov. 27, 1991) (emphasis added). Throughout the legislative history of the TCPA, Congress indicates its intent to protect First Amendment freedoms. Indeed, the TCPA's Congressional findings note that "commercial freedoms of speech and trade must be balanced in a way that ... permits legitimate telemarketing practices," and mention the "constitutional protections of free speech" and the "free speech protections embodied in the First Amendment of the Constitution." 47 U.S.C. § 227 (9), (13), (15). Senator Hollings also noted how the bill was "drafted to comply strictly with the first amendment guarantees of freedom of speech." 137 Cong. Rec. S16204, S16206 (daily ed. Nov. 7, 1991).

The ADMS imposes upon the purposes of the TCPA. It is an objective of Congress to regulate interstate telephone calls within the purview of the First Amendment; Indiana's statute ignores and contradicts free speech guarantees, thus standing "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995).

C. The Presumption Against Preemption Does Not Change Congress's Intent.

The State chides the District Court for failing to "mention—let alone give any weight to—the presumption against preemption." (Br. 20). Of course, there is no need to analyze the presumption when, as here, Congress' intent is clear. *See McHon*, 324 F.3d at 945. Moreover, when the State regulates in an area where there has been a history of significant federal presence, the presumption usually does not apply." *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003), *see also Locke*, 529 U.S. at 89 (2000) (same). As the Court in *Lockyer* noted,

> "Here, there is no dispute that the area of interstate telecommunications has a history of significant federal presence. Indeed, since the passing of the FCA in 1934, there has been a tremendous amount of federal legislation regarding interstate telecommunications including legislation directly concerned with the transmission of unsolicited facsimile

> advertisements. Consequently, the Court finds that the presumption against preemption inapplicable to the case at bar."

Lockyer, 2006 U.S. Dist. LEXIS 8324 at 17-18.

The State's reliance on the role of the FCC is misplaced for at least two reasons. First, the FCC has avoided regulating noncommercial speech. *See* 2003 Report and Order ¶63; 47 C.F.R. § 64.1200(a)(2)(ii). On at least this point, federal law is uniform, and the FCC is not the state's ally in its attempt to ban political calls. Second, the State's assertion that the FCC has the jurisdiction to determine the preemptive effect of its regulations conflicts with the State's assertion that the presumption against preemption applies. The limited precedential value of a lack of agency action notwithstanding, if the FCC has primary jurisdiction, then a presumption *in favor of preemption* applies. *Brown v. Hotel and Restaurant Employees*, 468 U.S. 491, 503 (1984). *Brown* also noted that in such an analysis, state interests are irrelevant. *Id.*

The State relies heavily on the presumption, arguing at times the savings clause is clear and other times that it is ambiguous, and each time returning the proposition that the presumption carries the day. However, and while the savings clause is not the most artfully drafted,

once all of the statutory construction principles are deployed Congress' intent is clear, and presumption does not overcome it.

The State also asserts that all Congress regulates on an interstate basis are services and facilities, and that the content of the calls are left solely to the states. This interpretation renders the savings clause wholly superfluous. All of the savings clause subsections relate to the content of what is transmitted over telephone lines. If the states were free to regulate content as they wished, there would be no need to "save" some of this regulation for them.

D. Decisions Not Preempting State Law Are Distinguishable.

Several of the cases cited by the State do not analyze the provisions of the TCPA at issue here. *Int'l Sci. and tech Inst., Inc. v. Inacom Commc'n, Inc.*, 106 F.3d 1146 (4th Cir. 1997) never analyzed express or conflict preemption, and did not interpret Section 227(f) except to note it exists. Interestingly, even the 4th Circuit's cursory interpretation of the savings clause was precisely the same as Patriotic Veterans and the District Court's. *Id.* at 1153 ("'nothing in this section ... shall preempt any State law that imposes more restrictive intrastate requirements ... *or* which prohibits' certain enumerated practices" (emphasis added)).

The North Dakota Supreme Court in *Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828 (N.D. 2006) never discussed the lack of state jurisdiction over interstate calls, did not analyze whether North Dakota's laws were a prohibition or a regulation, and refused to apply *Chamber of Commerce v. Lockyer*, 2006 WL 462482 (E.D. Cal., Feb. 27, 2006). At best, then, *Stenehjem*, is an incomplete analysis at odds with other federal decisions.

Utah Div. of Consumer Prot. v. Flagship Capital, 125 P.3d 894 (Utah 2005), not cited by the State, similarly refused to apply *Locke*, focused exclusively upon the savings clause without reference to the Communications Act, did not analyze whether the law was a prohibition or regulation, and incorrectly held that the TCPA authorizes states to impose restrictions upon interstate calls.

The Eighth Circuit in *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), held that Congress did not intend to "occupy the field" of automatic dialing announcing devices. 59 F. 3d at 1548. But the rest of *Van Bergen*'s analysis is inapposite because the case arose from a claim that the TCPA preempted the application of more restrictive state laws to *intrastate*, not interstate, telephone calls. Although no calls had been placed at the time of the legal challenge, an examination of the

district court opinion reviewed in *Van Bergen* demonstrates that, because the plaintiff was a Minnesota resident and "there is no evidence presently before the Court that he intends to connect his ADAD machines to telephone lines anywhere other than in Minnesota ... regulation of *his* use of ADAs would involve *intrastate* communications." *Van Bergen v. Minnesota*, Civ. 3-94-731, Memorandum Opinion and Order, at 11 (July 18, 1994) (emphasis in original). United States District Judge Kyle then concluded that the plaintiff lacked standing to challenge the applicability of the TCPA to interstate calls directed at Minnesota residents: "Therefore, Van Bergen cannot be heard to claim that the federal TCPA statute preempts Minnesota's ADAD statute since he cannot show that any injury to himself is fairly traceable to the fact that the Minnesota statute may regulate the interstate use of ADAs." *Id.* at 13.

