IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16-2059

PATRIOTIC VETERANS, INC.,

Plaintiff/Appellant,

v.

STATE OF INDIANA ex rel. GREG ZOELLER, ATTORNEY GENERAL, and GREG ZOELLER, ATTORNEY GENERAL,

Defendants/Appellees.

On Appeal from the United States District Court for the Southern District of Indiana, No. 1:10-cv-723-WTL-MPB
The Honorable William T. Lawrence, Judge

BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the Appellant is not complete and correct. Plaintiff/Appellant Patriotic Veterans, Inc. ("PVI") filed this action pursuant to 42 U.S.C. § 1983, seeking (1) a declaration that certain provisions of the Indiana Automatic Dialing Machine Statute (the "Autodialer Law"), Indiana Code § 24-5-14-1, *et seq.*, violate the First Amendment of the United States Constitution and are preempted by federal law, and (2) a permanent injunction against Defendants/Appellees ("the State"). Appellant's Appendix ("App.") 13. The district court granted summary judgment in favor of PVI on the grounds that federal law preempted the Autodialer Law. *Patriotic Veterans, Inc. v. Indiana*, 821 F. Supp. 2d 1074, 1079 (S.D. Ind. 2011). This Court reversed and remanded the case for review of PVI's First Amendment claim. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1054 (7th Cir. 2013). The district court had subject matter jurisdiction over this claim pursuant to 28 U.S.C. § 1331. PVI is an Illinois not-for-profit corporation with its principal place of business in Illinois. App. 12.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The district court entered final judgment in favor of the State on April 7, 2016, thereby disposing of all parties' claims. Appellant's Short Appendix ("Short App.") 15. No motion for a new trial or alteration of the judgment or any other motion tolling the time within which to appeal was filed. PVI filed a timely notice of appeal on May 6, 2016. District Court Electronic Filing Number ("ECF No.") 86. This is not an appeal from a decision of a magistrate judge.

STATEMENT OF THE ISSUE

May Indiana, consistent with the First Amendment, prohibit robocalling residents who have not given consent, regardless whether the robocalls would convey commercial or political messages?

STATEMENT OF THE CASE

Indiana residents prize residential privacy and resent uninvited intrusions by telemarketers. Accordingly, multiple state statutes protect Indiana citizens from unwanted telemarketing calls. In 1988, the General Assembly enacted the first of these—the law at issue here—by banning, absent the consent of the call recipient, calls that deliver prerecorded messages by way of autodialers. *See* Ind. Code § 24-5-14-5. In 2001, the General Assembly enacted a second statute—upheld in *National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 792 (7th Cir. 2006)—permitting citizens to register with the Attorney General their preferences not to receive "telephone sales calls." Telemarketers may not, without consent, make such calls—no matter how dialed—to registered residential telephone numbers. *See* Ind. Code § 24-4.7 *et seq.* (the "Telephone Privacy Act" or "Do-Not-Call Law"). While this case targets only the Autodialer Law, the interplay between the two is relevant to a proper understanding of the overall regulatory structure.

I. Indiana's Autodialer Law

The Autodialer Law prohibits "callers" from using "an automatic dialing-announcing device" to deliver a prerecorded message 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). A "caller" is "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. Accordingly, the Autodialer Law sweeps within its ambit *all* autodialed, prerecorded calls made without the call recipient's consent, including political messages (such as those soliciting political donations, getting out the vote, delivering a message, or taking a survey).

The Autodialer Law provides three narrow exceptions: (1) "school districts" may send these messages "to students, parents, or employees;" (2) a caller may robocall recipients "with whom the caller has a current business or personal relationship;" and (3) employers may send pre-recorded messages "advising employees of work schedules." Ind. Code § 24-5-14-5(a).

The Autodialer Law also requires anyone using an automatic dialing-announcing device to ensure that the device "disconnect[s] within ten (10) seconds after termination of the telephone call" by the recipient. Ind. Code § 24-5-14-6. When a caller uses a live operator to introduce its pre-recorded message, the operator must make prescribed disclosures at the beginning of the call, including "(1) The name of the business . . . or the entity for which the message is being made; (2) The purpose of the message; (3) The identity or kinds of goods or services that

the message is promoting; and (4) If applicable, the fact that the message intends to solicit payment or the commitment of funds." Ind. Code § 24-5-14-7.

The Attorney General is responsible for enforcing the Autodialer Law. Ind. Code § 24-5-14-13. The usual remedy for a violation of the Law is the negotiation of an assurance of voluntary compliance (AVC) whereby a violator agrees to stop violating the Law and to make some level of monetary payments to the State. App. 389. The Attorney General also has statutory authority to seek these same remedies in court. *Id.*; Ind. Code §§ 24-5-0.5-4(c), (g).

From January 1, 2002, through September 30, 2010 (the last reporting period prior to the filing of the State's Motion for Summary Judgment in this case) the Attorney General had fielded 27,577 valid complaints under the Do-Not-Call and Autodialer Laws.[1] App. 199. Of the 8,799 valid complaints received from January 1, 2009, through September 30, 2010, 4,533 (or 51.7%) reported the use of autodialers. *Id.*

From 2006 to 2011, the Attorney General's office handled 46 cases involving the Autodialer Law that resulted in either an AVC or an enforcement lawsuit. App. 389. Only three of those cases involved political calls. *Id.* Forty involved commercial calls and the remaining three involved calls by a charity and debt collection companies calling non-debtors. *Id.*

[1] A "valid" complaint "alleges facts that describe a possible violation of the Telephone Solicitation of Consumers Act or the Regulation of Automatic Dialing Machines Act, or both, and contains sufficient information to conduct an investigation." App. 198–99.

II. Indiana's Do-Not-Call Law

Though this case concerns the Autodialer Law, the Do-Not-Call Law is relevant to the State's enforcement interests. The Do-Not-Call Law prohibits "telephone sales call[s]," even if made by a live operator, to individuals who have registered with the Attorney General for the law's protections. *See* Ind. Code § 24-4.7-4-1. "Telephone sales calls" means only calls peddling "consumer goods and services" or soliciting "a charitable contribution." Ind. Code § 24-4.7-2-9. As political-message calls do neither, they are outside the ambit of the Do-Not-Call Law, though they are subject to the Autodialer Law.

When it comes to restricting telephone sales calls, Indiana's Do-Not-Call Law has been recognized as "one of the best in the country because it has few exemptions." App. 47. In fact, scientific survey evidence confirms the efficacy of the Do-Not-Call Law. Shortly after the Do-Not-Call Law became enforceable in 2002, Dr. Tom W. Smith, the Director of the General Social Survey Program at the National Opinion Research Center and a leading international expert on the design and conduct of surveys, collaborated with Walker Information to design and conduct a mail-in survey to determine the impact of the Do-Not-Call Law on the level of telemarketing calls in Indiana. *Id.* at 49, 51. The survey showed that for people on the Do-Not-Call list, calls on average declined from 12.1 per week to 1.9 per week post-enforcement, a decline of over 80 percent. *Id.* at 51. By way of comparison, non-registered households continued to receive 7.7 calls per week post-enforcement. *Id.* This led Dr. Smith to conclude that the Do-Not-Call Law "led to a huge decline

in telemarketing calls, remains highly successful, and is extremely effective." *Id.* at 53.

