No. 16-

IN THE

Supreme Court of the United States

PATRIOTIC VETERANS, INC.,

Petitioner,

v.

CURTIS HILL, ATTORNEY GENERAL OF INDIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Patriotic Veterans, Inc. is a non-profit advocacy group that disseminates recorded messages through automated telephone dialing machines. These calls address matters of public concern, including positions taken by candidates and officeholders. Automation provides prompt, effective, and consistent delivery of Patriotic Veterans' message. Indiana criminalizes this speech because some might find automated calls annoying. Yet the statute allows many of these allegedly annoying calls by commercial speakers.

The Seventh Circuit upheld this speech-restrictive statute. It is the first circuit to approve a limitation on automated calls since this Court changed the framework for content-based discrimination in *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015). In doing so, the Seventh Circuit contradicted at least two of this Court's decisions and created a circuit split with the Fourth Circuit, which relied upon *Reed* to strike down a similar restriction on automated calls.

1. Whether Indiana's statute creates a content-based restriction that cannot survive strict scrutiny under *Reed*?

2. Whether the statute is a valid time, place, and manner restriction?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Petitioner is a non-governmental, non-profit entity with no parent corporation.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Patriotic Veterans, Inc. seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

On January 3, 2017 the United States Court of Appeals for the Seventh Circuit issued an opinion and judgment reported at 845 F.3d 303 (7th Cir. 2017) and reproduced in the appendix to this Petition ("App.") at 1a. The judgment of the United States District Court for the Southern District of Indiana, entered on April 7, 2016, is reported at 177 F. Supp. 3d 1120 (S.D. Ind. 2016) and is reproduced at App. 8a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 based on Patriotic Veterans' claims under 42 U.S.C. § 1983. The Seventh Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision at issue (Ind. Code § 24-5-14-5) is reproduced in the Appendix at App. 24a.

INTRODUCTION

Patriotic Veterans places automated calls around the country. These calls convey messages on public

policy issues that matter to veterans and other voters. Those same calls are criminal in Indiana. Although the automated calls contain core political speech, Indiana's Automatic Dialing Machine Statute ("ADMS") precludes Patriotic Veterans from placing them even to those who wish to receive them. Violating the ADMS's prohibition on political speech is a Class C misdemeanor punishable by 60 days in prison and a fine for each call. *See* App. 28-29.

The Seventh Circuit upheld this criminal penalty for political speech. App. 1a. That decision violates the First Amendment and requires this Court's intervention for at least four reasons.

First, the Seventh Circuit's opinion conflicts with its sister circuit decision in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015), which invalidated a South Carolina statute that prohibited political speech conveyed through automated calls while allowing other forms of speech through automated calls.

Second, the Seventh Circuit effectively undid the content-discrimination analysis established by *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). It did this by upholding a statute that treats political speech as criminal while authorizing speech on commercial matters and other favored topics. The Seventh Circuit presumed these latter categories of speakers received implicit "consent" to receive automated calls, a legal construct that undermines *Reed*. It also conflicts with this Court's instruction in *Reed* that lower courts should not imbue a statute with a "content-neutral justification" when the statute itself makes content-based distinctions.

Third, the Seventh Circuit failed to apply strict scrutiny to Indiana's decision to shut the door on a widely used method of political speech. Automated calls are a catalyst for participation in the modern democratic process. They are one of the most effective, efficient means for low-budget grassroots advocacy groups to spread messages and encourage citizens to redress their grievances to elected officials. Although well-funded organizations may resort to traditional media, smaller, grassroots groups need to reach their audience in a timely and cost-effective manner through automated calls. The Seventh Circuit opinion – if upheld and extended to other jurisdictions – would quash this fluid form of communication.

Fourth, the Seventh Circuit overlooked the direct conflict between the Indiana statutory scheme and this Court's precedents in *Martin v. Struthers*, 319 U.S. 141 (1943) and *Watchtower v. Stratton*, 536 U.S. 150 (2002).

STATEMENT OF THE CASE

Patriotic Veterans is a not-for-profit Illinois corporation and a grassroots advocacy group. Circuit Appendix ("Cir. App.") 33-34. It aims to inform and educate the public on a variety of public policy issues. It advocates positions on important topics, supports and opposes pending legislation at the federal and state level, and encourages grassroots lobbying by veterans and others. *Id.*

The Chairman of Patriotic Veterans is James Nalepa, a 1978 graduate of the United States Military Academy. He is a combat veteran who served in various leadership capacities in the U.S. Army. Retired Col. Chuck Thomann

is one of the founders of Patriotic Veterans. He is a combat veteran of three major wars, and has been a spokesman for Patriotic Veterans' issue advocacy calls.

Patriotic Veterans uses automatically dialed phone calls to deliver messages on a variety of topics of public interest. Cir. App. 33-34. These calls encourage veterans and others to address their grievances to government officials and facilitate contact between voters and their representatives. *Id.*

Patriotic Veterans often needs to send messages in a short period of time, such as before a significant vote in Congress or a state legislature. Cir. App. 33-35. In those instances, only automated calls can reach an audience with the needed speed, breadth, and efficiency. *Id.* No other mode of speech meets these requirements. Calls by live operators cannot be made fast enough or in great enough numbers for messages to be timely and completely delivered to an audience of meaningful size. *Id.* The cost of live operators is about eight times higher than automated calls. *Id.* Radio and television ads are prohibitively expensive and are often sold out by the end of an election cycle. Cir. App. 33-35, 37-39.

Patriotic Veterans' calls provide short voice recordings from a spokesperson such as retired Col. Thomann or singer Pat Boone. Cir. App. 37-39. These calls are delivered to a predetermined list during a predetermined time period. *Id.* In Patriotic Veterans' experience, recipients will listen to an entire call between 20 to 30 percent of the time. Another 35 to 50 percent of calls are left in their entirety on voicemail or answering machines. *Id.* Somewhere between 55 to 80 percent of all automated calls are delivered in full to their intended recipients. *Id.*

Patriotic Veterans' issue advocacy calls are often "live transfer" calls in which recipients can ask to directly connected to the office of a public official to express views on an important public issue. Cir. App. 280. This allows ordinary citizens the ability to communicate with and influence public officials in ways otherwise available only to advocacy groups with deeper resources. *Id.*

Patriotic Veterans is sensitive to privacy concerns. It gives call recipients information as to how they may remove themselves from its calling list. Cir. App. 35. Patriotic Veterans does not make calls to cellphones. It complies with federal and state regulations regarding the time in which calls may be made. *Id.* It does not use calls to engage in fundraising. *Id.*

Despite the value Patriotic Veterans finds in placing automated political calls in other states, it cannot do so in Indiana because of the ADMS. Indiana enacted the ADMS in 1988. The ADMS provides that a caller may not place automated calls unless a recipient has consented or the "message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered." App. 26a (Ind. Code § 24-5-14-5).

The ADMS criminalizes non-compliant calls. Violations are a Class C misdemeanor punishable by 60 days confinement and a fine of $500. App. 28-29.

The ADMS provides three exceptions that allow automated calls from certain speakers to certain listeners, specifically:

(1) Messages from school districts to students, parents, or employees.

(2) Messages to subscribers with whom the caller has a current business or personal relationship.

(3) Messages advising employees of work schedules.

App. 26a.

Prior to 2006, Indiana's Attorney General did not enforce the ADMS as to political calls. Cir. App. 26. The ADMS was "widely ignored" during political campaigns. *Id.* Indiana changed course after conceding (in a separate lawsuit not involving Patriotic Veterans) that the state's do-not-call list does not apply to political calls. After making that concession, Indiana's Attorney General announced for the first time that he would enforce the ADMS as to political speech and issue advocacy. Cir. App. 26-31.

If Indiana's law did not exist, Patriotic Veterans would place automated phone calls related to its mission to Indiana veterans and voters. Cir. App. 33-34. It has not done so because of Indiana's restriction on automated political phone calls. *Id.*

In 2010, Patriotic Veterans filed this as-applied challenge to the ADMS in the Southern District of Indiana seeking: (1) a declaration that the ADMS is invalid as applied to Patriotic Veterans; and (2) a permanent injunction against the ADMS's enforcement against Patriotic Veterans. Cir. App. 13.

Patriotic Veterans asserted two grounds for the ADMS' invalidation. Cir. App. 18-20. First, it alleged that the ADMS was preempted by federal laws and agency rules that regulated the same subject matter. *Id.* Second, it alleged that the ADMS, as applied to interstate calls on political or campaign issues, violated the First Amendment of the Constitution by suppressing Patriotic Veterans' speech. *Id.*

Patriotic Veterans and the State filed cross-motions for summary judgment in 2010. Cir. App. 5-6. On September 27, 2011, the district court ruled that federal law preempted the ADMS. *Patriotic Veterans, Inc. v. Indiana ex rel. Zoeller*, 821 F. Supp. 2d 1074, 1079 (S.D. Ind. 2011). It did not reach the First Amendment issue. *Id.* at 1079 n. 5.