* * *

"In determining whether state law stands as an obstacle to the full implementation of federal law, it is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach the goal." *Ind. Bell Tel. Co. v. Ind. Util.*

Regulatory Comm'n, 359 F.3d 493, 497 (7th Cir. 2004) (*quoting Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 103 (1992)). The ADMS interferes with the national uniformity and lack of conflict with the Constitution that the Congress sought in passing the TCPA, and is therefore preempted as applied to interstate political calls.

V. The ADMS Is Unconstitutional And Unenforceable Because It Violates The First Amendment.

Patriotic Veterans places automated calls around the country in order to convey political messages to veterans as well as other voters. Those same calls are criminal in Indiana. Although these calls are core political speech, the ADMS targets them for criminal punishment. Violating the ADMS's prohibition on political speech is a Class C misdemeanor punishable by imprisonment of 60 days in prison and a fine for each occurrence. *See* Ind. Code § 24-5-14-10; Ind. Code § 35-50-3-4.

This criminal penalty for political speech violates the First Amendment in three respects. *First*, the ADMS is overbroad because its criminal sanction applies even if the call involves political speech sent to willing listeners who would not be "annoyed" to hear messages

on topics of public concern. All parties agree that such willing listeners exist throughout Indiana.

Second, the ADMS is a content-based regulation and improperly bans an entire mode of political speech. It must therefore be subject to strict scrutiny, a standard the ADMS cannot survive.

Third, even if the ADMS was a content neutral "time, place and manner" restriction, the government's weak interest and the overbroad scope of the statute renders it unconstitutional.

A. The ADMS Is Overbroad Because It Bans A Substantial Amount Of Political Speech.

The State's First Amendment arguments ignore the primary reason why the ADMS is unconstitutional in the first place – the fact that it is an overbroad ban on a substantial amount of protected speech. Because of the chilling effect that can occur when statutes prohibit activities related to speech, state regulation of speech may be struck if it is "overbroad." *Virginia v. Hicks*, 539 U.S. 113, 123 (2003). A statute is overbroad if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). In other

words, a "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Hicks,* 539 U.S. at 118-19 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)).

The ADMS is overbroad because it prevents (by criminal sanction) willing speakers from reaching willing listeners on matters of public concern. Free speech includes the right to listen. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976), as well as the right to communicate in the manner chosen by the speaker, *Citizens United v. Federal Election Comm'n,* 130 S.Ct. 876, 895 (2010). Under the First Amendment, "the protection afforded is to the communication, to its source and to its recipients both." *Va. Citizens,* 425 U.S. at 756. "'When one person has a right to speak, others hold a 'reciprocal right to receive' the speech.'" *Indiana Right to Life, Inc. v. Shepard*, 507 F.3d 545, 549 (7th Cir. 2007) (quoting *Virginia Citizens*, 425 U.S. at 756).

The ADMS undeniably stamps out the right of willing listeners to receive messages on political topics. Patriotic Veterans places calls in multiple states that do not ban automated calls. (Dkt. 34-5, ¶ 10). In its experience, 55 to 80 percent of calls are placed in their entirety. *Id.* For example, on October 15, 2010, Patriotic Veterans placed 68,628 calls in West Virginia. The recipients of 20,965 of those calls listened to the entire political message.

The State claims the Court should ignore this evidence because the recipients were not in Indiana and there is no evidence of calls made into Indiana. (Br. 39). But that is true *because* of the ADMS. The State creates a paradox, claiming that the only way to gather the necessary evidence to invalidate the ADMS is to violate it.[4]

Similarly, the State contends these individuals stay on the line only to determine who made the call so they could lodge a complaint. (Br. 39). Alternatively, the State suggests that these recipients "seethe at the disruption" throughout the call. *Id.* There is nothing in the

[4] In another ADMS case, the record shows that of approximately 400,000 automated phone calls there were only 22 complaints. This case is now pending before the Indiana Supreme Court after the trial court enjoined the statute under the Indiana Constitution. *See* Ind. Sup. Ct. Cause No. 07-S-00-1008-MI-411.

record to support this speculation, and it defies logic to believe that recipients would waste time listening to messages only to "seethe."

Moreover, evidence in the record – but ignored by the State – confirm that a substantial number of Indiana residents have had their desire to listen to automated calls foreclosed by the ADMS. Dkt. 42-2. These individuals are willing listeners for political calls but cannot do so because of the ADMS.

If there was any doubt about the point, even the State's expert acknowledges that individuals within Indiana would like to receive political messages through automated means. (Dkt. 42-1,p. 62). As the expert explained, "how many people would have a preference, a desire to get pre-recorded calls, political or otherwise, would be a small number of people, but they're *undoubtedly* are some." *Id.* at p. 66 (emphasis added).

Regardless of whether some as-of-yet unidentified number of Indiana residents would prefer not to receive *any* automated political calls, the record is clear that the ADMS prevents willing Indiana residents from receiving political messages. This protected political activity is swept up in the scope of the ADMS even though this speech has nothing to do with the State's claimed purpose of preventing the

"annoyance" that allegedly stems from the ringing of the telephone. This annoyance does not exist when willing recipients receive political messages.