Do-Not-Call subscribership further demonstrates the efficacy and popularity of the law. At the time of the State's summary judgment motion, the most recent population and telephone subscribership data from which the State could estimate the number of residential phone lines in Indiana dated from July 1, 2008. *Id.* at 198. At that time, the Do-Not-Call list contained 1,957,697 numbers, representing 75.5% of Indiana households. *Id.*

III. The Plaintiff

PVI is a 501(c)(4) not-for-profit Illinois corporation. App. 14, 33. Using a recording of its spokesperson's voice, it disseminates unsolicited political messages throughout the nation in jurisdictions that do not ban such activity. *Id.* at 37. PVI implies that it has never made its calls in Indiana. *Id.* at 18. The Attorney General has received at least one complaint alleging otherwise, though the Attorney General has never initiated an enforcement action against PVI. *Id.* at 200–201, 282–83.

PVI has historically hired Metrotec Advanced Telephone Messaging Services, a Voice Messaging Service provider, to facilitate the spread of its messages. *Id.* at 37. Using Metrotec, PVI is capable of delivering as many as 100,000 messages in a three-hour period. *Id.* Metrotec's promotional materials and website explicitly proclaim the unique ability of telephone calls to "stop[] people and demand[] attention." *Id.* at 276, 280. Metrotec also acknowledges that "[f]rankly, some may find automated calls a bit annoying." *Id.* at 277, 279. Metrotec's website contains

samples of the sorts of calls Metrotec uses to spread its clients' messages. *Id.* at 272. Even if these messages were sent to residents who had consented to receiving robocalls generally, none of Metrotec's calls in the record would comply with the disclosure or consent requirements of the Autodialer Law. *Id.* at 200. Record evidence demonstrates that the autodialer technology used by Metrotec often fails to respond to voice commands. *Id.* at 272.

IV. Procedural History

In 2010, PVI filed this lawsuit against the State of Indiana and Attorney General Greg Zoeller seeking a declaration that the Autodialer Law is invalid. App. 3 (Complaint filed June 10, 2010), 13–22 (First Amended Complaint filed September 24, 2010). PVI alleged that the Autodialer Law, insofar as it applies to interstate political-campaign calls, violates the First Amendment by suppressing PVI's political speech; is preempted by the Federal Communications Act of 1934 (FCA), Pub. L. 73-416, 48 Stat. 1064 (1934), the Telephone Consumer Protection Act of 1991 (TCPA), Pub. L. No. 102-243, 105 Stat. 2394 (1991), and FCC rules implementing the same; and "deprive[s] [PVI] of rights secured by the Supremacy Clause and the Commerce Clause of the United States Constitution." App. 18–20. PVI sought a permanent injunction preventing the Attorney General from enforcing the Autodialer Law with respect to interstate political-message calls. *Id.* at 21.

The parties filed cross-motions for summary judgment and, on September 27, 2011, the district court granted PVI's motion and denied the State's motion. *Id.* at 933, 941. The district court held that the Autodialer Law "is preempted by the

TCPA as it applies to the interstate use of automatic telephone dialing systems" and thus enjoined the State from enforcing the Autodialer Law "with respect to any interstate telephone call made to express a political message." *Id.* at 941. It declined to address the merits of PVI's First Amendment claims. *Id.* at 941 n.5.

This Court, however, stayed the district court's injunction pending appeal, so the Autodialer Law has been in continuous effect throughout the litigation. Order, *Patriotic Veterans, Inc. v. Indiana*, No. 11-3265 (7th Cir. Dec. 21, 2011), ECF No. 12. Before this Court in the first appeal, the parties briefed both the preemption and First Amendment issues. App. 877, 1012. On November 21, 2013, the Court reversed, holding that the TCPA does not preempt the Autodialer Law. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1054 (7th Cir. 2013). In the context of determining whether the Autodialer Law is a prohibition or regulation for purposes of its preemption analysis, the Court addressed the Law's "enumerated exemptions" and determined that "each describes a form of implied consent: . . . 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." *Id.* at 1047.

The Court declined to address PVI's First Amendment claim, stating "[w]e are a reviewing court and think that the [constitutional] argument would benefit from two-tiered examination." *Id.* Accordingly, the Court remanded the case to the district court for consideration of PVI's constitutional claim in the first instance. *Id.*

On remand, the district court granted summary judgment in favor of the State, holding that the Autodialer Law "is content neutral and is a valid time, place, or manner restriction on speech, and, accordingly it does not violate the First Amendment." Short App. 12. Taking into account the Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and the Fourth Circuit's decision in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), the district court rejected PVI's argument that the Autodialer Law's limited exceptions render it impermissibly content-based, concluding instead that "these exceptions are based on the relationship of the speaker and recipient of the message rather than the content of the message." Short App. 6.

Because the Autodialer Law is content-neutral, the district court applied intermediate scrutiny, *id.* at 8–9, which it deemed satisfied because the Law is narrowly tailored to serve the government's compelling interest in protecting residential privacy "from speech that holds the listener captive in his or her own home." *Id.* at 9–10. With respect to narrow tailoring, the court found that the Law succeeds because its limits "are designed to remedy the problems perceived with the use of [autodialer] technology" yet "the live operator and prior consent options allow the continued use of [autodialer technology] while protecting the interests of the recipient." *Id.* at 11. Furthermore, said the court, the Law "leaves open ample alternative channels for communication . . . including live telephone calls, consented to robocalls, radio and television advertising and interview, debates, door-to-door

visits, mailings, flyers, posters, billboards, [and] bumper stickers" among others. *Id.* at 11–12.

SUMMARY OF THE ARGUMENT

PVI argues it should win because the Autodialer Law and the Attorney General target political speech for censorship and because robocalls do not actually bother people enough to warrant regulation. Neither line of attack has any basis in the text of the statute or the record—or any plausible understanding of daily living in an era of mass telemarketing.

The Indiana Autodialer Law helps protect the peace and tranquility of the home from the incessant ringing of the telephone; such residential privacy is of "the highest order in a free and civilized society." *Carey v. Brown*, 447 U.S. 455, 471 (1980). And because it is justified by reference to a compelling government interest unrelated to the content of speech, the Law is valid as a regulation of the "manner" of speech, precluding as it does only one limited means of communicating messages to Indiana citizens.

It matters not that PVI or others may wish to communicate *political* messages using autodialers. Only laws that *target* political speech, such as those that regulate petition circulators, are subject to strict scrutiny. The Autodialer Law does no such thing, even if it prohibits using autodialers to send pre-recorded political messages along with other kinds of messages. The Supreme Court has long permitted state and local governments to regulate the method of spreading even

political messages in order to protect substantial interests (such as residential and neighborhood peace) unrelated to the content of those messages.

The Supreme Court's holding in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which clarified the Court's two-part test to determine whether a speech regulation is content-neutral, did not undermine the content neutrality of the Autodialer Law, which prohibits *all* prerecorded telephone calls made with an autodialer without consent of the call recipient. *Id.* at 2226–27. Likewise, the three exceptions to the law do not render the law content-based because they rely not on the content of the message, but on the relationship between the caller and the recipient. This Court has already observed that each enumerated exemption to the Autodialer Law "describes a form of implied consent[.]" *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1047 (7th Cir. 2013). Therefore, the statute is content-neutral and should not be subjected to strict scrutiny.

Yet the Autodialer Law is valid even under strict scrutiny because it uses the least restrictive means of advancing the cause of residential privacy, which cannot be gainsaid as a compelling government interest. PVI trivializes the harm to privacy caused by unwelcome robocalls as a "fleeting" annoyance, PVI Br. 28, as if to suggest no one is really bothered by them. But courts across the country in case after case have treated residential privacy as a compelling government interest when evaluating telephone privacy laws. It is not credible for PVI to deny the seriousness of the privacy intrusion at stake.