The State appealed the district court's ruling to the Seventh Circuit. It held that federal law did not preempt the ADMS. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 (7th Cir. 2013). The Seventh Circuit remanded for consideration of the First Amendment issue. *Id.* at 1054.

On April 7, 2016, the district court granted summary judgment for the State, ruling that the ADMS did not violate the First Amendment. App. 8a.

The Seventh Circuit affirmed in a six-page opinion. App. 1a. The opinion concluded that the ADMS did not make a content-based distinction between types of speech and survived intermediate scrutiny because of the State's putative interest in preventing "unwanted calls." App. 3a-6a. Although Patriotic Veterans makes no calls to cellphones, the opinion emphasized alleged annoyance

from calls, "especially cellphone calls." *Id.* The Seventh Circuit therefore concluded that the Indiana law was constitutional as a "time, place, and manner" regulation. *Id.*

REASONS FOR GRANTING THE PETITION

By providing sweeping exceptions based on the most tenuous of "business relationships," the ADMS elevates solicitations, debt collection, and other commercial speech above Patriotic Veterans' issue advocacy. The Seventh Circuit found that this content-based distinction did not warrant strict scrutiny. This decision contradicts this Court's holding in *Reed* and conflicts with the Fourth Circuit's decision in *Cahaly*, which struck down South Carolina's autodialer law because it made similar content-based distinctions in regulating automated calls. The Court should therefore grant *certiorari* to review the Seventh Circuit opinion.

I. The Court should grant *certiorari* to resolve the conflict between circuits regarding content-based regulation of automated calls.

A circuit conflict exists between the Seventh Circuit and the Fourth Circuit regarding the application of this Court's decision in *Reed*. In 2015, the Fourth Circuit struck down South Carolina's autodialer statute in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015). The *Cahaly* decision relied on *Reed* and found that prohibiting automated calls on political topics (while allowing other forms of speech) created a content-based distinction under *Reed*: "Here, the anti-robocall statute applies to calls

with a consumer or political message but does not reach calls made for any other purpose. Because of these facial content distinctions, we do not reach the second step to consider the government's regulatory purpose." *Cahaly*, 796 F.3d at 405.

As was the fatal defect in *Cahaly*, Indiana's statute bars calls on core political speech but authorizes other forms of automated calls, including commercial speech. Despite *Cahaly* and *Reed*, the Seventh Circuit treated the ADMS as a content-neutral time, place, and manner restriction and upheld it under intermediate scrutiny. App. 6a-7a. This result directly conflicts with the conclusion reached by the Fourth Circuit in *Cahaly*.

The Seventh Circuit's opinion declined to follow *Cahaly* because South Carolina's statute expressly referenced political speech. App. 5a. This argument ignores the breadth of Indiana's statute compared to South Carolina's more limited (and now void) statute. The South Carolina statute banned only certain categories of automated calls. It allowed all other calls to continue. S.C. Code Ann. § 16–17–446(A). By contrast, Indiana swept up *all* automated calls, but then exempted a select group of favored speakers. Ind. Code § 24-5-14-5.

The Seventh Circuit overemphasized this difference in structure between the two statutes. The effect of both statutes is the same – political speech is illegal while speech on other topics may proceed. The method of achieving this result – whether by a directly targeting political speech or through a broad ban with exemptions for favored speech – is a distinction without a difference.

Reed already rejected the idea that a statute must "target" political speech to be content based. *See Reed*, 135 S.Ct. at 2223. *Reed* explained that the government's "targeting" of a particular type of speech is not the test for determining whether strict scrutiny must apply. *Id.* Courts need not probe whether the government actually intended to censor speech. *Id.* at 2228. *Reed* explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227.

A regulation failing this standard is content based "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

So long as a regulation of speech makes distinctions based on the topic addressed in the speech, it is content based and subject to strict scrutiny. *Id.* Whether political speech is singled out for coverage in the law (as in South Carolina), or singled out for exclusion from the law's exceptions (as in Indiana) does not matter under *Reed*.

More recently, a district court struck down Arkansas's autodialer ban in *Gresham v. Rutledge*, 198 F.Supp.3d 965 (E.D. Ark. 2016). The Arkansas statute prohibited the use of autodialers for political speech as well as for the sale of goods and services. *Id.* at 968 (citing Ark. Code Ann. § 5-63-204(a)(1)). Because it restricted political speech – "which 'is, and has always been, at the core of the protection afforded by the First Amendment'" – the Court followed *Reed* and *Cahaly* and applied strict scrutiny. *Id.*

at 969 (quoting *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014)).

The doctrinal conflict fostered by the Seventh Circuit's opinion is further demonstrated by its reliance on a handful of autodialer cases that arose before *Reed*. The opinion cited these cases to claim that the ADMS remains content neutral even after *Reed*. App. 2a. Those cases apply the outdated test for viewpoint discrimination that *Reed* rejected. *Id*.

II. Certiorari is needed because content-based regulation of technology is a matter of vital concern to grassroots organizations around the country.

Patriotic Veterans is one of thousands of grassroots organizations that advocate their viewpoint through automated messages. If the Seventh Circuit's conclusion is allowed to calcify into settled law, states would gain a bludgeon capable of closing off this entire method of political speech.

This risk is palpable given the incentives some elected officials have to create the type of content-based restrictions barred by *Reed*. Preventing affordable means of speech favors entrenched interests. Well-funded incumbents logically may wish to curtail speech by political opponents and outsiders. Automated calls and other affordable technologies level the electoral playing field by giving grassroots organizations a chance to be heard in the democratic process. "By depriving potential opponents of a tool that allows for cost-effective, targeted, critical messaging and simultaneously appeases

its constituents, incumbent politicians can use banning robocalls as a winning campaign issue." Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 239 (2009) (footnotes omitted).

For example, if Patriotic Veterans placed 500,000 calls throughout Indiana, some of those would reach recipients within the districts of "swing" representatives. Those calls in turn would prompt interested citizens to contact their representatives, a type of "live transfer" call that Patriotic Veterans facilitates. Cir. App. 280. That outreach could be critical in influencing a wavering legislator in the waning hours before a vote.

This contact between representatives and constituents promotes legislative accountability and responsiveness. The First Amendment places no value in stifling this process. As one commentator has explained, automated calls are a natural, modern extension of how the marketplace of ideas serves the democratic process: "A functional democracy is noisy, rowdy, and sometimes annoying. Robocalls, however, are the sound of democracy in action. Silencing or limiting speech invariably protects the incumbent power structure. Rather than being concerned about the disturbing noise of the ringing phone, we should be alarmed at the potential for silence." *Miller*, *supra*, at 253 (footnotes omitted).

If allowed to stand, the Seventh Circuit's opinion opens the door for further encroachments into free speech rights. It sets a new floor for regulating speech through technology that other states may rush to meet. It provides a method by which legislatures may ban the

use of technological means to disseminate political or ideological messages. Elected officials may find regulating speech through new technologies to be an easy way to placate some constituents or preserve their legislative seats. That concern animated the Fourth Circuit's decision in *Cahaly,* which arose out of an incumbent's complaints about automated calls advocating another candidate. *Cahaly*, 796 F.3d at 405. But the plain language of the First Amendment (and this Court's cases construing it) prevents legislation that restricts core political speech based on the message it conveys.

While relying on modern technology, autodialed calls are essentially an 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 ring is more intrusive than the knock. One can ignore or hang up the phone as easily as ignore the canvasser at the door. As the Oregon Supreme Court explained in striking down that state's 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) (emphasis added).

This Court has also explained that no matter the channel of communication, the importance of political speech prevents the State from entirely foreclosing the use of that channel for political speech. *Citizens United v. Federal Election Comm'n,* 558 U.S. 310 (2010).

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.

Id. at 326.

While *Citizens United* concerned political speech by highly funded organizations, grassroots organizations like Patriotic Veterans have the same interest in disseminating their message.

Automated calls represent the surest and most efficient means for smaller organizations to deliver their message. Curtailing this entire mode of communication undercuts this basic First Amendment interest. *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) ("Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent — by eliminating a common means of speaking.").

III. Because Indiana's statute discriminates against protected political speech, the Seventh Circuit misapplied Reed in upholding it.

The Court should also grant *certiorari* because of the Seventh Circuit's deviation from the Court's teachings in *Reed*. That decision made a critical change in First Amendment law by expanding the standard for determining when government regulates speech based on its content. 135 S.Ct. at 2227.