B. The Statute Burdens Political Speech And Cannot Survive Strict Scrutiny.

Free speech on political issues is a cornerstone right under the First Amendment. The very purpose of that Amendment was "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 899 (2010) (quoting *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). The ADMS creates this type of burden and should be reviewed under strict scrutiny because: (1) it is not content neutral; and (2) it bars an entire method of political speech.

1. The ADMS Is Not Content Neutral And Is Being Targeted To Political Calls.

First, strict scrutiny applies because the ADMS targets political speech both on its face and in the manner in which the State has chosen to enforce it. A statute is content-based and subject to strict scrutiny if it is justified by reference to the content of the speech. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

The ADMS on its face sets political speech apart from other forms of speech. The ADMS applies with full force *only* to political speech. Commercial solicitations are already regulated by the Privacy Act. *National Coalition of Prayer Inc. v. Carter,* 455 F.3d 783, 789 (7th Cir. 2006). Automated political calls do not fall within the scope of the Privacy Act and are only forbidden by the ADMS. (Br. 52). However, the ADMS allows other species of automated calls by exempting calls from school districts, debt collectors and employers. These exemptions protect educational and commercial speech but not political speech. The State therefore presumes that speech by debt collectors or schools is more important than political speech. The exemptions allow these preferred forms of speech while simultaneously suppressing core political speech.

Indeed, the State admits the purpose of the ADMS is to suppress this speech or, if a recording is used, prohibitively expensive. (Br. 47-48). When the Privacy Act was before this Court, the State expressly acknowledged that it could not apply it to political speech. *National Coalition of Prayer*, 455 F.3d at 789. The State makes no such concession here, as the State's purpose is to foreclose this avenue of speech. While the State claims that the purpose of the ADMS is to prevent disruption by the ringing of the telephone, it allows that very thing when it comes to other types of speech that it deems more important. It would allow this identical type of speech if the speaker could pay the eight-fold costs of having the calls made by an operator. Because political speech is placed in this disfavored position among the categories of speech regulated by the ADMS, the statute must be subject to strict scrutiny. *See, e.g., Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F. Supp. 2d 671, 684 (N.D. Ohio 2003).

Even if the ADMS was not content-based on its face, a statute can violate the First Amendment if it is enforced in a speech-discriminatory manner. *United States v. Marcavage*, 609 F.3d 264, 287 (3d Cir. 2010); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). If there was any doubt about the ADMS's purpose in stopping automated political

speech, the State's enforcement of it has made the point perfectly clear. Although not mentioned in its brief, the State did not enforce the ADMS against political calls until after the Court made clear that the Privacy Act did not apply to political calls. *National Coalition of Prayer*, 455 F.3d at 789. The State did not even record complaints of violations of the ADMS until its loss before this Court in 2006. (Dkt. 42-1, pp. 35-36). At that point, the State changed course and warned political parties that it would target political calls for enforcement under the ADMS. (Dkt. 34-3).[5]

The State claims that other cases have found other states' restrictions on automated calls to be content neutral. *See* Br. 39. But none of those states specifically enforced their statutes to target political calls. Because "a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship," the ADMS cannot be applied in a manner that targets political speech. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988).

[5] Although the State makes much of the fact that the ADMS was passed in 1988, Br. 40, the State fails to mention that it had not been construed to apply to political calls or enforced against political speech until 2006.

For instance, the State heavily relies on *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) to claim the ADMS survives as a content neutral regulation. (Br. 39). *Van Bergen* treated its exceptions as being "based on relationship rather than content" and therefore content-neutral. *Id.* at 1551. But a hypothetical "relationship" does not make the ADMS content neutral. The statute unequivocally exalts speech by schools and debt collectors over political speech. That those speakers might also have a prior relationship with the listener cannot change the fact that the statute differentiates between categories of speech based on their content. Indeed, some listeners would have a prior relationship with a speaker, one that would be far more substantial than with a debt collector. But the ADMS disfavors this political speech. That content discrimination requires strict scrutiny.[6]

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[6] Moreover, the Eighth Circuit *Van Bergen* simply assumed that the cost of a prerecorded call introduced by a live operator "should be only a marginally more costly option" than prerecorded calls. 59 F.3d at 1556. Here, however, the *undisputed* evidence demonstrates that the cost of a live operator call is several orders of magnitude higher than a prerecorded call, with the result that such calls are not a cost-effective form of political expression. *See infra*, Section II.C. Further, the evidence shows that the additional time necessary to place live operator-introduced calls would destroy one of the principal advantages of prerecorded calls – their ability to communicate with large numbers of voters in a short period of time immediately before the election. *See id.*

2. The Statute Impermissibly Burdens Political Speech By Banning A Medium Of Political Expression.

Even if the Court concludes that the ADMS is content neutral, the statute acts as a virtual ban on protected political speech. The ADMS's attempt to ration political speech is unconstitutional under an unbroken line of Supreme Court decisions prohibiting laws that suppress entire methods of political speech. These cases arise in the context of laws that sought to prohibit traditional political acts such as leafleting or canvassing. Automated calls are the modern equivalent of this political speech, and these cases naturally extend to automated calls.