Furthermore, because the Law permits call recipients to opt out of coverage, it protects the interests of the vast majority of Indiana residents while also accommodating the interests of those few who might actually prefer to receive repeated robocalls. The Supreme Court has held that state laws establishing a general rule against a particular manner of communication that harms individuals are valid so long as they permit those whom the law protects to opt out of the protection. That is exactly the model of the Autodialer Law, so it survives First Amendment scrutiny.

In short, as private homes are not public fora, PVI has no right to impose any sort of message on residents without consent. That basic principle governs this case and supports the validity of the Indiana Autodialer Law.

ARGUMENT

Courts around the country have rejected First Amendment challenges to laws protecting residential privacy from unwanted telemarketing calls. The Eighth and Ninth Circuits have rejected First Amendment challenges to autodialer laws similar to the one at stake here. *See Bland v. Fessler*, 88 F.3d 729, 732–36 (9th Cir. 1996); *Moser v. FCC*, 46 F.3d 970, 973–75 (9th Cir. 1995); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1549–56 (8th Cir. 1995). Indeed, *Van Bergen* rejected a challenge by a political speaker. *See Van Bergen*, 59 F.3d at 1546.

Other courts, including this one, have reached similar conclusions with respect to other prohibitions against harassing telephone calls. *See Nat'l Coal. of Prayer, Inc. v. Carter*, 455 F.3d 783, 792 (7th Cir. 2006); *Fraternal Order of Police v.*

Stenehjem, 431 F.3d 591, 600 (8th Cir. 2005); *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 351 (4th Cir. 2005); *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1246 (10th Cir. 2004); *see also State by Humphrey v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 891–92 (Minn. 1992).

There is no reason to depart from these cases here.

I. Strict Scrutiny Does Not Apply Where, as Here, a Law Is Content Neutral and Does Not Regulate a Public Forum

A. Only laws that *target* political speech face strict scrutiny

PVI's principal argument is that, because the messages it wishes to distribute are political in nature, the Autodialer Law should be subjected to, and cannot withstand, First Amendment strict scrutiny. *See* Br. of Appellant Patriotic Veterans, Inc. ("PVI Br.") 13–15. No doctrine, however, holds that a generally applicable, content-neutral, time, place and manner regulation is subject to strict scrutiny when applied to political speech.

1. Strict scrutiny applies only where the regulation actually *targets* political speech. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365–66 (2010) (invalidating statute that suppressed political speech on the basis of the speaker's corporate identity); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 200 (1992) (striking down rule requiring election-petition circulators to disclose their names); *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (invalidating prohibition against paying ballot-access-petition circulators).

In contrast, the Court has long applied ordinary time, place, and manner doctrine, rather than strict scrutiny, to content-neutral laws impacting political

communications. For example, in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803–05 (1984), the Court ruled, without invoking strict scrutiny, that a law prohibiting signs on public property in order to preserve aesthetics could be applied to political-campaign signs. It said that "[t]he incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest." *Id.* at 808; *see also Frisby v. Schultz*, 487 U.S. 474, 484–85 (1988) (anti-residential picketing law could be directed at abortion protesters); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 648–49 (1981) (equating religious messages with political messages and saying content-neutral place-of-speech laws need not accommodate either); *United States v. O'Brien*, 391 U.S. 367, 382 (1968) (law against destroying draft cards could be applied to burning them as part of a political protest).

Furthermore, it is implausible that the ordinance requiring rock bands to use house mixers upheld in *Ward v. Rock Against Racism*, 491 U.S. 781, 803 (1989), or the law prohibiting raucous sound trucks upheld in *Kovacs v. Cooper*, 336 U.S. 77, 87–89 (1949), would have been subjected to strict scrutiny if the speakers had been communicating political-campaign messages (especially considering the message in *Kovacs* concerned a labor dispute, *id.* at 79). Thus, while states may exempt political solicitations from laws regulating other types of fully protected speech in reliance on its special status (*see Nat'l Coal. of Prayer, Inc. v. Carter*, 455 F.3d 783,

788–89 (7th Cir. 2006); *Auburn Police Union v. Carpenter*, 8 F.3d 886, 901 (1st Cir. 1993)), a refusal to afford such accommodation does not trigger strict scrutiny.

PVI's characterization of the Autodialer Law on this score is wholly inaccurate. It claims the Law "bars automated political calls but allows automated calls on commercial and other topics." PVI Br. 10–11. Not true. The Autodialer Law in no way *targets* political calls, surveys, solicitations, or any other non-commercial calls. It is a blanket robocall prohibition with only three limited exceptions based on the relationship of the caller to the call recipient, from which consent may reasonably be inferred (as this Court has already determined). *See* Part I.C., *infra*.

2. Unable to make a case for any facial targeting of political speech, PVI contends the Autodialer Law should face strict scrutiny because the Attorney General enforces the Law in a manner that targets political speech. As the district court stressed, however, PVI has no evidence to support this assertion. Short App. 7 n.4.

First, PVI gives a distorted history of Indiana robocall enforcement when it contends that, from 1988 to 2006, the Attorney General did not enforce the Law against political campaigns, but suddenly began targeting political calls in 2006. PVI implies, but in no way demonstrates, that the State enforced the Autodialer Law against commercial robocallers but not political robocallers in the years immediately following passage of the statute. More likely, there was little enforcement against *anyone* during that period.

PVI also stitches together a convoluted theory of why the Attorney General began enforcing the Autodialer Law against political robocalls in 2006. It contends that the Attorney General in effect created an exception to the *Do-Not-Call Law* for political calls in order to satisfy constitutional scrutiny in *National Coalition of Prayer*. PVI Br. 5. Then, having claimed victory in that case, the Attorney General, in an act that supposedly revealed his true disfavor for political discourse, "announced for the first time that [he] would enforce the ADMS as to political calls and treat the ADMS as a ban on political speech." *Id.* at 7.

This fanciful account, however, ignores the actual differing text of the Do-Not-Call Law and the Autodialer Law. The Do-Not-Call Law applies only to telephone sales calls, a category that manifestly does not include calls conveying political messages.[2] The Autodialer Law, in contrast, applies to *all* robocalls (with a few relationship-based exceptions), which manifestly covers robocalls conveying political messages as well as other robocalls. *See* Ind. Code § 24-5-14-5. These differences have nothing to do with the Attorney General's "interpretations" of the

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[2] "Telephone sales call" is defined as follows:

> [A] telephone call made to a consumer for any of the following purposes:
>
> (1) Solicitation of a sale of consumer goods or services.
> (2) Solicitation of a charitable contribution.
> (3) Obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.
>
> The term includes . . . [a] call made by use of an automated dialing device . . . [or] a recorded message device.

Ind. Code § 24-4.7-2-9.

law or any forbearance under one law but not the other. It has only to do with legislative text enacted by the General Assembly.

The timing of Attorney General enforcement actions also has nothing to do with the *National Coalition* decision; rather, it turns on citizen complaints. That is, in the administrations of Attorneys General Steve Carter and Greg Zoeller (dating from 2001 to the present), enforcement of both the no-call law and the Autodialer Law have been triggered by citizen complaints, not Attorney General censorship agendas. App. 198.

On that score, lack of enforcement of the Autodialer Law prior to the mid-2000s is unsurprising, as Indiana citizens did not have a strong expectation of residential telephone privacy, or a convenient way to lodge telemarketing complaints, until the advent of the Do-Not-Call Law and creation of the Telephone Privacy section within the Attorney General's consumer protection division in 2002. *See* Ind. Code §§ 24-4.7-2-4, 24-4.7-3-3. Enforcement of *that* law led to an immediate 80% decrease in the number of telemarketing calls registered telephone subscribers received. App. 51. With Hoosiers receiving far fewer telephone sales calls, robocalls became more conspicuous and the Attorney General began to receive complaints seeking relief. When in 2006 Attorney General Carter notified political parties of his intent to enforce the Act, he was responding to complaints from Hoosiers who had become accustomed to a greater degree of residential telephone privacy. *See id.* at 29–32.