The *Reed* standard puts aside the government's motivation and does not probe whether the government actually intended to censor speech. Id. at 2228. Whatever its intent, if the government regulates based on the "topic discussed," a statute is content based. *Id.* This remains true "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). Any such content-based regulation of speech is "presumptively unconstitutional" and must be reviewed under strict scrutiny. *Id.*

Applying this methodology, the Court struck down an Arizona town's ordinance that treated the entire category of religious speech differently from political and other types of speech. *Id.*

The Seventh Circuit decision upholding the ADMS is a significant departure from the teaching of *Reed* that will be followed by other lower courts if this Court does not intervene. Despite *Reed,* the ADMS restricts automated political speech but allows automated speech on commercial topics. It favors speakers with a "business" message over speakers who wish to engage in the cornerstone right to free speech. The ADMS allows automated calls from debt collectors and solicitors, but criminalizes messages on matters of public concern. The statute's exemptions allow preferred commercial forms of speech while simultaneously suppressing core political speech. As was the case when this Court invalidated the ordinance in *Reed*, political speech "is treated differently from [speech] conveying other types of ideas." 135 S.Ct. at 2227.

Because the ADMS places political speech in a disfavored position among various categories of speech, the statute must be subject to strict scrutiny.

The Seventh Circuit treated the statute as content neutral by holding that the ADMS' exceptions are not based on content. Instead, it concluded that "implied consent" for automated calls existed within the business and other relationships favored by Indiana's statute. App. 13a.

This "implied consent" theory runs directly afoul of *Reed. Reed* instructed that motivation and intent did not matter. *Reed* told the lower courts that a "content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech" no longer matter in analyzing speech-restrictive statutes. *Reed,* 135 S.Ct. at 2227.

The Seventh Circuit applied just such a "content-neutral justification" when it relied on "implied consent" to uphold the Indiana statute. This construct does not save the statute, as "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id*. at 2228.

The ADMS is the type of content-based restriction for which *Reed* compels strict scrutiny. The statute allows commercial entities to make automated calls, without limit, to those with whom they maintain a "current business or personal relationship" Ind. Code § 24-5-14-5. This language authorizes automated sales calls. It also allows calls from debt collectors, arguably the most pernicious and "annoying" type of unsolicited calls. By contrast, the ADMS criminalizes speech from non-commercial

advocacy groups regardless of the caller's relationship with the recipient.

The ADMS therefore allows consumer credit card companies, cable companies, banks, and other service providers to send limitless automated messages to sell their goods and services. It effectively opens the door to automated calls from the thousands of commercial entities with whom Hoosiers share their phone numbers – a necessary part of many business transactions and online purchases.

Reading these relationships as "consent" to unlimited calls would come as a shock to the thousands of Hoosiers who maintain a "current business or personal relationship" with commercial entities wanting to solicit their business. Ind. Code § 24-5-14-5.

In reality, the ADMS regulates *speech*. Regardless of the relationship between the parties, the statute allows some speech by automated calls but bans other speech by automated calls. It does so based on speakers and their messages. Its exceptions are not grounded in consent. They are discrimination based on content.

Even if the ADMS's exceptions rest on "consent," Indiana still has elevated commercial transactions above political speech because it does not extend the same doctrine of "implied consent" to *other* instances where consent could be implied. For instance, a person registering as a member of a political party or attending a campaign rally impliedly consents to communications on political matters. Voters impliedly consent to being part of the political process, including speech related to that

process. This leap in logic is no greater than the chasm the Seventh Circuit hurdled in assuming that a fleeting "business" relationship creates consent for automated calls. Yet business calls with "implied consent" are authorized; political calls with "implied consent" remain criminal.

The "implied consent" construct therefore is a proxy for the speech in which these actors may engage under the ADMS. The ADMS authorizes messages by certain speakers about matters of interest to them. Regardless of the relationships involved, the ADMS grants them leave to use autodialers. Political speech is disfavored and may not flow through autodialers.

Some states exempt nonprofit organizations but not businesses in their restrictions on automated calls. *See, e.g.*, Ala. Code § 8-19A-4; Wisc. Code § 100.52(1)(j). The ADMS took the opposite approach by exempting businesses and censoring nonprofit organizations through criminal sanctions. The statute would permit an automated call campaign to millions of customers of retailers, including chain retailers, credit card companies, banks, and utilities. These calls would not be limited by topic and could, for instance, support a bill to increase taxes or to decrease defense spending. The same statute that allows these calls would *bar* automated calls by grassroots organizations like Patriotic Veterans who oppose that same tax increase or defense cuts.

The ADMS also allows school districts to make unlimited calls to parents, which may include calls on such public issues such as the benefits of a proposed school tax increase or annexation of property into a school district.

Opponents of the proposals would *not* have the same means of addressing those issues.

The ADMS therefore selects among various speakers in deciding who may make automated calls. In doing so, it selects which speech is lawful and which is criminal. The parameters for making this distinction rest on the topic of the call and the speakers involved. While restricting automation for political calls, the statute's exceptions permit businesses to use that technology to convey their messages. *See* Ind. Code § 24-5-14-5. Yet political speakers with every bit the same "relationship" or "implied consent" are not only left out, but face criminal sanctions if they use the same method as other speakers. This culling of political speech from the favored categories under the statute constitutes viewpoint discrimination under *Reed*, 135 S.Ct. at 2227.[1]

IV. The ADMS cannot pass strict scrutiny where the government interest is limited to "annoyance" and the ADMS is not narrowly tailored.

Strict scrutiny requires a statute to serve a "compelling state interest." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The statute must also be "narrowly tailored" to serve

1. The Seventh Circuit's implied consent construct also conflicts with the consent language already in the ADMS. The statute separately allows automated calls where the recipient "has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message." Ind. Code § 24-5-14-5. This provision would have little meaning if the *other* exceptions to the statute applied only to those who also consented. Indiana also maintains an extensive "do not call" list that protects the privacy of those who decide not to receive calls.

that interest and must use the "least restrictive means" to regulate. *Id*. This standard presumes that a statute is unconstitutional. *Reed*, 135 S.Ct. at 2227. It is "well-nigh insurmountable." *Meyer*, 486 U.S. at 424.

Indiana offers only a single interest to justify the ADMS – the sound of a ringing telephone. There is no public safety danger. There is no physical intrusion into a home. There is only the concern that some residents might be annoyed when the phone rings to deliver Patriotic Veterans' messages.

A ringing telephone has been a fact of American life for more than a century. A ring is a brief sound every adult has heard. It is a sound we experience numerous times each day. It is as fleeting as it is familiar, as any call may promptly end at the will of the receiver. The length of this transaction is in the hands of the listener, who may chose for herself whether to hear the proffered political message or immediately end a call.

Just as this Court held that "the knocker on the front door is treated as an invitation or license … permit[ing] the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave," *Florida v. Jardines*, 133 S.Ct. 1409, 1415 (2013) (quoting *Breard v. Alexandria*, 341 U.S. 622, 626 (1951)), the public listing of a phone may be considered a license to be called, absent an affirmative step to the contrary, such as registering for a "do not call" list. The resident may ignore the call, or receive the visitor.

Having to hear a ring and lift a receiver is hardly the type of *compelling* state interest that warrants content-

based restrictions on political speech. And despite the Seventh Circuit's concern to the contrary, Patriotic Veterans does not make calls to cellphones.

Applying the State's "annoyance" argument to different media illustrates the problem with applying it to political speech. Many citizens in an election year would claim annoyance from political messages blasted through our televisions and radios (or even through Internet ads). These citizens simply turn the dial, just as a call recipient may hang up a phone. The government has no compelling interest in restricting political commercials that cause annoyance. The government similarly has no compelling interest in banning automated calls that have the same political content.

The ADMS prevents *all* automated political calls, including those that are welcome by the recipient and not perceived as harassment or telemarketing. The ADMS targets selective inconvenience. The undisputed facts show that between 20 to 30 percent of all automated calls are delivered to the listener in their entirety, while another 35 to 50 percent go to voicemail and disturb no one. Cir. App. 37-38.

The State previously cited an ungrounded fear that Patriotic Veterans might flood Hoosiers with thousands of calls. This is an as-applied challenge. Hyperbole about what some other caller might do has no basis in the record, a matter of particular concern given *the State's* burden to prove its compelling interest. The State appears to believe that because calls can be made faster by autodialers, groups like Patriotic Veterans would *repeat* their message over and over to "harass" Hoosiers with a flood of political messages.

Once a message is delivered to a recipient, Patriotic Veterans has no need to deliver it again. The autodialers provide speed to ensure that messages are delivered in a timely fashion and address issues as they arise, and they provide cost-effectiveness to enable grassroots organizations to communicate with large audiences. Cir. App. 36-39. This desire for speed and efficiency does not indicate a desire to inundate. The State cannot support its strict scrutiny burden through conjecture.