For instance, in City *of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court considered the constitutionality of a city ordinance against displays of signs on residential property. *Id.* at 54. The Court found that the ordinance was unconstitutional because it almost completely foreclosed a form of political communication that was "unusually cheap and convenient." *Id.* at 57.[7]

[7] The State attempts to distinguish *Ladue* by claiming that the speaker in that case was the homeowner. (Br. 45.) That is a distinction without difference given *Ladue's* teaching that the ordinance could not entirely foreclose a form of political speech. 512 U.S. at 57.

Ladue relied largely on *Martin v. City of Struthers*, 319 U.S. 141 (1943). *Martin* held that a local ordinance prohibiting a person from knocking on the door of residences to distribute literature was unconstitutional as applied to a person distributing such literature door-to-door for a religious purpose. The municipality claimed the ordinance protected homeowners from nuisances and crime. The Supreme Court nonetheless held that the ordinance was unconstitutional because it went too far by "substituting the judgment of the community for the judgment of the individual householder. It submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it." *Id.* at 143-144.

Similarly, in *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939), the Court invalidated under the First Amendment local ordinances from several jurisdictions that prohibited a person from distributing literature in the streets or other public places. The Court held that the legitimate municipal interest in preventing littering could not justify an ordinance that imposed a total prohibition on a person's ability to exercise his free speech rights by distributing literature to passersby. *Id.* at 160-62.

Most recently, the Court struck down an ordinance that prohibited door-to-door advocacy without a permit, as applied to "religious proselytizing . . . anonymous political speech, and the distribution of handbills." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 153 (2002). Relying on *Ladue* and its predecessors, *Watchtower* concluded that the ordinance was so intrusive on political speech it could not survive under any standard of review. *See id.* at 164.

The distinction articulated in *Watchtower* between the compelling governmental interest necessary to justify a prohibition or limitation on political speech under the First Amendment, as opposed to the lesser showing necessary to justify a restriction on commercial speech, was recognized in this Court's decision in *National Coalition of Prayer*, 455 F.3d 783. There, the court upheld the constitutionality of the Privacy Act, which precluded charities from making fundraising calls through professional marketers. 455 F.3d at 784. In upholding the restriction as applied to that form of *commercial* speech, the court stated in three places that "an act that severely impinged on core First Amendment values" might not survive constitutional scrutiny." *Id.* at 790 n.3. Specifically, the court noted that the Indiana statute "sharply

curtails telemarketing – the speech that was most injurious to residential privacy – while excluding speech that historically enjoys greater First Amendment protection." *Id.* at 792. As such, the Court stated that:

> [W]e are mindful that if an ordinance is to regulate any speech, it must be able to withstand a First Amendment challenge. To that end, it is not surprising that the Indiana Attorney General has fashioned an "implicit exception" for political speech, even if that speech comes from professional telemarketers. Political speech has long been considered the touchstone of First Amendment protection in Supreme Court jurisprudence, and courts are prone to strike down legislation that attempts to regulate it.

Id. at 791.[8]

The State now ignores the "'implicit exception' for political speech" that it recognized in *National Coalition* and the careful line drawn in that case to avoid an unconstitutional restriction on the core political speech.

Here, the grounds for concluding that the ADMS is unconstitutional are even stronger than in the *Martin-City of Ladue-Watchtower* line of cases. This case involves a virtual prohibition on all

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[8] The State contends that the Court did not "suggest that strict scrutiny would have applied to the Telephone Privacy Act if it had regulated political calls," Br. 35, the plain language of the opinion speaks for itself.

prerecorded political telephone calls. By their nature, these calls do not present the risk of physical intrusion, coercion, and intimidation, or use as a pretext for criminal activity that the municipalities advanced as justification for their ordinances in those cases.

Patriotic Veterans seeks to engage in a form of canvassing by using a modern technology – the prerecorded telephone call. The Supreme Court's concern that direct, cost-effective means of communication are available to less well-funded political speakers is particularly relevant today. In modern terms, a prohibition on prerecorded telephone calls is not neutral among candidates, but helps only those who are well-funded. It can also serve as an incumbent-protection device because they tend to be better funded than challengers.

Because "[i]t is frequently feasible to pour new wine into old legal bottles," *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 599 (Ind. 2001), recent cases have extended the logic of the *Ladue* line of cases to the new legal "wine" presented by the expanded use of technology to communicate with voters. *See Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993) (granting injunction to prevent enforcement of a similar autodialer statute); *Jaynes v. Commonwealth*, 666 S.E.2d 303 (Va.

2008) (finding overbroad a ban on anonymous spam because it might include political speech).

The autodialer calls are clearly a modern extension of established forms of protected political speech such as canvassing. The knock on the door is replaced with the ringing of the phone. There is no reason to believe the phone is more intrusive than the knock. One can ignore the door as easily as hang up the phone. As the Oregon Supreme Court explained in striking down a similar complete ban on autodialed calls:

> The spoken word is our most popular and, to date, most significant form of communication. Newer forms of transmitting communications have arisen in the last 200 years. The telegraph (Cook, Wheatstone, Morse, 1837) enables people to communicate messages through an electrically charged wire by using a coded sound system. The telephone (Bell, 1876) carries the sound of one's voice through electrically charged wire. Radio (Marconi, 1895) carries signals through the air that may be received and transformed, by electronic means, into the sound of voices.
>
> Audio recordings enable people to record their voices in another medium that may be replayed virtually anywhere. Most recently, people communicate with computers by voice, and computers replicate the human voice by technologically simulating its sound. . . .
>
> The fact that one's means of expression is by a recording or simulation of one's voice does not alter its essential nature – speech.