Furthermore, the record shows that Attorneys General Carter and Zoeller have enforced the Autodialer Law regardless of the political, commercial, or other content of the robocall message. *See id.* at 198. In fact, the vast majority of Indiana's Autodialer Law enforcement actions have involved *commercial*, not political, speech. *See id.* at 390–624. Cases involving commercial calls accounted for roughly 87% of autodialer enforcement actions between 2006 and 2011, whereas cases involving political calls accounted for only 6% of autodialer enforcement actions during that time period (the last reporting period for which data was available prior to the close of summary judgment briefing in this matter). App. 389. An entire volume of the appendix submitted on appeal by PVI—plus over half of another volume—consists almost entirely of enforcement settlements with *commercial* robocallers. App. 390–860.

On this record, it is implausible to suggest that enforcement of the Autodialer Law against political robocalls arises from some animus against political campaign speech on the part of an official who must campaign for office himself.

3. Nor can the Law's narrow exceptions reasonably be said to exalt other speech over political speech. First, any such assertion is belied by the general preferential treatment Indiana affords political calls by not subjecting them to the Do-Not-Call Law (which would preclude all calls to registered telephone subscribers, whether autodialed or not). Second, the Autodialer Law's exceptions do not mean that the State somehow *prefers* debt collection or school and employer scheduling notification calls over other types of speech; they simply reflect implied

consent and that other factors restrain such calls—as this Court has already said about this exact law. *See Patriotic Veterans*, 736 F.3d at 1047.

What is more, schools and employers do not have incentives to make high volumes of repeated calls the way PVI does. Among other things, the need to maintain the relationship that gave rise to the exception in the first place will deter unnecessary robocalls from schools and employers. And with respect to debt collection calls, they are already covered by the Fair Debt Collection Practices Act, which prohibits repeated calls to collect debts. *See* 15 U.S.C. §§ 1692c(c), 1692d(5).

4. Finally, PVI claims a justification for strict scrutiny in dicta from this Court's opinion in *National Coalition*. PVI Br. 36. PVI argues that "[t]he State now ignores the 'implicit exception for political speech' that it recognized in *National Coalition*," *id.*, but-for-which, PVI alleges, the Court would have struck down the Do-Not-Call Law. *Id.* at 5, 45 n.6. This is both an incorrect characterization of *National Coalition* and an implausible argument.

Again, the Attorney General created no exceptions from the Do-Not-Call Law. Rather, the Do-Not-Call Law *by its own terms* applies only to "telephone sales call[s]," and political calls do not fit that description. The Attorney General had no authority to fashion an exemption for political calls in the Do-Not-Call Law, and has no authority to do so here. Only the General Assembly has the power to create exemptions in statutes.

Second, in *National Coalition* this Court in no way suggested that strict scrutiny would have applied to the Do-Not-Call Law if it had regulated political

calls. Rather, the Court observed that the heightened protection granted to political speech allowed the legislature to exempt political calls from the Do-Not-Call Law without making the Law underinclusive. *See Nat'l Coal.*, 455 F.3d at 791–92 (discussing the propriety of exemptions from the Do-Not-Call Law). Indeed, the only mention of political speech was the Court's notation that an act barring only one side of a political debate would be unacceptable. *See id.* at 790 n.3 ("We acknowledge that an act that severely impinged on core First Amendment values, such as an opt-in list that allowed homeowners to block calls from only one side of a political debate, might not survive a *Rowan* balancing test. That is not the case before us, however . . . ."). Of course, the Autodialer Law prevents prerecorded harassment without reference to which side of the political debate is speaking.

In that regard, it is worth repeating that Indiana's telemarketing laws are more solicitous of political campaign speech than they are of, for example, commercial or charitable solicitations. The latter are subject to both the Do-Not-Call Law *and* the Autodialer Law. *See* Ind. Code § 24-4.7-2-9 (defining "telephone sales calls" as a commercial or charitable solicitation); Ind. Code § 24-5-14-5 (regulating all autodialed, prerecorded messages). Thus, not only are commercial speakers prohibited from using autodialers, but they are also prohibited from calling registered citizens *at all*. In contrast, political speakers are subjected only to the Autodialer Law and may otherwise make calls freely. Political telemarketing is subjected to the least regulation of any telemarketing in Indiana.

In sum, because the Autodialer Law is a content-neutral law prohibiting a particular manner of speech, it is not subject to strict scrutiny.

B. The content neutrality of the Autodialer Law is unhurt by *Reed*

PVI hangs much of its case on *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), where the Court re-articulated the two-part test courts should use to determine whether a speech restriction is content-neutral. First, said *Reed*, a law is content-neutral if it does not, on its face, draw a distinction based on "the topic discussed or the idea or message expressed." *Id.* at 2227. Second, even a facially content-neutral law will be considered 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.'" *Id.* (quoting *Ward*, 491 U.S. at 791).

Reed is of little significance here, however, as the Autodialer Law is content neutral under both inquiries. It prohibits all prerecorded telephone calls made with an autodialer without consent of the call recipient (with a handful of justifiable exceptions that turn on the relationship of the caller and the recipient). *See* Ind. Code § 24-5-14-5; *Patriotic Veterans*, 736 F.3d at 1047. The Law applies without regard to the content of the message and is justified by reference to speech-neutral interests, namely defending the residential privacy of Indiana residents from the onslaught of massive numbers of unsolicited and harassing telemarketing calls.

Yet while several other circuits have deemed similar autodialer laws content neutral, *see Bland*, 88 F.3d at 733–34; *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir.

1995), even as applied to calls made in connection with a political campaign, *see Van Bergen*, 59 F.3d at 1550–51, PVI downplays them because they were decided before *Reed*. PVI Br. 23–24. But *Reed* did not undo all that came before—it merely clarified that a restriction based upon the topic discussed is content-based. *See Reed*, 135 S. Ct. at 2227.

To be sure, this Court in *Norton v. City of Springfield*, 806 F.3d 411, 412 (7th Cir. 2015), said that "*Reed* understands content discrimination differently," but that was only in reference to this Court's previous toleration of viewpoint-neutral "topical censorship" of panhandlers (on the theory that it did not "interfere with the marketplace for ideas"). *Id.* This Court reversed its treatment of a panhandling ordinance after *Reed* because it "regulates 'because of the topic discussed.'" *Id.*

That same concern does not arise with either the Indiana Autodialer Law or the autodialer laws upheld in *Van Bergen* and *Bland*, which are no more content-based now than they were before *Reed*. Again, the laws challenged in those cases applied to *all* callers with only limited exemptions "based on relationship rather than content." *Van Bergen*, 59 F.3d at 1550; *Bland*, 88 F.3d at 733 ("These exemptions rest not on the content of the message, but on existing relationships implying consent to the receipt of the ADAD calls."). Similarly, *Moser* upheld the TCPA, which "regulates all automated telemarketing calls without regard to whether they are commercial or noncommercial," *i.e.*, without regard to content. *Moser*, 46 F.3d at 973.