The government's alleged interest is undermined by the fact that the ADMS allows "annoying" phone calls from creditors, commercial entities, schools, and employers. The State is selective in what it deems an annoyance. Salespeople and debt collectors may annoy Hoosiers at will if they have a single business transaction with them. The statute is therefore not furthering a compelling interest, but is choosing which topics and voices are worthy of being heard and which are not.

No rational explanation exists for allowing "annoying" commercial calls while placing political speech on a lower plane. For instance, a Congressional report has concluded that "[c]omplaint statistics show that unwanted commercial calls are *a far bigger problem* than unsolicited calls from political or charitable organizations." H.R. Rep. 102–317, at 16 (1991) (emphasis added).

Finally, the ADMS only fosters whatever "privacy" interest remains when taking into account Indiana's existing "do-not-call" list. Ind. Code § 24-4.7-4-1. That list reduces the number of intrusive calls Indiana residents receive. The State has argued that the "do-not-call" list "led to a huge decline in telemarketing calls, remains

highly successful, and is extremely effective." State Cir. Br. at 53. The ADMS therefore attacks whatever leftover, marginal "annoyance" exists after the sweeping impact of the do-not-call list, which is to say, it targets political calls.

V. The ADMS is not narrowly tailored but allows the very "annoyance" the State claims it prevents.

The ADMS is not narrowly tailored because it sweeps all political speech into its prohibition, including speech listeners wish to receive. The ADMS could employ narrower means to achieve the same goal. It simultaneously undermines its putative purpose by allowing the very "annoyance" for which it claims a compelling interest.

A statute fails the "narrowly tailored" test unless it is designed "to protect only unwilling recipients of the communications." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The ADMS's restriction on automated political calls does not consider that many residents want to hear political messages. It is undisputed that some Indiana residents welcome political calls. Many listeners will hear the entire call. It also undisputed that these listeners are not annoyed or "harassed." Yet the ADMS sweeps away the rights of these listeners to receive automated political messages. *See, e.g., Frisby*, 487 U.S. at 485.

The Fourth Circuit's *Cahaly* opinion outlined the available narrower remedies in this circumstance. 796 F.3d at 405-06. *Cahaly* struck down the restriction on political speech because "[p]lausible less restrictive alternatives" exist, "includ[ing] time-of-day imitations, mandatory disclosure of the caller's identity, or do-not-call lists." *Id*. at 406.

A do-not-call list for automated political calls would address any concerns over "annoyance" without the sweep of the current restrictions on automated political calls. The State's sole response to this narrowly tailored result was to claim that a state-sponsored do-not-call list for automated political calls is somehow *more* restrictive than Indiana's current system. State Cir. Br. 42. That might be true for businesses, which are given a broad exception allegedly based on "implied consent." But it is not true for entities like Patriotic Veterans, which are prohibited from using automated calls to address issues of public concern.

The ADMS also cannot be narrowly tailored because, as previously discussed, it allows for many of the very "annoying" calls for which it claims a compelling interest. *Reed*, 135 S.Ct. at 2232.

In addition to allowing many automated calls, it allows calls by live operators. A ringing phone caused by a machine is no more annoying than one from a live operator. The State's expert conceded that the "norm of politeness" could make live operator calls even *more* burdensome on unwilling recipients by creating a barrier to simply hanging up. There is therefore no narrow tailoring between the live operator requirement and the intended purpose of the act to limit "annoyance."

Finally, the Seventh Circuit concluded that passive media such as websites or television commercials might serve the same purpose as automated calls. These forms of communication are simply not analogous, as they lack the immediacy, timeliness, and expediency of automated calls. For passive media like websites, a person must affirmatively seek the message, 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 bar that does not leave in place any similar or adequate means of communication.

VI. The ADMS violates the freedoms of speech in conflict with this Court's settled precedents.

Even assuming the ADMS is content neutral, the Seventh Circuit still needed to determine "whether Indiana . . . is entitled to make advance consent (express or implied) a condition of any automated phone call, regardless of subject." App. 5a. Before answering this question, the panel made some erroneous observations. First, the panel claimed that such calls are "unwanted," and "many recipients find [robocalls] obnoxious because there's no live person at the other end of the line." *Id.* at 6a. Second, the panel assumed (also, without reference to the record) that there are "plenty of [other] ways to spread messages." *Id.* Third, unsupported in the record, as well as irrelevant to the constitutional issues presented, is the circuit court's belief that "[m]ost members of the public want to limit calls." *Id.*

The panel therefore concluded, "[p]reventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction." *Id.* In addition to being wrong on the facts,[2] the panel's conclusion is directly contrary to this Court's precedents.

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2. Although not supported by the record, the circuit court also claimed that much of the public's supposed annoyance with automated calls would arise from calls to cellphones. App. 6a. Patriotic Veterans does not call cellphones.

A. The ADMS violates both the right to speak and the right to listen in conflict with *Martin v. Struthers*.

The Seventh Circuit cited no Supreme Court precedent to support its conclusion that Indiana's statute is a valid time, place, and manner restriction.[3] And for good reason — the court's decision directly conflicts with the First Amendment speech and press principles laid down in *Martin v. Struthers*, 319 U.S. 141 (1943). In *Struthers*, this Court rejected the notion that a city ordinance prohibiting door-to-door distribution of literature could be justified as a valid time, place, and manner regulation:

> Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution,

3. The circuit court cited four cases from the Eighth and Ninth Circuits. Only two of those cases discussed *Struthers*, and the others disregarded it for reasons not applicable here. In *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the court based its decision on the fact that the recipient of the call "has no opportunity to indicate the desire not to receive such calls." *Here*, however, the recipient has the right to be added to the Indiana "do-not-call" list under the Indiana Telephone Privacy Act, Inc. Code § 24-4.7-1-1, *et seq*. Second, *Van Bergen* assumed that automated calling was a new technology which "should be only marginally more costly option," which the record in this case demonstrates to be false. In *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996), the Ninth Circuit followed the flawed *Van Bergen* decision. Neither case considered the "prior restraint" principle, and both cases antedated *Watchtower v. Village of Stratton*, decided almost a decade later, as discussed in Section II.B, *infra*.

> it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors. . . .

Id. at 146-47.

The Indiana statute falls short of this constitutional mark. Under the Indiana supervisory scheme, the caller is divested of the full right to distribute his message, and the recipient is divested of the full right to decide whether to receive each message. Rather, in order to initiate a conversation, the caller must say what the state tells him to say in the manner that the state tells him to say it. And since the record is clear that Patriotic Veterans cannot afford to comply with the Indiana law, the subscriber loses the freedom that he otherwise would have to accept or reject a call from Patriotic Veterans, which it could not afford to make using a "live caller." Cir. App. 34, 38. The circuit court ignored the fact that the First Amendment freedoms of speech and press "embrace the right to distribute . . . and necessarily protect the right to receive . . . ." *Struthers*, 319 U.S. at 143.

By requiring advance consent as a condition of communicating, Indiana has sacrificed the constitutional interests of both the caller and the recipient. The ADMS, like the city ordinance in *Struthers*, cannot be justified on the grounds that it protects the interests of citizens, "whether particular citizens want that protection or not." *Id.* at 143. The ADMS impermissibly "substitutes the judgment of the community for the judgment of the individual householder." *Id.* at 144.

And for what reason? According to the Seventh Circuit, the Indiana law is said to have been designed for "protecting phone subscribers' peace and quiet [by] [p]reventing the phone . . . from frequently ringing with unwanted calls [which] uses [up the] phone owner's time and mental energy [and irritates] many recipients [who] find [the calls] obnoxious because there's no live person at the other end of the line." App. 6a.

Similarly, the *Struthers* city ordinance prohibiting door-to-door soliciting was "aimed at the protection of the householders from annoyance [and crime], including intrusion upon the hours of rest..." *Struthers*, 319 U.S. at 144. Yet, the Court in *Struthers* was not persuaded by such arguments: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in accordance with the dissemination of ideas in the best tradition of free discussion." *Id.* at 145.

Contrary to the rule in *Struthers*, the lower courts elevated Indiana's purported rationale for the statute over the speech and press principles protecting the dissemination of ideas – principles which are absolutely essential for the operation and preservation of a constitutional republic. *See Talley v. California*, 362 U.S. 60, 64-65 (1960).

Solicitous of the importance of maximizing access to speech and press opportunities, *Struthers* observed that door-to-door canvassing was "widespread[,] attest[ing] [to] its major importance..., [as] one of the most accepted techniques of seeking popular support," and "essential to the poorly financed causes of little people." *Struthers*,

319 U.S. at 145-46. In contradiction, the Seventh Circuit relied on the widespread use of telephone canvassing to *justify* the Indiana law.