Moser v. Frohnmayer, 845 P.2d 1284, 1285-86 (Or. 1993).

The State offers only a surface explanation as to why the ADMS's effort to foreclose a form of political speech escapes strict scrutiny. Instead of meaningfully distinguishing these cases, the State dismisses this decades-long string of authority by claiming these cases dealt with "venerable" means of communication. (Br. 44). It is true, as the State notes, that none of them dealt specifically with automatic dialing machines. *Id.* But simply focusing on the particular device used to communicate – whether it is a knock on the door, a leaflet or a telephone – ignores the actual teachings of those cases. The State cannot prohibit an entire mode of political speech based on "annoyance," whether from "venerable" leafleting or canvassing or a more modern form such as automated calls. The Supreme Court has made clear that no matter what the channel of communication, the important role of political speech prevents the state from entirely foreclosing the use of that channel for political speech. *Citizens United,* 130 S.Ct. at 890. The Supreme Court has expressly held that the First Amendment takes the courts out of the business of choosing the modes of communication used by political speakers. In *Citizens United,* the Court explained that:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of

> communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.

Citizens United, 130 S.Ct. at 890.

Finally, the State contends the ADMS is not in fact a total ban on automated calls because those calls may be placed so long as they are preceded by a live operator. Leaving aside for a moment that this undercuts the State's preemption argument (which applies only if the State "prohibits. ... the use of automatic telephone dialing systems"), under the ADMS, an automated call can be placed only if it is preceded by a live operator who obtains the listener's consent and gives certain disclosures. Ind. Code § 24-5-14-7,-14. This live operator requirement is disconnected from the State's claimed purpose of preventing intrusion or annoyance. For those who do not consent, the annoyance of a ringing telephone exists regardless of whether consent is sought (or disclosures made) by a live operator or a machine. An automated call is capable of recording the listener's consent and obviously can give recorded disclosures. While the State claims there is no evidence that electronic

consent can be given, Br. 51, the record unequivocally shows technology allow calls to seek consent and respond accordingly. (Dkt. 34-5, ¶ 6).[9]

The effect on residential privacy in having these questions asked by a prerecorded, interactive call is no different than if a live operator is used (who would then create the risk of humor error). Once the telephone rings, it does not matter if consent obtained by operator or by machine.

The live operator requirement serves no purpose other than to drive up costs and limit political speech. It is a false barrier intended to artificially prevent political calls from being made. It creates a *de facto* ban on calls by imposing a burdensome live operator requirement that no party could actually meet. Patriotic Veterans does not bemoan that "it costs too much to hire live operators." The use of live operators fundamentally changes the form of communication both in terms of the scope of the audience and the ability to quickly reach an audience with

[9] Despite this evidence, the State engages in speculation by claiming – without record citation – that in its experience, supposedly interactive voice technology leads nowhere." Br. 51.

a message candidates can control.[10] In practical terms, the cost renders it unusable.

3. The ADMS Cannot Survive Strict Scrutiny.

Because the ADMS is not content neutral and completely bars a form of political speech, it must satisfy the strict scrutiny standard. Strict scrutiny requires a "compelling state interest" to be served by the statute, which in turn must be "narrowly tailored" and must use the "least restrictive means." *Meyer*, 486 U.S. at 424. Case law and other authorities often note that it is strict in theory but fatal in fact. Cf. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. LAW REV. 793 (2006). Strict scrutiny is in fact "well-nigh insurmountable." *Meyer*, 486 U.S. at 424. The ADMS satisfies none of the requirements of the strict scrutiny test and should be invalidated.

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[10] Indeed, this was the finding of an Indiana state court opinion that enjoined the enforcement of the ADMS on state law grounds, a holding that is now before the Indiana Supreme Court. *State v. Economic Freedom Fund*, Cause No. 07C01-0609-MI-0425 (June 10, 2010). There the trial court struck the act in part because under the live operator requirement, "political calls would be limited or even eliminated by the cost of obtaining consent in a form the ADMS would recognize. [Plaintiffs'] political message would not reach as many Indiana residences as quickly, and it would be irreparably harmed." *Id.* at 5.

First, the ADMS does not serve a compelling state interest. Under strict scrutiny, the type of interest to be served must extend beyond interests "that are 'legitimate,' 'valid,' or 'strong.'" *Marcavage*, 609 F.3d at 287. The Supreme Court has variously described a "compelling interest" as one that is "of the highest order," *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993), "overriding," *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995); or "unusually important," *Goldman v. Weinberger*, 475 U.S. 503, 530 (1986).

No matter what formulation is used, "annoyance" is not enough. *Ohio Citizen Action*, 272 F. Supp. 2d at 685 ("While the government's interest in minimizing annoyance is legitimate, it is not, in and of itself, compelling enough to form the basis for a content-based restriction on free speech."). In short, "the government cannot restrict speech out of a concern for the discomfort it might elicit in listeners." *Brazos Valley Coalition for Life, Inc. v. City of Bryan*, 421 F.3d 314, 326 (5th Cir. 2005).

The Supreme Court has rejected claims with far stronger privacy interests than mere annoyance (such as the names of witnesses, jurors and crime victims). *See Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989);

Cox Broad. Corp. v. Cohn, 420 U.S. 469, 496 (1975); *Cooper v. Dillon*, 403 F.3d 1208, 1218 (11th Cir. 2005).