These cases—and the statutes they uphold—stand in stark contrast to the statute invalidated in *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015), which specifically prohibited calls "of a political nature including, but not limited to, calls relating to political campaigns." *Cahaly*, 796 F.3d at 402. As the district court observed in this case, the South Carolina statute invalidated in *Cahaly* "made facial content distinctions and thus was subject to strict scrutiny." Short App. 7. The South Carolina law applied explicitly to political speech and attempted to blunt the persuasive effect of that speech. Such a law could not plausibly be deemed content neutral, either before or after *Reed*. The Indiana statute at issue here, on the other hand, applies uniformly to all robocalls no matter their message, with relationship-based exceptions (see Part I.C., *infra*). Unlike in *Norton*, there is no issue of "topical censorship" to be re-evaluated in light of *Reed*.

C. Exceptions do not render the Autodialer Law content-based

As noted, the three enumerated exceptions do not draw content-based distinctions according to the message communicated, but instead turn on the relationship between the speaker and the recipient. School districts, employers, and "subscribers with whom the caller has a current business or personal relationship," are reasonably treated as having the implied consent of the call recipient. *See* Ind. Code § 24-5-14-5(a)(2).

This Court recognized as much when it observed that each enumerated exemption to the statute "describes a form of implied consent[.]" *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1047 (7th Cir. 2013). Indeed, said the Court, "[b]y

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." *Id; see also Van Bergen*, 59 F.3d at 1551) ("The three exceptions merely identify groups of subscribers that perforce already have consent to contact the subscriber, and who do not have to go through the formality of obtaining additional specific consent to satisfy the statute.").

As to the third of these exceptions, which covers "messages to subscribers with whom the caller has a current business or personal relationship," Ind. Code § 24-5-14-5(a)(2), PVI protests an "almost boundless carve-out for commercial speech," PVI Br. 20, but this is baseless hyperbole.

First, the exception specifies "*current*" business or personal relationships, demonstrating that its application is not "boundless" at all. By contrast, the "established business relationship" exception to the federal TCPA—which was eliminated as to autodialer calls in 2012—specified that the relationship exists for three months after a consumer inquiry and 18 months after a transaction. *See* 47 C.F.R. § 64.1200(f)(5). Thus, under the federal exception, an individual who takes his car to Firestone for an oil change could have been subjected to up to 18 months of automated calls regarding tire sales and other promotional events. Under Indiana law, Firestone can place an automated call only to notify the individual that the oil change is finished and his car is ready for pick-up. In other words, the Indiana exception is limited to the subject of the current business or personal relationship, *i.e.*, where it is reasonable to infer consent, just as with the other

exceptions. *See Van Bergen*, 59 F.3d at 1550 ("By establishing a business, social, or educational relationship with a potential caller, the subscriber is implying consent to communicate back and forth with the caller.").[3]

Second, the exception applies to *all* callers, not only those expressing commercial speech. Under this exception, for example, a blood bank could use autodialer technology to send prerecorded reminders to individuals who schedule appointments to donate blood. Or, a political campaign could send pre-recorded reminders to individuals who have agreed to volunteer. Accordingly, the exception in no way favors commercial speech.

II. The Autodialer Law Satisfies Any Level of Scrutiny Because it Protects Residential Privacy Without Shutting Down an Entire Channel of Communication

A. The Autodialer Law advances the compelling government interest in protecting residential privacy

Government has a well-established compelling interest in protecting residential privacy from harassing telephone calls. *See, e.g., Nat'l Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 790 (7th Cir. 2006); *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591, 597 (8th Cir. 2005); *Mainstream Mktg. Servs., Inc. v. FTC*, 358 F.3d 1228, 1237–38 (10th Cir. 2004); *Bland v. Fessler*, 88 F.3d 729, 734–35 (9th

[3] It bears observing that business relationship exceptions identical to—and even far broader than—Indiana's "current relationship" exception have been typical for telemarketing restrictions, yet even those statutes have been upheld. The autodialer laws upheld in the Eighth and Ninth Circuits, for example, exempted "messages to subscribers with whom the caller has a current business or social relationship," *Van Bergen*, 59 F.3d at 1550 (citing Minn. Stat. § 325E.27), and "message[s] to an established business associate, customer, or other person having an established relationship with the [caller]." *Bland*, 88 F.3d at 733 (citing Cal. Pub. Util. Code § 2872(f)).

Cir. 1996); *Moser v. FCC*, 46 F.3d 970, 974 (9th Cir. 1995); *Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995). The Autodialer Law protects residential privacy by precluding telemarketers such as PVI from using their technology to harass Indiana citizens.

PVI admits that, using its vendor Metrotec, it can dial 100,000 homes every three hours. PVI Br. 50–51. Thus, but for the Autodialer Law, PVI could, between 9 a.m. and 9 p.m., harass 400,000 Indiana residents per day—and that was using technology as it stood in 2010, when the summary judgment record in this case was first created. Even if PVI will call only once per day, App. 35, 400,000 unsolicited calls by *one telemarketer alone* is a grave daily threat to the privacy of Indiana residents' homes. That number would have to be multiplied many times over to account for all the robocallers who would take advantage of the regulatory void.

PVI asserts that 20 to 30 percent of its call recipients in *other* states listen to the entirety of PVI's message, PVI Br. 8, a statistic it contends somehow constitutes evidence that *Indiana* residents would actually welcome PVI's daily, autodialed, prerecorded messages. PVI Br. 30. The record demonstrates, however, that Indiana residents in particular do not welcome prerecorded, autodialed calls, and they find the existing web of state telemarketing protections highly effective. *See* App. 198. There is no negating Indiana's interest in protecting residential privacy from telephone harassment, nor any reasonable dispute that the Autodialer Law directly advances that objective.

1. First, no rule requires the government to prove the existence of a self-evident problem it seeks to remedy. *See Van Bergen*, 59 F.3d at 1554 ("[W]e do not believe that external evidence of the disruption ADAD calls can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities."); *see also Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 393–94 (2000) (no need to prove danger of political corruption); *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986) (no evidence of vote fraud or political corruption necessary); *cf. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 953 (7th Cir. 2007) (no need to prove existence of in-person voter fraud to justify voter ID law), *aff'd* 553 U.S. 181 (2008). Consequently, PVI cannot prevail in this case by way of trying to disprove the government's long-recognized compelling interesting in protecting residential privacy from harassing telephone calls.

2. Regardless, the harassing quality of robocalls is easily proved. PVI's robocall vendor, Metrotec, has candidly summarized in its promotional materials the problem that robocalls pose: "The Most Powerful Sound In The World: A ringing telephone—it stops people and demands attention." App. 276, 280. This incessant "stop and demand" nature of multiple robocalls directed at Hoosier households day after day, evening after evening, is the evil the General Assembly seeks to stop. Indiana residents do not want to be subjected to onslaughts of telephonic "stop and demand" orders, regardless of their content.

Robocalls are "more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons." S. Rep. No. 102-178, at 4 (1991), *reprinted in* 1991

U.S.C.C.A.N. 1968, 1972. Because such calls cannot interact with receivers except in preprogrammed ways, they "do not allow the caller to feel the frustration of the called party," fill up answering machines, and do not automatically disconnect even after hang up. *Id.* at 4–5. For all of these reasons, Congress explicitly determined that "it is legitimate and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by 'live' persons." *Id.* at 5. Even Metrotec, whose business depends on this disruption of residential privacy, allows that "[f]rankly, some may find automated calls a bit annoying." App. at 277, 279.