The court dismissed Patriotic Veterans' concerns about the prohibitively higher cost associated with having a live operator obtain preclearance. Instead, the court preferred to allay the supposed "frustrat[ion of] the recipient" by sacrificing automated calls which are "cheap for the caller." App. 6a. Essentially, the panel elevated distaste for unwanted telephone calls over the First Amendment rights of the communicator to speak and the recipient to listen, contrary to the *Struthers* ruling that:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.

Struthers, 319 U.S. at 143.

The Court more recently extended *Struthers* by striking down a city ordinance calculated to require a village mayor's permission to engage in door-to-door soliciting. *See Watchtower Bible and Tract Society of New York, Inc. v. Stratton*, 536 U.S. 150 (2002). In order to satisfy the city, the canvasser was required first to fill out a Solicitor's Registration Form, disclosing his name, stating the "purpose" of his message, and the "goods or services offered," similar to the requirements of the ADMS. *See Stratton*, 536 U.S. at 155 n.2. This Court struck down the ordinance as invalid on its face:

> On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution.

Id. at 162.

The automated call is the modern day pamphlet. Instead of distributing one's message while walking door-to-door, today's technology enables messengers inexpensively to go phone-to-phone, and those phone calls are most certainly entitled to the same First Amendment protection as personal visits which, even more than telephone calls, use up a homeowner's "time and mental energy." 845 F.3d at 305-06.

Just as the *Struthers* and *Stratton* homeowners were free to ignore the pamphleteer at their front doors by not answering the doorbell or refusing to hear the message, so too Indiana homeowners are free to limit an automated call by not answering the phone or by hanging it up.[4] In a constitutional republic, being required to expend a bit of precious "time and mental energy" should be viewed as the price — and truly not that much of a price — that Americans pay for living in a free society. As Justice Stevens observed at the close of his opinion in *Stratton*:

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4. "In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail." *Rowan*, 397 U.S. at 736.

> The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.

Stratton, 536 U.S. at 169.

B. The ADMS does not leave Patriotic Veterans with ample alternative channels for communication.

1. The Courts Below Failed to Consider the Specific Use of Automated calls by Patriotic Veterans.

Although the Seventh Circuit did not explain why it addressed other "ways to spread messages," such a showing is mandatory for time, place, and manner restrictions, which must "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Seventh Circuit stated that the ADMS does "leave[] open [such] ample alternative channels for communication." App. 21a. It held that "[e]veryone has plenty of ways to spread messages." App. 6a. The district court identified these alternative communication channels as "live telephone calls, consented to robocalls, radio and television advertising and interviews, debates, door-to-door visits, mailings, flyers, posters, billboards, bumper stickers, e-mail, blogs, internet advertisements, Twitter feeds, YouTube videos, and Facebook postings." App. 22a. The circuit court provided a shorter and somewhat different list –a "TV, newspapers and magazines (including

ads), websites, social media (Facebook, Twitter, and the like), calls from live persons, and even recorded spiels if a live operator first secures consent." App. 6a.

The district court explained that it could see no First Amendment problem even with a statute which hampered Patriotic Veterans in communicating its message as desired – asserting that "an adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech." App. 22a (quoting *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002)). *Weinberg*, however, had relied on a Ninth Circuit decision which clearly stated that "'an alternative is not ample if the speaker is not permitted to reach the intended audience.'" *Id*. at 1042 (quoting *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (emphasis added)). At the very least, the *Bay Area Peace Navy* rule should apply in this case. As this Court has recognized, "[e]ven assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech," such a different medium must be "reasonable alternatives … in terms of impact and effectiveness." *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 477 n. 9 (2007).

And it should have been clear that Patriotic Veterans does not have the "ample alternative channels" that this Court requires to communicate its message, as those channels do not allow it to reach its intended audience. *See* Section VI.B.2 & 3 *infra*.

2. Patriotic Veterans requires an efficient and prompt means to reach its audience.

In the district court, Patriotic Veterans explained that making calls using a live operator would cost eight times as much as placing automated calls, and without the use of automated telephone calls, it "could not afford to ... disseminate the same number of messages to the same number of voters." Cir. App. 34. Further, for Patriotic Veterans to accomplish its mission, it sometimes needs "to send messages in a short period of time, such as on the eve of an election or before a vote [in a legislative body] important to its members." Cir. App. 35, 38. Patriotic Veterans needs a method of communication that is both affordable and fast.

Neither the district court's list of 18 "ample other means" nor the circuit court's list of eight alternatives meets the need of Patriotic Veterans. To be sure, some of the identified means of communication can be engaged in cheaply. And some can be done quickly. A few can be accomplished both cheaply and quickly – but many of those involve entirely Internet-based communications: websites, email, blogs, Twitter, YouTube, and Facebook – alternatives which would not actually reach Patriotic Veterans' target audience.

No one doubts the effectiveness of Internet communications and social media in reaching *some* voters, particularly younger ones. Patriotic Veterans could make an unlimited number of Tweets, YouTube videos, or Facebook posts without reaching many in its target audience. Its demographic includes large numbers of middle-aged and senior citizens who use telephone

landlines – truly, "a venerable means of communication." The Seventh Circuit was fully aware of Patriotic Veterans' target demographic, as it noted when this case was before it earlier:

> in 2010, Patriotic Veterans, in partnership with singing idol Pat Boone sponsored nearly 1.9 million calls to veterans and seniors across the U.S. about cuts in Medicare as a result of the passage of Obamacare.

Patriotic Veterans, 736 F.3d at 1044.

This automated telephone call by Pat Boone (now age 82) clearly was intended to reach a target audience of "veterans and seniors" who may not monitor a Twitter feed. In *Weinberg* (relied on below), even the Seventh Circuit similarly recognized that target audiences often differ: "Blackhawk fans are a fundamentally different market than the market for bookstore readers or Internet users." *Id*. at 1042.

Without automated telephone calls, Patriotic Veterans is simply not able to have its message reach its intended audience. As Patriotic Veterans' vendor explained below, "[i]n any campaign, whether for a candidate or an issue, we are aware of no faster or more cost-effective way [than automated telephone calls] to reach the voter." Cir. App. 39. As this Court has made clear, "we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). Thus, the courts below erred when they effectively barred Patriotic Veterans' grassroots lobbying program because they presumed to

know better than Patriotic Veterans how the organization could (or should) spread its message. The courts below felt at liberty to sanction a state law effectively barring automated calls, but, as this Court noted in *City of Ladue*, "'[a]lthough prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent — by eliminating a common means of speaking." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

3. None of the Court-Identified Alternative Channels Allows for Effective Grassroots Lobbying.

As the Seventh Circuit related in its 2013 decision below, the calls made by Patriotic Veterans often recruit a prominent person such as Pat Boone to present a recorded message. When recipients hear well-known and well-respected voices, they pay greater attention, thereby facilitating the educational message contained in these calls. This type of personal contact cannot be achieved nearly as effectively through any of the alternative channels of communications postulated by the courts below.

Furthermore, Patriotic Veterans generally uses automated telephone equipment to generate large numbers of grassroots communications with elected officials. To that end, persons called are given a sophisticated "live transfer" option to be connected directly with their member of the state legislature, so that they can more effectively petition their elected officials – generally by supporting or opposing legislation then pending. Cir. App. 280. The only communications channel which allows

Patriotic Veterans to communicate directly with their elected official in a cost and time effective manner is via telephone calls using automated dialing equipment. By enabling a person to communicate directly with one's elected representative, the automated call makes it possible for even the most humble citizen to exercise his First Amendment right to "petition [the Government] for redress of their grievances" in its "most pristine and classic form." *See Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JANUARY 3, 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-2059

PATRIOTIC VETERANS, INC.,

Plaintiff-Appellant,

v.

GREG ZOELLER, ATTORNEY GENERAL OF INDIANA,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 1:10-cv-723-WTL-MPB –
William T. Lawrence, *Judge.*

November 1, 2016, Argued
January 3, 2017, Decided

Before EASTERBROOK, ROVNER, and SYKES, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Plaintiff, a veterans' group, contends that an anti-robocall statute, Ind. Code §24-5-14-5, violates the First Amendment to the Constitution, applied to the states by the Fourteenth

Amendment. The Telephone Consumer Protection Act, 47 U.S.C. §227, which contains a similar limit, has been sustained by two circuits. See *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), affirmed on other grounds, 136 S. Ct. 663, 193 L. Ed. 2d 571 (2016); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1549-56 (8th Cir. 1995); *Moser v. FCC*, 46 F.3d 970 (9th Cir. 1995). The same circuits have approved state laws as well. See *Van Bergen* (sustaining a Minnesota law in addition to §227); *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996) (California law). But relying on *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015), which found South Carolina's anti-robocall law to be unconstitutional, plaintiff maintains that *Reed v. Gilbert*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), made these decisions obsolete and dooms both state and federal anti-robocall statutes as instances of content discrimination. We disagree with that contention and conclude that Indiana's law is valid.