Here, there is no threat to life or limb. The State's marginal interest in protecting privacy from brief interruption by a ringing telephone from only some sources does not rise to the level of a *compelling* state interest. Moreover, it cannot be acceptable for a live operator to call a home hundreds of times a day to deliver a message of any type, but if a machine causes the phone to ring one time on a political topic, it is a criminal act.

Moreover, at least 20 to 30 percent of the recipients of these calls do not experience any disruption at all, as they are willing listeners to the call. Another 25 to 35 percent of calls go to an answering machine and either bother no one or are received by a willing listener. In all, 45 to 65 percent of all automated calls are delivered in their entirety and do not result in a disruption to the recipient.

The State also contends it does not need to provide any evidence of a compelling government interest but can simply speculate that there might be an interest to be served by the ADMS. The State speculates that a parade of horribles could occur if automated political calls were no longer criminal, citing possibilities such as 400,000 simultaneous

calls by one operator, calls repeated to the same location over and over, or calls placed at odd hours. (Br. 36). There is no evidence to support the State's claim that Patriotic Veterans would inundate Indiana voters in the manner the State describes. The State cannot speculate about some hypothetical harm that could possibly occur, as "speculation does not establish a compelling interest justifying a burden" on protected constitutional rights. *Miller v. Brown*, 503 F.3d 360, 371 (4th Cir. 2007). As the Supreme Court has instructed, the burden to demonstrate the government's interest "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on . . . speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). *See also Fed. Elec. Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

Second, the ADMS is not narrowly tailored and does not use the least restrictive means to regulate. Instead, the ADMS creates a virtual ban on a form of political speech. While other less restrictive means exist – such as a do-not-call list for automated political calls, or regulations that fall short of banning all automated calls – the State

has chosen a means that sweeps up the most speech possible. Up to 30 percent of recipients listen to the political messages in their totality. Under the State's ban, none of these listeners would have access to speech they willingly receive.

An obviously narrower approach already exists in the form of the do-not-call-list. The State already uses such a list to carry out the Privacy Act, and it offers no basis as to why a similar do-not-call list would undermine the purposes of the ADMS.[11]

C. The Automatic Dialer Statute Cannot Satisfy The Intermediate Review Applied To Time, Place And Manner Restrictions.

Even if the Court concludes that the ADMS were content neutral and does not burden protected political speech, it still must satisfy the test for time, place and manner restrictions and incidental burdens on speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); "Proper time, place, or manner restrictions must be narrowly tailored to serve a significant government interest unrelated to the suppression of free expression and leave open alternative channels for

[11] The State launches an attack on what it calls "internal" do-not-call lists maintained by the caller. (Br. 50). It offers no evidence to support its conclusion that such lists are ineffective. However, even if that was so, the State lauds its own do-not-call list as an effective mechanism for deterring unwanted calls.

communication." *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1000 (7th Cir. 2002). The ADMS does not satisfy this standard because it does not serve a significant government interest, is not narrowly tailored and does not leave open alternative channels of communication.

1. The State's claimed interest in preventing "annoyance" is not logical, nor is it a "significant" interest worthy of impinging on core political speech.

The ADMS does not rest on a significant government interest unrelated to the suppression of speech. While the State freely equates Patriotic Veterans with the commercial speech barred by the Privacy Act, the only matter at issue is the use of automated calls to convey *political* speech. Robust and timely political speech is a core value of our federal constitution, not an "evil" to be stamped out. Br. 51. There is no governmental interest in sanitizing away political speech. Moreover, far from a substantial interest, the State's interest here is to prevent the minor annoyance of having to answer the telephone, an act Hoosiers do dozens of times a day. [12]

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[12] The State makes much of the fact that Patriotic Veterans' vendor uses advertising that stateming that a ringing telephone "stops people and demands attention." (Br. 38). That statement goes right to the point, as the telephone is a powerful and, at times, the only available medium for reaching voters with the malleable messages that come into play in the waning days of political campaigns. Most

Whatever interest the State has in preventing annoyance is not served for people who wish to receive political messages, as even the State's expert admits the obvious conclusion that people are not annoyed by messages with which they agree or find interesting. (Dkt. 42-1, p. 45). To the extent the State's interest lies in preventing fraud, autodialed calls actually reduce that risk by not giving live operators access to sensitive voter information which can be acquired before or during the call. A machine is not capable of identity theft. [13]

The State relies largely on data it developed under the Privacy Act. (Br. 7). That data shows that 25 percent of Hoosiers have chosen *not* to join the Act's do-not-call list even as to commercial solicitations, meaning that more than 800,000 people are not disturbed even when a

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Hoosiers answer the phone dozens of times a day. What little marginal intrusion political calls could cause would be in addition to the other momentary intrusions life inflicts in a normal day. That interest pales in comparison to the importance automated calls have in modern political debate.