If even Metrotec is willing to acknowledge even that much, it is no surprise that courts have long recognized the infuriating intrusiveness of automated calls. This Court has acknowledged that Indiana legislators "believe that the bulk of [Indiana] citizens find automated telephone messages to be an annoyance," *Patriotic Veterans*, 736 F.3d at 1043, a "hunch" that is "backed by empirical data." *Id.* The Eighth Circuit has noted that robocalls are "uniquely intrusive," as "[a]n ADAD does not offer the recipient the option of cutting off the calls; it does not offer householders a choice of whether to respond to the speaker or not." *Van Bergen*, 59 F.3d at 1554–55. The Ninth Circuit has expressed frustration at the "one-way onslaught of information," *Bland*, 88 F.3d at 733, which makes robocall disruption "a different order of magnitude" compared with door-to-door solicitation, *id.* at 733 n.9. Likewise, the Supreme Court of Minnesota expressed concern that the "shrill and imperious ring of the telephone" summons the recipient, depriving them of the

ability to choose to expose themselves to particular expression or not. *State by Humphrey v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 898–99 (Minn. 1992). These decisions and others like them make manifest the loathing with which prerecorded, autodialed calls are viewed by the residents that receive them.

PVI nonetheless has argued that Hoosiers would welcome its autodialed, pre-recorded messages, but its supporting evidence—that some call recipients in other states do not immediately hang up—does not demonstrate that *anyone* welcomes the calls. App. 38. Those who listen to the entirety of an autodialed, prerecorded message might do so in the hope of learning who has made the call so that they can register their objection to the call. Others may listen in hopes of being able to register for an internal no-call list mandated by federal law. *See* 47 C.F.R. § 64.1200(d). And still others may listen but seethe at the disruption.

Tellingly, the Attorney General has received at least one complaint regarding PVI's prohibited autodialer calls. App. 200–01, 282–83. Considering that PVI implies that it has not made any calls to Indiana, *id*. at 18, this directly disproves any claim that PVI's prerecorded, autodialed messages are welcome. This is not surprising. Residential privacy protection was enhanced by the Do-Not-Call Law, which in 2002 created a do-not-call list banning unwanted telephone sales calls, even by live operators. This had a dramatic impact on Hoosiers' residential telephone privacy, leading to an immediate 80% decrease in the number of telemarketing calls that registered telephone subscribers received. *Id.* at 51. As of October 2010 (when the district court record in this case was made), Indiana's no-

call registry contained 1,828,065 unique telephone numbers; only 341 people have requested removal since 2002. *Id.* at 53, 198. Indiana's citizens have thus placed a premium on *effectively* protecting residential tranquility by prohibiting unwanted telemarketing calls of all types for nearly a decade.

The overwhelmingly positive impact of the Do-Not-Call Law has had ramifications for the Autodialer Law. Hoosiers have grown less tolerant of telemarketing calls of all types, including those not covered by the Do-Not-Call Law, such as calls from political speakers. Accordingly, as the Indiana air cleared of telephone sales calls, political robocalls became more and more noticeable. At the time the record in this case was made, complaints about autodialed calls constituted 51.7% of all valid complaints regarding unwanted telemarketing. *Id.* at 199.

This general history of robocall complaints demonstrates that Hoosiers do *not* welcome robocalls, political or not. Indeed, the entire reason PVI instituted this lawsuit is that it knows that if it makes supposedly "welcome" calls it risks prompting residents' complaints and AG enforcement actions. *Id.* at 15, 18. Accordingly, there can be no reasonable dispute that Indiana has a compelling interest in protecting the residential privacy of its citizens from harassing robocalls.

3. PVI suggests that the limited exemptions for schools, employers, and prior business relationships undermine the Autodialer Law's ability to advance the state's compelling interest in residential privacy. PVI Br. 29–30. First, it bears observing that "[t]he concept of underinclusiveness needs to be approached with some caution . . . . Holding an underinclusive classification to violate the First

Amendment can chase government into overbroad restraints on speech." *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 345 (4th Cir. 2005) (upholding FTC regulations of charitable solicitations notwithstanding exemptions). It is thus odd for PVI to argue that the Autodialer Law is invalid because it does not restrict *enough* speech.

Second, as the First Amendment prefers more limited speech restrictions, a content-neutral law is fatally *under*inclusive only where its exemptions render the law so ineffectual that its purported justification comes into question. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429–30 (1993). Under this standard, the Seventh Circuit invalidated a do-not-call registry covering only one industry because it could not reasonably advance the asserted interest of protecting residential privacy. *See Pearson v. Edgar*, 153 F.3d 397, 404–05 (7th Cir. 1998). However, it has upheld Indiana's broad-based do-not-call registry despite a few exemptions because that law *does* reasonably achieve the same objective. *See Nat'l Coal.*, 455 F.3d at 791–92.

In this case, the few relationship-based exemptions to the Autodialer Law hardly undermine its efficacy or cast doubt upon its speech-neutral justification. They merely accommodate calls where it is reasonable to infer the recipient's consent and that are not likely to be made repeatedly. These exceptions in no way approach the regulations invalidated in *Discovery Network* or *Pearson*, where the laws at stake had little hope of accomplishing their stated objectives. Indeed, Indiana's matrix of telephone privacy laws has proven highly effective, such that

Hoosiers now guard their residential privacy jealously and refuse to accept unwanted, harassing telephone calls. Whatever else may be said about the Autodialer Law, it can hardly be tagged "ineffective."

B. The Autodialer Law has a reasonable fit with its objective of protecting residential privacy

To be sufficiently narrowly tailored, a content-neutral law prohibiting a manner of speech need only have a "reasonable fit" with its objective. *See Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("What our decisions require is a 'fit' between the legislature's ends and the means chose to accomplish those ends—a fit that is not necessarily perfect, but reasonable." (internal citations omitted)). Courts have had no trouble concluding that similar laws prohibiting autodialers have been sufficiently narrowly tailored. *See Bland*, 88 F.3d at 735–36; *Van Bergen*, 59 F.3d at 1555–56; *Moser*, 46 F.3d at 974–75.

1. The Autodialer Law prohibits only one method of communication that is capable of causing tremendous disruption to residential privacy

The Autodialer Law plainly bears a reasonable fit to its objective of preventing the incessant ringing of the telephone caused by autodialer technology, which, as PVI boasts, dials massive numbers of residents in a short span of time, at minimal cost to the speaker. PVI Br. 52; App. 37–38. The Law prohibits only one method of communicating—using an autodialer to deliver prerecorded messages—and only when the call recipient has not given consent. *See* Ind. Code § 24-5-14-5(b). The Autodialer Law does not foreclose any alternative means of communication. As the district court observed, PVI "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 feed, YouTube videos, and Facebook postings." Short App. 12. And as social media continues to evolve, other avenues of communication—such as Instagram, Tumblr, and Snapchat, all of which have grown in popularity in the past few years—will present even more alternatives.

Again, the fit between means and ends need not be *perfect*. *Fox*, 492 U.S. at 476–78. For example, the law upheld in *Frisby v. Schultz*, 487 U.S. 474, 488 (1988), banned *all* protests directed at specific homes, even if the homeowner did not object in advance. It is enough that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quotation omitted). Given the volume of calls autodialer technology enables, *see* PVI Br. 52, government restrictions on the use of that technology are the most effective means of promoting the State's interest in protecting residential privacy from "speech that holds the listener captive in his or her own home." Short App. 9.

2. *Ladue* and other cases cited by PVI underscore the primacy of "individual liberty in the home" and do not support PVI's arguments

For its narrow tailoring argument, PVI principally relies on *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), as well as *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150 (2002), *Martin v. City of Struthers*, 319 U.S. 141 (1943),

and *Schneider v. State (Town of Irvington)*, 308 U.S. 147 (1939). None of these cases undermines the validity of the Autodialer Law.