Indiana forbids recorded phone messages placed by automated dialing machines 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." Ind. Code §24-5-14-5(b). Plaintiff maintains that the option given by subsection (b)(2) is prohibitively expensive, so that as a practical matter the statute forbids robocalls in the absence of advance consent by the recipient. We shall assume that this is so. Yet the requirement of consent is not content discrimination, so plaintiff focuses attention on three statutory exceptions:

> This section does not apply to any of the following messages:
>
> > (1) Messages from school districts to students, parents, or employees.
> >
> > (2) Messages to subscribers with whom the caller has a current business or personal relationship.
> >
> > (3) Messages advising employees of work schedules.

Ind. Code §24-5-14-5(a). The district court concluded that these exceptions do not constitute content discrimination and held that the law is constitutional. 177 F. Supp. 3d 1120 (S.D. Ind. 2016). The district court had earlier deemed the Indiana statute preempted, but we reversed, 736 F.3d 1041 (7th Cir. 2013), leaving only the constitutional challenge.

Plaintiff tells us that the statute as a whole disfavors political speech and therefore entails content discrimination, as *Reed* understood that phrase. We don't get it. Nothing in the statute, including the three exceptions, disfavors political speech. The statute as a whole disfavors cold calls (that is, calls to strangers), but if a recipient has authorized robocalls then the nature of the message is irrelevant. The three exceptions in §24-5-14-5(a) likewise depend on the relation between the caller and the recipient, not on what the caller proposes to say. Our first opinion described these exceptions as a form of implied consent, 736 F.3d at 1047, adding to the express

consent exception in §24-5-14-5(b)(1). The exceptions collectively concern who may be called, not what may be said, and therefore do not establish content discrimination.

That's not quite true of §24-5-14-5(a)(3), which deals with messages "advising employees of work schedules." If plaintiff proposed to make automated calls to its own employees, it could contend that the restriction—the calls must concern work schedules—blocked it from including political speech. But, when asked at argument, counsel for plaintiff stated that the organization does not feel inhibited in communicating with its own employees—who, after all, may have given express consent under §24-5-14-5(b)(1). So if we were to hold that employers may say anything they like in automated calls to employees, this would do plaintiff no good. Nor would an injunction striking subsection (a)(3) from the statute. Such an injunction would make plaintiff worse off by making it harder to get in touch with its staff, and plaintiff understandably has not asked for that relief. What it wants is an order preventing Indiana from enforcing §24-5-14-5(b). Potential problems with how subsection (a)(3) affects other persons do not give plaintiff standing to complain about subsection (b), its target in this suit.

Plaintiff's other line of argument is that the statute is excessive in relation to its goal of protecting phone subscribers' peace and quiet, and that the First Amendment thus requires Indiana to make an exception for political speech. That exception, if created, would be *real* content discrimination, and *Reed* then would prohibit the state from forbidding robocall advertising and other

non-political speech. That's the conclusion of *Cahaly*. South Carolina's antirobocall statute "applies to calls with a consumer or political message but does not reach calls made for any other purpose." *Cahaly*, 796 F.3d at 405. The Fourth Circuit concluded that drawing lines on the basis of the message presented, rather than (as Indiana's law does) consent by the person to be called, is content discrimination prohibited by the First Amendment. Plaintiff wants us to take a content-neutral law and make it invalid by creating message-based distinctions. That's out of the question. Indiana's law must stand or fall as written. Thus the remaining question is not whether Indiana must allow automated politicking by phone, but whether it is entitled to make advance consent (express or implied) a condition of any automated phone call, regardless of subject.

No one can deny the legitimacy of the state's goal: Preventing the phone (at home or in one's pocket) from frequently ringing with unwanted calls. Every call uses some of the phone owner's time and mental energy, both of which are precious. Most members of the public want to limit calls, especially cell-phone calls, to family and acquaintances, and to get their political information (not to mention their advertisements) in other ways. Federal law severely limits unsolicited calls to cell phones, 47 U.S.C. §227(b)(1)(A)(iii), and the FTC maintains a do-not-call registry for landline phones, just as the Postal Service maintains a no-junk-mail list. These devices have been sustained against constitutional challenge. See, e.g., *Rowan v. Post Office*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970) (junk-mail list); *Mainstream Marketing*

Services, Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004) (do-not-call registry). Limits on unsolicited faxes have been sustained on similar reasoning. See, e.g., *Missouri ex rel. Nixon v. American Blast Fax, Inc.*, 323 F.3d 649 (8th Cir. 2003).

But number porting has made it increasingly hard to distinguish cell numbers from landline numbers, and many callers disregard (or are exempt from) the do-not-call registry because it is expensive to check the FTC's list against lists of potential call recipients. That's why the national government and states such as Indiana have adopted limits on a particular calling technology, the robocall, that many recipients find obnoxious because there's no live person at the other end of the line. The lack of a live person makes the call frustrating for the recipient but cheap for the caller, which multiplies the number of these aggravating calls in the absence of legal controls. Anyone proposing to queue up a robocall knows its own technology, even if it does not know whether the potential recipient is a cell phone or landline phone, or is on or off the do-not-call list.

Everyone has plenty of ways to spread messages: TV, newspapers and magazines (including ads), websites, social media (Facebook, Twitter, and the like), calls from live persons, and even recorded spiels if a live operator first secures consent. Plaintiff can ask its donors and potential donors to agree to receive robocalls. Preventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction. Other circuits' decisions, which we have

cited, spell out the reasoning; repetition would be otiose. Because Indiana does not discriminate by content—the statute determines who may be called, not what message may be conveyed—these decisions have not been called into question by *Reed*.

AFFIRMED

APPENDIX B — ENTRY ON MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION, FILED APRIL 7, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. 1:10-cv-723-WTL-MPB

PATRIOTIC VETERANS, INC.,

Plaintiff,

vs.

STATE OF INDIANA, *et al.*,

Defendants.

April 7, 2016, Decided
April 7, 2016, Filed

ENTRY ON MOTIONS FOR SUMMARY JUDGMENT

This cause is before the Court on the parties' cross–motions for summary judgment (Dkt. Nos. 32, 35). The motions are fully briefed and the Court, being duly advised, **DENIES** the Plaintiff's motion and **GRANTS** the Defendants' motion for the reasons set forth below.

Appendix B

I. BACKGROUND

Plaintiff Patriotic Veterans, Inc., is an Illinois non-profit corporation that exists for the purpose of informing voters of the positions taken by candidates and office holders on issues of interest to veterans. In furtherance of its mission, the Plaintiff wishes to place automated interstate telephone calls to Indiana residents to communicate political messages relating to particular candidates or issues. However, doing so would violate Indiana's Automated Dialing Machine Statute ("IADMS"), Ind. Code § 24-5-14-1 et seq., which bans autodialed calls with the following limited exceptions:

> (a) This section does not apply to any of the following messages:
>
> (1) Messages from school districts to students, parents, or employees.
>
> (2) Messages to subscribers with whom the caller has a current business or personal relationship.
>
> (3) Messages 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.[1]

Ind. Code § 24-5-14-5. If the IADMS did not exist, the Plaintiff has indicated that it would place automated phone calls related to its mission to Indiana Veterans and voters. Indiana Attorney General Greg Zoeller has declined to exempt political calls from enforcement under the IADMS[2] and would seek fines and injunctive relief against the Plaintiff if it placed automated political calls to Indiana residents. Indeed, violation of the IADMS constitutes a Class C misdemeanor. Ind. Code § 24-5-14-10.

In an earlier ruling, the Court held that the Telephone Consumer Protection Act preempted the IADMS. *Patriotic Veterans, Inc. v. Indiana*, 821 F. Supp. 2d 1074

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1. The statute was amended in 2015, but the changes in form do not affect the content of the statute or the Court's analysis.

2. When applying another Indiana statute, the Telephone Privacy Act, a previous Indiana Attorney General recognized "an 'implicit exclusion' for calls soliciting political contributions." *See National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 784 (7th Cir. 2006). Attorney General Zoeller recognizes no such exclusion with regard to the IADMS and has expressly reminded Indiana's political parties that the statute does not exempt political calls. He also has stated that he intends to actively enforce the statute's provisions.

(S.D. Ind. 2011). The Seventh Circuit reversed the Court's ruling on preemption and remanded the case for the Court to evaluate "whether Indiana's statute violates the free speech rights protected by the First Amendment to the United States Constitution." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1054 (7th Cir. 2013).

II. DISCUSSION

Federal Rule of Civil Procedure 56(a) provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In this case, the parties agree that none of the relevant facts are in dispute; rather, the resolution of this case hinges solely on issues of law.