[13] Fraud and false speech enjoy no First Amendment protection, and the political speech in which Patriotic Veterans seeks to engage would not fall into that category even if it was the purpose of the ADMS. *U.S. v. Stevens*, 130 S.Ct. 1577 (2010).

telephone call solicits a mere commercial transaction, much less a communication containing core political speech. [14]

The State's argument that the ADMS prevents intrusion by requiring a live operator is also not supported by the record. The intrusion the State cites – the ringing of the phone – is the same whether a call is placed by a machine or a live person. The phone must ring either way. Indeed, the State's expert agrees that some individuals would find a live operator to be a *more* significant intrusion than an automated call because an "individual could . . . try and be persuasive to try and . . . talk them into listening while a pre-recorded message obviously can't in any way adjust its pitch to an individual." (Dkt. 42-1,

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[14] Although the State treats the two statutes as interchangeable, the Indiana General Assembly does not share that view. It enacted the statutes 13 years apart, with the ADMS going into effect in 1988 and the Privacy Act not following until 2001. Moreover, the General Assembly placed the statutes in separate chapters within the Indiana Code. *Compare* Ind. Code § 24-5-14-5 (placement of ADMS within statutes concerning "consumer sales") *with* Ind. Code § 24-4.7-2-9 (placement of Privacy Act within statutes concerning "Telephone Solicitation of Consumers"). The statutes also operate in different manners, as the Privacy Act is an "opt in" mechanism in which citizens chose for themselves what speech to receive while the ADMS operates as a *per se* ban on all automated calls unless they fall into the three narrow exceptions. Despite the "opt in" nature of the Privacy Act, the Court has already noted that even that Act would have dubious constitutionality if applied to political speech. *Nat'l Coalition of Prayer, Inc.*, 455 F.3d at 791 (2006).

pp. 52-53). To the State's expert, the "norm of politeness" could make live operator calls even more burdensome on unwilling recipients:

> The main reason that the studies have indicated is because of basically a norm of politeness. When you're talking to an actual person, while you're perfectly justified to not, you know, listen to them, you are being to a certain extent impolite by denying their request for – you know, to listen to them. There is no similar presumption when it's a machine that is communicating to you or trying to.

(Dkt. 42-1, 52).[15]

To the extent the State's interest lies in reducing the amount of intrusions by way of telephone calls, the State has already done so through the Privacy Act. The State repeatedly cites the efficacy of the Privacy Act and lauds the reduction in telephone calls it has produced, going so far as to claim that it has reduced calls even to individuals *not* on the do-not-call list. But if it is true that the Privacy Act has already

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[15] The State claims that it is fair to require speakers to incur the extra cost of live operators because it believes the costs "to residential privacy" is so much greater than the costs to the speaker using an automated calling system. (Br. 52). The State justifies the live operator requirement by claiming that it corrects an "externality" by making the caller – and not the listener – incur the burden of the call. *Id.* This claimed interest is simply not supported by the record given the State's concession that live calls can in fact be more intrusive. No matter who places it, the call occurs and the intrusion is had. Far from rectifying an externality, the State has created an artificial barrier to entry that serves no purpose other than to prevent political speech from occurring.

greatly reduced the amount of invasive telephone calls, the State cannot claim that there is a *significant* interest to be served by an even greater reduction in telephone calls. If, as the State contends, the Privacy Act has already greatly reduced the number of invasive calls, the only purpose left for the ADMS is the elimination of whatever *marginal* calls remain after the prohibition of the Privacy Act went into place. The State has not shown that this a significant interest, particularly in light the undeniable burden the ADMS imposes on protected political speech. To allow the wishes of those who might be "annoyed" at the limited intrusion of a ringing phone would create a "heckler's veto," in which the majority gets to override the speech of minorities. *Ovadal v. City of Madison*, 416 F.3d 531, 533-34, 537 (7th Cir. 2005). [16]

2. The ADMS's ban on speech is not narrowly tailored.

The ADMS is also not "narrowly tailored" to any state interest. *Ward*, 491 U.S. at 796. It sweeps all political speech into its prohibition, including speech to listeners who would like to receive it. A

[16] Moreover, the State cannot speculate as to the interest at stake, as courts "must closely scrutinize the regulation to determine if it indeed promotes the Government's purposes in more than a speculative way." *Community for Creative Non-Violence v. Kerrigan*, 865 F.2d 382, 390 (D.C. Cir 1989).

statute "is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. . . . A complete ban [on speech] can be narrowly tailored, but only if *each activity within the proscription's scope is an appropriately targeted evil.*" *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (emphasis added).

Moreover, a statute is not "narrowly tailored" if it is not designed "to protect only unwilling recipients of the communications." *Id.* Under the intermediate scrutiny standard, the State must demonstrate that its restriction on prerecorded political calls does not sweep protected speech within its prohibition. *See e.g., Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002).

The State continues to ignore that it has plenty of narrower ways to serve its advanced interests. It could consider, for example, a "do-not-call list" for automated political calls. Technology also allows the recipients of automated calls to simply press a button to opt-out of further calls. Requiring callers to follow this process would also further the State's claimed interest without the same substantial burden imposed by the State's ban on automated political calls.

Moreover, a narrowly tailored statute must leave open "adequate" alternative means of communication. *U.S. Postal Serv. v. Council of*

Greenburgh Civic Associations, 453 U.S. 114, 132 (1981). There must be more than some theoretical alternative avenue, but instead a meaningful option to the prohibited time, place or manner of speech. *See Playboy Entm't Group*, 529 U.S. 803. In the *Playboy* case, the Supreme Court held that a statute blocking certain adult channels for all cable subscribers was unnecessarily restrictive because it could have allowed subscribers who did not wish to receive these channels to "opt out" of receiving them. *Playboy*, 529 U.S. at 814-15.