In *Ladue*, the Court invalidated a law precluding a means of communication *by* a resident at home rather than a means of communication *to* a resident at home without consent. *Ladue*, 512 U.S. at 45. The only lesson to draw from *Ladue* is that community aesthetics is an insufficient justification for prohibiting an individual from communicating a message on his own property. *See id.* at 54–55. PVI argues that the holding did not depend on the speaker's identity as a homeowner. PVI Br. 33 n.4. Yet *Ladue* clearly rests on "[a] special respect for individual liberty in the home[, which] has long been part of our culture and our law." *Ladue*, 512 U.S. at 58. Indeed, to the extent it exalts the primacy of individual residents when protected speech conflicts with community values, the rationale of *Ladue* supports upholding the Autodialer Law, which champions the rights of residents in their homes against the onslaught of robocalls.

In addition, the Court in *Ladue* focused on the "venerable" means of communication at issue, as "residential signs have long been an important and distinct medium of expression." *Id.* at 54–55. The Court even cited cases protecting similarly "venerable" means of communication, including leafleting, door-to-door handbilling, and live entertainment. *See id.* at 55 (collecting cases). Automated, prerecorded messages, a technology still in its infancy in 1988 when Indiana enacted the Autodialer Law, does not similarly qualify as "venerable." Even now, using the telephone to spread automated, prerecorded political messages, while

perhaps on the rise, hardly qualifies as a "common means of speaking," *see id.*, which PVI seems to concede. PVI Br. 39.

Martin, *Watchtower Bible*, and *Town of Irvington* are all distinguishable in the same manner as *Ladue*. Each of these cases protected a very traditional and common form of protected speech—handbilling door-to-door and on public streets by individuals—against questionable attempts to protect against fraud and litter. *See Watchtower Bible*, 536 U.S. at 165–67; *Martin*, 319 U.S. at 143–44; *Town of Irvington*, 308 U.S. at 162–63. Here, in contrast with the laws at issue in those cases, the Indiana Autodialer Law freely permits animate contact with Indiana residents in their homes to communicate political messages. The Autodialer Law even permits automated calls when the resident gives consent—an accommodation of individual preferences that the law in *Martin* did not make. *See* Ind. Code § 24-5-14-5(b); *Martin*, 319 U.S. at 143–44.

What is more, individual residences, unlike the public sidewalks and streets at issue in *Town of Irvington*, are not public fora. Citizens do not expect to be free from repeated entreaties in public; they do, however, expect it in their homes unless they have given consent. *See Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 736 (1970); *see also Hill v. Colorado*, 530 U.S. 703, 717 (2000) (upholding law requiring a targeted individual's consent before communicating any messages within 100 feet of an abortion clinic).

Frisby, which upheld a law prohibiting picketing directed at individual homes, neatly captures many of these concepts. It recognized that directing a

protest at someone's house can be prohibited because "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Frisby*, 487 U.S. at 484 (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). In fact, "a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 484–85.

3. Content-neutral laws may permissibly impose greater costs on a method of communication that causes harm in order to limit the externalization of burdens

PVI's argument that it costs too much to hire live operators fares no better. PVI Br. 50. The Supreme Court has been quite clear that, where content-neutral laws are concerned, the relative efficiency of the affected medium of communication is irrelevant. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) ("The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message."); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 812 n.30 (1984); *Kovacs v. Cooper*, 336 U.S. 77, 87–88 (1949).

The best that PVI can muster is to cite *Meyer*, where the Court invalidated a law prohibiting paid petition circulators in part because it outlawed the most efficient means of communication. PVI Br. 51 (citing *Meyer*, 486 U.S. at 414). Again, however, the law at issue in that case *directly targeted* political discourse. *See Meyer*, 486 U.S. at 420–21. Laws that are content-neutral, on the other hand,

may permissibly impose greater costs on speakers in order to limit the externalization of burdens. *See Nat'l Coalition*, 455 F.3d at 791 (upholding Indiana Do-Not-Call Law's requirement that charitable solicitations be made via volunteers and employees only); *Bland*, 88 F.3d at 736; *Van Bergen*, 59 F.3d at 1556; *Moser*, 46 F.3d at 973–75.

PVI cites *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), for the notion that government cannot prefer one channel of communication over another or prohibit any particular channel entirely. PVI Br. 39. But the Court made that point only in reference to congressional (and potentially judicial) efforts to squelch the *influence* of expressly political speech. *Id.* at 326. It was not suggesting that government lacks authority to impose regulatory burdens on a means of spreading a message that causes secondary harm unrelated to the message being conveyed and its capacity to persuade.

The Autodialer Law regulates *one specific* method of harassing and abusive communication (robocalls) because only that method, with its extreme efficiency and minimal cost to the speaker, threatens residential privacy. *See Van Bergen*, 59 F.3d at 1545–55 (observing that autodialers "are increasingly widely used to inexpensively reach a large number of people" and their regulation is justified by "the sheer quantity" of calls they are capable of making); *Bland*, 88 F.3d at 734 (finding a "significant interest in protecting the public" from the use of autodialer technology, which "can generate an incredible volume of prerecorded telephone calls"). It is inaccurate, therefore, for PVI to suggest that the Autodialer Law shuts

down an entire channel of communication. PVI Br. 33. It permits political speakers to use the telephone—just not to do so in ways proven to cause harassment in the home. It even permits robocalls to residents who welcome them, unlikely as that may be.

PVI also complains that traditional forms of communication "are either too slow to reach the desired amount of voters or the time is impossible to obtain." PVI Br. 54. It explains that Metrotec lacks the capacity to meet the demand for its services without recourse to autodialer machines. *Id.* at 51. But the State is not required to refrain from regulating harassing and intrusive telephone calls simply because a private corporation is unable or unwilling to meet consumer demands in some other way. In short, there is no rule that political speakers must be able to use the most efficient channels of communication. Where, as here, the government has a subordinating justification for regulating a particularly injurious channel of communication, and other channels are available, the regulation is permissible. *See Van Bergen*, 59 F.3d at 1556 (holding that "[l]ive telephone calls, door-to-door distribution of information, street corner leafleting, posters and signs, and bulk mailings" were all adequate alternatives); *see also Moser*, 46 F.3d at 975; *Frisby*, 487 U.S. at 486–87 .

All regulations of communication media for the sake of health, safety, welfare and privacy impose costs and inefficiencies on speakers. But under PVI's theory, government could not regulate sound trucks, for example, if some speakers would thereby be economically unable to spread their messages. PVI dismisses this point,

arguing that "this case is not a circumstance of mere limitation. It is a prohibition." PVI Br. 52. But the Supreme Court upheld a *prohibition* against sound trucks in *Kovacs*, notwithstanding that "more people may be more easily and cheaply reached by sound trucks[.]" *Kovacs*, 336 U.S. at 88.

Unfettered robocalling is not merely tooling around a neighborhood in a raucous sound truck, and it certainly is not the occasional knock on the door by a census taker, congressional candidate, neighborhood advocate or Girl Scout selling cookies. Rather, it is Lloyd and Harry squawking The Most Annoying Sound in the World into everyone's homes several times each day—without consent, it hardly seems necessary to add.[4] Surely the government can prohibit *that* sort of annoyance, no matter the message ultimately conveyed.

C. The Autodialer Law is the least restrictive means to further the State's objective of protecting residential privacy

Even if strict scrutiny applies, the Autodialer Law is sufficiently narrowly tailored because no less restrictive alternative could accomplish the State's objective of protecting residential privacy. "The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Sable Commc'ns of Cal., Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989). Under this analysis, proposed alternatives must actually accomplish the interest effectuated by the government's chosen means. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525,

[4] *Dumb and Dumber* (1994), *available at* https://www.youtube.com/watch?v=KAWoP1kncRE (last visited July 15, 2016).