A. Overbreadth

The Plaintiff first argues that the IADMS is overbroad. Specifically, the Plaintiff argues that the IADMS "sweeps into its scope protected political speech, including speech listeners wish to receive." Dkt. No. 33 at 14. To support a claim of overbreadth, the party before the court must identify a significant difference between its claim that the statute is invalid on overbreadth grounds and its claim that it is unconstitutional as applied to its particular activity. *See Members of City Counsel of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). Here, the Plaintiff's overbreadth challenge rests on the IADMS' application to political messages. The Plaintiff separately challenges the IADMS'

application to its own political messages. Nothing in the record indicates that the IADMS will have any different impact on third parties' interests in free speech than it has on the Plaintiff's interests. *See id.* Thus, the Court will limit its review of the IADMS to the case before it and analyze it as applied to the Plaintiff.

B. Content Neutrality

The First Amendment prohibits the enactment of law "abridging the freedom of speech." U.S. Const. I. A government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227, 192 L. Ed. 2d 236 (2015). Content-based speech restrictions are subject to strict scrutiny, *id.*, while content-neutral laws are to be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication, *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). A court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227 (quoting *Sorrell v. IMS Health, Inc.* 564 U.S. 552, 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011)). Distinctions based on message may define regulated speech by particular subject matter or may define regulated speech by its function or purpose. *Reed*, 135 S. Ct. at 2227.

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The Supreme Court has recognized an additional category of laws that, while "facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id.* (quoting *Ward*, 491 U.S. at 791).

The IADMS defines "caller" broadly as "an individual, corporation, limited liability company, partnership, unincorporated association, or the entity that attempts to contact, or contacts, a subscriber in Indiana by using a telephone or telephone line." Ind. Code § 24-5-14-2. The central provision of the statute restricts the caller from using an automatic dialing-announcing device ("ADAD") or connecting an ADAD to a telephone line unless the subscriber has consented to the receipt of the message or the message is preceded by a live operator who obtained the subscriber's consent. As noted above, the provision applies to all messages with three exceptions: (1) messages from school districts to students, parents, or employees; (2) messages to subscribers with whom the caller has a current business or personal relationship; and (3) messages advising employees of work schedules. Ind. Code § 24-5-14-5.

As the Seventh Circuit recognized, these limited exceptions are based on the recipient's implied consent:

> Indiana's statute . . . does appear to be a prohibition — it prohibits automatic dialing devices unless consent is first obtained. There

> are indeed other enumerated exemptions to the statute, but each describes a form of implied consent: Autodialers may be used to make 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. By accepting a job, an employee impliedly consents to phone calls from his employer for work related scheduling purposes, as do families who enroll children at school or people who enter into business relationships.

Patriotic Veterans, 736 F.3d at 1047. As such, these exceptions are based on the relationship of the speaker and recipient of the message rather than the content of the message.

On its face, the IADMS does not draw a distinction based on the content of speech, the topic discussed, or any message expressed. It does not protect specific categories of speech while prohibiting others; rather, its exceptions are based on implied consent due to the prior relationship between the parties, not the content of the caller's message. Thus, the IADMS is content neutral on its face.

In the second step of the *Reed* analysis, a facially content-neutral law can still be categorized as content based if it "cannot be 'justified without reference to the content of the regulated speech'" or if it was "adopted

by the government 'because of disagreement with the message the speech conveys.'" 135 S. Ct. at 2227 (brackets omitted) (quoting *Ward*, 491 U.S. at 791). The Defendants' stated justification for the IADMS — their interest in protecting residential privacy from unsolicited, harassing telephone calls — does not require reference to the content or message. Therefore, the IADMS is content neutral.

This finding is consistent with decisions from other circuits. In *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit examined a statute similar to the IADMS.[3] The court found that the Minnesota statute regulating the use of telephone ADADs was content neutral because it limited the time and manner, not the content, of the communications. Likewise, in *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996), the Ninth Circuit found that California statutes that regulated the use of ADADs were content neutral. The Plaintiff argues that the Court's decision should be guided by the Fourth Circuit's decision in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015), where the court found the anti-robocall statute did not survive a strict scrutiny analysis. However, the statute at issue in that case prohibited only those robocalls that were "for the purpose of making an unsolicited consumer telephone

3. The Minnesota statute restricted the use of ADADs to situations in which the subscriber had consented to receipt of the message or the ADAD message was preceded by a live operator who obtained consent to the playing of the message, with three exceptions: (1) messages to subscribers with whom the caller had a current business or social relationship; (2) messages from schools to parents, students, or employees; and (3) messages to employees advising them of work schedules. *Van Bergen*, 59 F.3d at 1550.

call" or were "of a political nature including, but not limited to, calls relating to political campaigns." S.C. Code Ann. § 16-17-446(A). Based on the express language of the statute, the Fourth Circuit found that it was content based; the statute made facial content distinctions and thus was subject to strict scrutiny. *Cahaly*, 796 F.3d at 405. By contrast, the IADMS does not target political speech or any other type of speech.

The Plaintiff argues that the IADMS burdens political speech and therefore requires the Court to apply a strict scrutiny analysis.[4] However, the Supreme Court has analyzed content-neutral laws that impact political communications using the time, place, and manner scheme applied to other content-neutral laws. *See, e.g., Members of the City Council of Los Angeles*, 466 U.S. at 803-05 (holding that a law prohibiting signs on public property in order to preserve aesthetics could be applied to political-campaign signs).

The Plaintiff attempts to analogize the present case to cases in which the statutes at issue specifically targeted political speech. However, any comparison to the statutes at issue in those cases is inapposite because the IADMS does not target political speech. For example, the Plaintiff cites to *Meyer v. Grant*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988), but that case dealt with a statute that specifically prohibited the use of paid petition circulators to gather signatures to have a proposed state

4. The Plaintiff also alleges that the IADMS has been enforced so as to target political calls, but the Plaintiff points to no evidence that supports this argument.

constitutional amendment placed on the general election ballot.[5] Likewise, any reliance on *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010), is misplaced. There, the Court held that the statute at issue suppressed political speech on the basis of the speaker's corporate identity. By contrast, the IADMS does not govern specific subject matter, s*ee Reed*, 135 S. Ct. at 2230 (citation omitted), and any burden to political speech is incidental.[6]

C. Time, Place, or Manner Restriction

Because the IADMS is content-neutral, it must be analyzed under the standards applicable to restrictions on the time, place, or manner of engaging in free speech. *See Ward*, 491 U.S. at 791. Accordingly, the IADMS does not run afoul of the First Amendment so long as it is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for

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5. The Court in *Meyer*, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425, did not specifically address whether the statute was content based. It clearly was. However, in *Reed*, 135 S. Ct. 2218, 192 L. Ed. 2d 236, the Court first examined whether the law was content based, finding that it was because it targeted specific subject matter for differential treatment. *See id.* at 2230-31. Only after making that finding did the Court apply strict scrutiny.

6. The Plaintiff argues that language from the Seventh Circuit's opinion in *National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783 (7th Cir. 2006), dictates a ruling in its favor. However, in that case the majority was applying the balancing test established in *Rowan v. United States Postal Service*, 397 U.S. 728, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970), a test that clearly is not applicable in this case.

communication of [ ] information." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529, 189 L. Ed. 2d 502 (2014) (quoting *Ward*, 491 U.S. at 791).

1. Significant Governmental Interest

Residential privacy is a significant governmental interest. "The [s]tate's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) (quoting *Carey v. Brown*, 447 U.S. 455, 471, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980)). Moreover, an "important aspect of residential privacy is the protection of the unwilling listener." *Frisby*, 487 U.S. at 484. As such, the state's interest is particularly strong where it is protecting its citizens from speech that holds the listener captive in his or her own home. *See id.* at 484-85. The use of an ADAD telephone call to deliver speech implicates this interest. *See also Nat'l Coal. of Prayer*, 455 F.3d at 790 ("[T] he Supreme Court has already made clear that citizens in their own homes have a stronger interest in being free from unwanted communication than a speaker has in speaking in a manner that invades residential privacy.").

Further, ADAD calls are especially disruptive because the recipient can interact only with the computer. If a call is made by a live operator, the call recipient can inform the operator that he does not wish to hear from the caller again. A Senate Report on the use of automated equipment to engage in telemarketing found as follows:

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> [I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by "live" persons. These automated calls cannot interact with the customer except in preprogrammed ways, do not allow the caller to feel the frustration of the called party, fill an answering machine tape or a voice recording service, and do not disconnect the line even after the customer hangs up the telephone. For all these reasons, it is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by "live" persons.