The State claims that there is an adequate alternative to automated calls because speakers could employ live operators. But the record proves that live operators are not a realistic or adequate alternative to automated calls. The facts are undisputed that live operator calls impose on speakers burdens that are more than *8 times* greater than automated calls. (Dkt. 34-5, ¶ 4). Knowing this, the State's choice to require live operators is simply a proxy for saying "make no calls at all." As such, speakers have fundamentally different access to their audience through automated means, a fact even the State's expert does not dispute. (Dkt. 42-1, p. 51). ("There's some cost related factors, the automated with only either a synthesized voice or a recorded human voice are significantly less costly.").

This exponentially greater burden is a difference in kind, not degree. By requiring live operators, the ADMS makes the costs of communication so prohibitive no one could effectively access it. This burden is not that speakers are being thrifty with their resources. Although the State criticizes Patriotic Veterans for not simply paying live operators, it has not shown that there is a single entity that has found it feasible to use a live operator approach.[17]

Moreover, live operator calls cannot be made on the same expedited basis as automated calls. (Dkt. 34-4, ¶ 7). The record shows that the bulk of calls that Patriotic Veterans' service provider places in a given year are made within three weeks of an election. *Id.* It would be impossible for its service provider to handle such a volume over this

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[17] It is settled that a statute may unconstitutionally restrict political expression through the costs it imposes on the speaker. This precise issue was addressed in *Meyer*, 486 U.S. at 414. The Court held that a Colorado law which prohibited the use of paid employees to circulate initiative petitions violated the First Amendment. The Court found that the prohibition against the use of paid circulators "limits the number of voices who will convey [their] message and the hours they can speak and, therefore, limits the size of the audience they can reach." 486 U.S. at 422-23. It also found that the prohibition on this communication mechanism "has the inevitable effect of reducing the total quantum of speech on a public issue." *Id.* at 423. The Court concluded that: "The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 424.

busy time period using live operators. *Id.* Autodialed calls, however, can be prepared and disseminated within a few hours. Placing 100,000 automated calls by a machine takes three hours. Placing the same amount of calls by a live operator takes approximately two to five days. (Dkt. 34-5, ¶ 8). This reality precludes any claim that live operator calls are an "adequate" substitute for automated political calls.

The State claims that there is no right for speakers "to use the most efficient channels of communication" and bemoans that a contrary rule "would mean that the government could not regulate sound trucks, for example, if some speakers would thereby be economically unable to spread their messages." (Br. 48). But this case is not a circumstance of mere limitation. It is a prohibition. This is not a case where the State has limited the hours when calls can be made, the volume of calls that could be made or the persons who may be called under a do-not-call list. Instead, the ADMS takes the most burdensome route by banning all political calls without offering any alternative channels that bear any likeness to the automated calls.

Requiring live operators is also not an adequate alternative avenue because operators fundamentally change this form of communication. Automated calls have a unique ability to convey a

political message in a swift fashion to a wide audience. There is no dispute that automated calls allow for timely messages that are carefully crafted and controlled. The speaker can know precisely what is said to the listener. A call by a live operator places the message in the hands of another. Live operator calls cannot guarantee uniformity of the speaker's message. An autodialed call can be in the candidates or spokesperson's *own voice* with a message controlled by the persons placing it.

On the precipice of an election, these calls are the best, most efficient way a candidate or group has to speak directly to the voters. The features of automated are critical because they allow speakers to target audiences on a speedy basis in order to react to and counteract the charges and issues that arise in modern campaigns. Automated telephone calls are unique among the modes of political speech for their ability to quickly and efficiently address a mass audience during the waning hours of a political campaign. *See, e.g.*, Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?* 16 MICH. TELECOMM. TECH. L. REV. 213, 219 (2009) ("In general, [automated calls] serve a good and necessary purpose where

they provide an inexpensive and effective way for political candidates to connect with voters during the campaign process.").

Finally, the State suggests that passive media such as websites or television commercials might serve the same purpose. (Br. 44). Those forms of communication are simply not analogous, as they lack the immediacy, timeliness and expediency of automated calls. A person has to affirmatively seek out these messages, depriving a speaker of the audience otherwise available by automated calls. Despite these unique features of automated calls, the State has virtually foreclosed this mode of communication through a sweeping ban that does not leave in place any similar or adequate means of communication.

Modern campaigns live within the 24-hour news cycle. Besides their expense, traditional media are not capable of responding quickly to the needs of modern campaigns as new issues suddenly and unexpectedly arise. Campaigns can be so fluid (and messages so time-sensitive) that traditional media are either too slow to reach the desired amount of voters or the time is impossible to obtain. Rapid-fire allegations arise in the abbreviated news cycle faced by modern campaigns. Patriotic Veterans will therefore need to send messages in compact periods of time, such as on the eve of an election or before a

vote important to it. (Dkt. 34-4, ¶ 7). The ADMS prevents it from using critical means for doing so.

Television commercials are also not an appropriate alternative channel. Besides their prohibitive expense, television is broadcast generally and cannot be narrowly tailored to voters. It therefore forces speakers to waste Moreover, television commercials cannot be produced with the speed and efficiency of automated calls, thereby sapping their usefulness in the 24-hour news cycle. Finally, many listeners find political commercials as annoying and intrusive as telephone calls, but that annoyance is hardly a justification to ban them.

CONCLUSION

Patriotic Veterans requests the district court order be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the Brief of Appellee complies with the type-volume requirement set forth in Federal Rule of Appellate Procedure 32. Based on the word count program contained in Microsoft Word XP, the Brief of Appellee contains 13,998 words.

/s/*Paul L. Jefferson*
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CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2011, a copy of the foregoing was filed with the Court. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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