556 (2001) ("[T]he case law requires . . . 'a means narrowly tailored to achieve the desired objective.'" (internal quotations and citations omitted) (emphasis added)); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). The Autodialer Law survives even this level of review.

1. PVI has suggested two alternative regulatory approaches that, in its view, would sufficiently address the State's concerns. Neither fully comprehends, let alone addresses, the State's regulatory interest in protecting residential privacy from unwanted robocalls.

First, PVI argues that "[a]n obviously narrower approach already exists in the form of the do-not-call list." PVI Br. 31. It is not entirely clear what PVI means by this. To the extent PVI is referring to an internal do-not-call list maintained by the entity making the calls, *see id.* at 32 n.3, PVI has never provided evidence that it offers recipients the option of joining such a list, that it discloses its identity to recipients, or that it would enable call recipients to register their preferences not to be called while on the phone. Indiana residents who receive a call from PVI may well have no idea whose no-call list they need to join in order to stop the calls from recurring, and the vast majority of call recipients would likely hang up long before obtaining all of the required information necessary to place themselves on such a list, even if forthcoming. Tellingly, the sample messages that PVI's vendor, Metrotec, posts on its web site do not disclose the source of the call or provide any

opportunity for a call recipient to register an objection to receiving the call. App. 272.

Furthermore, PVI has provided no details concerning how it would enforce such consumer preferences, nor any data showing that registering for *its* internal no-call list would effectively preserve residential privacy from robocalls more generally. These omissions are significant because history has conclusively demonstrated that individual telemarketers' internal no-call lists provide ineffective protection for residential privacy. When the FCC first implemented the TCPA in the early 1990s, it created regulations requiring individual telemarketers to keep and adhere to internal lists of call recipients that registered their preferences not to be called again. *See* Telemarketing Sales Rule, 68 Fed. Reg. 4580, 4629–31 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). Consumers bore the heavy burden of communicating to *every* telemarketer that they be placed on these internal no-call lists. *See id.* at 4629. Such requests were often ignored and consumers lacked any means to monitor compliance. *See id.* Furthermore, resorting to the courts to protect these rights proved complex and time-consuming, and the resulting judgments were often difficult to enforce. *See id.* In 2003, the FCC rejected reliance on internal, company-based no-call lists as "seriously inadequate," noting that receiving even one unsolicited telemarketing call could make a consumer "angry" and "frustrated." *Id.* at 4631.

In light of this history, the Tenth Circuit rejected the argument that company-specific no-call lists constitute an acceptable alternative to broader no-call

rules. *See Mainstream Mktg.*, 358 F.3d at 1244 (quoting the FTC do-not-call rule and finding that "the record in this matter overwhelmingly shows" that "the company-specific approach is seriously inadequate to protect consumers' privacy from an abusive pattern of calls placed by a seller or telemarketer" (internal quotations omitted)).

To the extent PVI's "obviously narrower approach" would mean including political calls in the *State's* Do-Not-Call Law, *see* PVI Br. at 31–32 & n.3, PVI has not demonstrated that this would be a viable alternative to the Autodialer Law. Indeed, this solution would actually be *more* restrictive, not less.

This Court, of course, has already upheld the consumer opt-in regulatory model for charitable solicitations. *See Nat'l Coalition*, 455 F.3d at 792. But, again, the Indiana residential telephone privacy protection matrix has multiple levels, with political advocacy receiving the most caller-friendly treatment. The Autodialer Law applies to all types of telemarketing, but charitable and commercial solicitations are *further* restricted vis-à-vis Indiana residents who have joined the Do-Not-Call list, while political advocacy calls are not. This regulatory scheme allows political advocates many more avenues for communication under Indiana law than other speakers. Adding political calls to the do-not-call registry law would erase that advantage.

In any event, the Supreme Court has approved the citizen opt-out model for political speech as sufficiently narrowly tailored under strict scrutiny. In *Hill v. Colorado*, 530 U.S. 703, 717 (2000), it upheld a law imposing on protestors the

burden of obtaining the consent of any patients they wished to talk to on sidewalks near abortion clinics. The protected audience—the patients—did not have to register their objection first. Rather, the burden was on the speaker to obtain consent. Here, the Autodialer Law's opt-out regulatory scheme similarly gives effect to the desires of Indiana residents not to be bothered by this means of speech, while still respecting anyone's desire to receive such calls. Particularly in light of *Hill*, it fits comfortably within the Supreme Court's First Amendment doctrine.

2. Finally, PVI argues that time-of-day limitations, mandatory disclosure of the caller's identity, and a requirement for an automated consent request would constitute adequate less restrictive means of regulation. In proposing these alternatives, PVI makes it clear that it misunderstands the nature of the residential privacy problem, which cannot be addressed by limiting the time of day the calls are made or the disclosure of the caller's identity, and which may be exacerbated by automated consent. The key is to reduce disruption of residential peace and quiet by the constant, unwelcome ringing of the telephone, no matter when residents are at home. And a person who must divert attention (multiple times a day) from a loved one, a favorite novel or movie, or even a nap, is not made whole by hearing a pre-recorded voice disclose the caller's identity and *then* ask for permission.

What is more, because robocalls are cheap and widely available, they threaten a far greater number of privacy intrusions than calls introduced by live operators. *See* Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 Mich. Telecomm. & Tech. L. Rev. 213, 214–

16 (2009) (discussing the cheapness and availability of autodialed calls). The low cost of making pre-recorded robocalls is exactly what invites the harm that Indiana seeks to prevent, *i.e.*, multiple calls from a variety of sources disrupting the privacy of Indiana residences every day. The residential privacy costs from such calls are disproportionately high compared to the low cost incurred by the robocaller. The live-operator requirement aligns the costs voluntarily undertaken by the caller with the costs unilaterally imposed on the call recipient by forcing robocallers to internalize the privacy costs they impose on unwilling recipients. So, permitting robocallers to use automated response systems rather than live operators would allow robocallers to continue to externalize much of the cost of their calls and undermine the State's objective of protecting residential privacy.

PVI contends that an automated call can obtain consent the same as a live operator. PVI Br. 41. First, of course, this assertion ignores the State's objective of reducing the number of unwanted calls. Second, PVI's only evidence in this regard is the vague and unsupported assertion of Metrotec's president that such technology exists, with no demonstration as to its efficacy. Meanwhile, the State has cited record evidence (the CD mentioned in the Notice of Manual Filing provided at page 272 of Appellants' Appendix) demonstrating that such technology fails to respond to voice commands and thereby frustrates call recipients even beyond the initial ringing of the telephone. *Cf. Van Bergen*, 59 F.3d at 1555 (observing that autodialer calls "are uniquely intrusive due to the machine's inability to register a listener's response."). If PVI knew of better performing technology, it should have supplied it.

Regardless, as automated response systems fail to effectuate Indiana's compelling interest in reducing unwanted calls, they are not a viable "more narrowly tailored alternative" for First Amendment purposes.

Against this backdrop, there is no real dispute over the strength of the State's interest or the potency of the Autodialer Law. The only question is who should bear the initial burden: callers (by being forced to obtain consent), or citizens (by being forced to register their desire to be left alone). S*ee* Telemarketing Sales Rule, Statement of Basis and Purpose, 68 Fed Reg. 4580, 4629–31 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310) (discussing the burden of opt-in regimes on citizens). In light of *Hill*, which approved the citizen opt-out model in a case about abortion-related speech, the Autodialer Law should be upheld as sufficiently narrowly tailored under any level of scrutiny.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I verify that this brief, including footnotes and issues presented, but excluding certificates, contains 11,725 words according to the word-count function of Microsoft Word, the word-processing program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, which sent notification of such filing to the following:

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