S. Rep. No. 102-178, at 4-5, as reprinted in 1991 U.S.C.C.A.N. 1968, 1972.

While the Plaintiff characterizes the interest as "the minor annoyance of having to answer the phone," Dkt. No. 33 at 26, the promotional materials and website of the company the Plaintiff has used to make the calls speak of the ability of a "ringing telephone . . . to stop[] people and demand[] attention." Dkt. No. 36-4 at 80. The Plaintiff indicates that at least 20 to 30 percent of calls are heard in their entirety and surmises that the recipients are therefore willing listeners. As the Defendants point out, the recipients may simply be listening to the entire call to try to register their objection to the calls or in the hope of being able to opt out of future calls. The Plaintiff also indicates that 25 to 35 percent of calls go to an answering

machine and theorizes that those calls presumably bother no one. This supposition ignores the possibility that an answering machine could be filled by such messages.

Because ADAD calls intrude on the privacy and tranquility of the home and the recipient does not have the opportunity to indicate the desire to not receive such calls to a live operator, the government has a substantial interest in limiting the use of unsolicited, unconsented-to ADAD calls.

2. Narrowly Tailored

The IADMS is narrowly tailored to reach the Government's interests. To satisfy this standard, a regulation need not be the least speech-restrictive means of advancing the Government's interests. "Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)). Narrow tailoring in this context requires, in other words, that the means chosen do not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

The Plaintiff argues that using a live operator would be prohibitively expensive; however, a live operator initiating the calls would be more efficient than a live operator making and delivering the entire message. An operator could announce the source of the call and

determine if the listener wanted to hear the message and immediately move on to the next call after hearing the response. Use of a live operator also would allow recipients the chance to not only decline to listen to the message at that time but also to request that the caller not call again. As such, recipients could reduce the number of such calls that they receive.

The limits on the use of ADAD calls are designed to remedy the problems perceived with the use of ADAD technology. Further, although the use of ADADs is limited, the live operator and prior consent options allow the continued use of ADADs while protecting the interests of the recipient. The Plaintiff points to less restrictive means of regulation, but, under *Ward*, the mere existence of alternatives is not dispositive. *Ward*, 491 U.S. at 798-99 (A regulation of the time, place, or manner of protected speech must be narrowly tailored but "need not be the least restrictive or least intrusive means of doing so."). Of course, there must be a "close fit" between ends and means, *McCullen*, 134 S. Ct. at 2534, and such a fit exists here. Further, the IADMS does not "foreclose an entire medium of expression," *see City of Ladue v. Gilleo*, 512 U.S. 43, 56, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994); rather, it prohibits a single method of communication: autodialed, prerecorded calls to people who have not consented to receive those calls. Thus, it is narrowly tailored.

3. Alternative Channels of Communication

Finally, the IADMS leaves open ample alternative channels for communication. "[E]ven regulations that do

not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.'" *City of Ladue*, 512 U.S. at 56 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)). "We recognize that 'an adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech.'" *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002) (quoting *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000)).

Contrary to the Plaintiff's claim, the IADMS does not "eliminate[] their ability to have a voice in the marketplace of ideas when elections, votes, or other dialogue of political importance occurs." Dkt. No. 33 at 11. The Plaintiff has pointed to evidence that the cost of live operator calls is about eight times more expensive using the vendor that the Plaintiff has used and that calls cannot always be made fast enough for the messages to be delivered in the time allotted. However, as the Defendants note, the Plaintiff has ample other means with which to deliver its message, including live telephone calls, consented to robocalls, radio and television advertising and interviews, debates, door-to-door visits, mailings, flyers, posters, billboards, bumper stickers, e-mail, blogs, internet advertisements, Twitter feeds, YouTube videos, and Facebook postings. The Plaintiff is not entitled to its first or best choice or even one that provides the same audience. Ample alternative channels of communication remain open to the Plaintiff, and thus this prong of the test is satisfied.

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III. CONCLUSION

The IADMS is content neutral and is a valid time, place, or manner restriction on speech, and, accordingly, it does not violate the First Amendment. Therefore, the Court **DENIES** the Plaintiff's motion for summary judgment and **GRANTS** the Defendants' motion for summary judgment.

SO ORDERED: 4/7/16

/s/ William T. Lawrence
Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

APPENDIX C — STATUTES

IC 24-5-14

Chapter 14. Regulation of Automatic Dialing Machines

IC 24-5-14-1

Automatic dialing-announcing device

Sec. 1. As used in this chapter, "automatic dialing-announcing device" means a device that:

(1) selects and dials telephone numbers; and

(2) working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

As added by P.L.151-1988, SEC.1.

IC 24-5-14-2

Caller

Sec. 2. As used in this chapter, "caller" means an individual, corporation, limited liability company, partnership, unincorporated association, or the entity that attempts to contact, or contacts, a subscriber in Indiana by using a telephone or telephone line.

As added by P.L.151-1988, SEC.1. Amended by P.L.8-1993, SEC.364.

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IC 24-5-14-3

Commercial telephone solicitation

Sec. 3. (a) As used in this chapter, "commercial telephone solicitation" means any unsolicited call to a subscriber when:

(1) the person initiating the call has not had a prior business or personal relationship with the subscriber; and

(2) the purpose of the call is to solicit the purchase or the consideration of the purchase of goods or services by the subscriber.

(b) The term does not include calls initiated by the following:

(1) The state or a political subdivision (as defined by IC 36-1-2-13) for exclusively public purposes.

(2) The United States or any of its subdivisions for exclusively public purposes (involving real property in Indiana).

As added by P.L.151-1988, SEC.1.

Appendix C

IC 24-5-14-4

Subscriber

Sec. 4. As used in this chapter, "subscriber" means:

(1) a person who has subscribed to telephone service from a telephone company; or

(2) other persons living or residing with the subscribing person.

As added by P.L.151-1988, SEC.1.

IC 24-5-14-5

Restrictions on use of automatic dialing-announcing device

Sec. 5. (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.

As added by P.L.151-1988, SEC.1.

IC 24-5-14-6

Disconnect requirement

Sec. 6. A caller may not use an automatic dialing-announcing device unless the device is designed and operated to disconnect within ten (10) seconds after termination of the telephone call by the subscriber.

As added by P.L.151-1988, SEC.1.

IC 24-5-14-7

Live operator preceding message; disclosure

Sec. 7. When a message is immediately preceded by a live operator, the operator must, at the outset of the message, disclose the following:

(1) The name of the business, firm, organization, association, partnership, or entity for which the message is being made.

(2) The purpose of the message.

(3) The identity or kinds of goods or services the message is promoting.

(4) If applicable, the fact that the message intends to solicit payment or the commitment of funds.

As added by P.L.151-1988, SEC.1.

IC 24-5-14-8

Time restrictions

Sec. 8. (a) This section does not apply to messages described in section 5(a) of this chapter.

(b) A caller may not use an automatic dialing-announcing device for commercial telephone solicitation so that a subscriber receives a telephone call before 9 a.m. or after 8 p.m.

As added by P.L.151-1988, SEC.1.

IC 24-5-14-9

Failure to comply; petition; injunction

Sec. 9. Upon petition by any person that a caller has failed to comply with this chapter, the circuit or superior court of the county of residence of the petitioner may enjoin the caller from further violations.

As added by P.L.151-1988, SEC.1.

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IC 24-5-14-10

Misdemeanor

Sec. 10. A caller who fails to comply with this chapter commits a Class C misdemeanor.

As added by P.L.151-1988, SEC.1.

IC 24-5-14-12

Prohibited use of automatic dialing-announcing device

Sec. 12. A caller may not use an automatic dialing-announcing device to make a telephone call to the following:

(1) A hospital (as defined in IC 16-18-2-179(b)).

(2) An ambulatory outpatient surgical center (as defined in IC 16-18-2-14).

(3) A health facility (as defined in IC 16-18-2-167).

(4) An emergency medical services facility (as defined in IC 16-18-2-111).

(5) A business providing emergency ambulance services (as defined in IC 16-18-2-107).

(6) A state institution (as defined in IC 12-7-2-184).

(7) A private mental health institution licensed under IC 12-25.

(8) A residential facility (as defined in IC 12-7-2-165).

(9) A law enforcement agency (as defined in IC 10-13-3-10).

(10) A fire department (as defined in IC 36-8-17-2).

As added by P.L.117-1992, SEC.1. Amended by P.L.2-1993, SEC.134; P.L.2-2003, SEC.63.

IC 24-5-14-13

Deceptive act of caller; remedies and penalties

Sec. 13. A caller who violates this chapter commits a deceptive act that is actionable by the attorney general under IC 24-5-0.5-4 and that is subject to the remedies and penalties under IC 24-5-0.5-4(c), IC 24-5-0.5-4(d), IC 24-5-0.5-4(f), IC 24-5-0.5-4(g), and IC 24-5-0.5-8.

As added by P.L.117-1992, SEC.2.