No. 16-1198

IN THE
Supreme Court of the United States

PATRIOTIC VETERANS, INC.,
Petitioner,
v.

CURTIS T. HILL, JR.,
Attorney General of Indiana,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, consistent with the First Amendment, a state may prohibit using autodialers to distribute pre-recorded telephone messages to recipients who have not consented.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL CASES [CONT'D]

STATE CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nearly thirty years ago, in 1988, the Indiana General Assembly enacted the Indiana Autodialer Law to protect the residential privacy of Hoosiers from unwanted robocalls. In 2001, the legislature added even more protection from telemarketers with the Telephone Privacy Act, which invites residents to register with the Indiana Attorney General their preferences not to receive *any* telephone calls that solicit sales or charitable donations (live calls made by employees and volunteers of charities exempted). Ind. Code § 24-4.7 *et seq*. With these two laws long in place, Indiana residents have become accustomed to some of the most effective protection from unwanted telemarketing calls in the country. In Indiana, the "shrill and imperious ring of the telephone," *State by Humphrey v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 888 (Minn. 1992), has been tamed by evenhanded restrictions that may be overridden by the choices of individual call recipients. Patriotic Veterans, Inc., claims the First Amendment permits it to disturb that relative peace simply because its messages are political.

1. With the Autodialer Law, absent the consent of the call recipient, it is unlawful to deliver a prerecorded telephone message to an Indiana resident using an automatic dialing-announcing device. Ind. Code § 24-5-14-5. Yet the Autodialer Law permits robocalls when "the [recipient] has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message," or when the recipient has given consent to a live

operator immediately prior to delivery of the message. Ind. Code § 24-5-14-5(b). It also exempts calls, based on implied consent, where the caller has an ongoing school, employment, business, or personal relationship with the call recipient. Ind. Code § 24-5-14-5(a).

2. Patriotic Veterans is a political advocacy organization that wants to deliver unlimited pre-recorded messages to Indiana residents using autodialers. It brags that its telemarketing vendor can deliver as many as 100,000 unsolicited political robocalls in a three-hour period. Cir. App. at 37. That vendor even advertises the unique ability of telephone calls to "stop[] people and demand[] attention," *id.* at 276, 280, though it candidly acknowledges, "[f]rankly, some may find automated calls a bit annoying." *Id.* at 277, 279.

Patriotic Veterans claims that the Autodialer Law violates its First Amendment right to direct an unlimited number of unsolicited calls into Hoosier households on a daily basis. No judge has yet been persuaded.

3. The district court, following *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), determined that the Autodialer Law is facially content neutral and "does not draw a distinction based on the content of speech, the topic discussed, or any message expressed." App. at 14a. Moreover, "its exceptions are based on implied consent due to the prior relationship between the parties, not the content of the caller's message." *Id.* The district court also

concluded that the State's "interest in protecting residential privacy from unsolicited, harassing telephone calls [] does not require reference to the content or message," thereby satisfying the second step of the *Reed* analysis. *Id.* at 15a.

Using the analysis appropriate for content-neutral time, place, and manner restrictions affecting speech, the district court recognized that protecting residential privacy "is a significant governmental interest." *Id.* at 18a. This interest is particularly strong in regard to robocalls, which "are especially disruptive because the recipient can interact only with the computer." *Id.* Furthermore, the Autodialer Law is narrowly tailored because its "limits on the use of [robocalls] are designed to remedy the problems perceived with the use of [autodialer] technology." *Id.* at 21a. In addition, "the live operator and prior consent options allow the continued use of [robocalls] while protecting the interests of the recipient." *Id.* Not only is there a close fit between ends and means, but the Autodialer Law prohibits only "a single method of communication," not "an entire medium of expression[.]" *Id.*

Finally, the district court enumerated "[a]mple alternative channels of communication open to [Patriotic Veterans]," 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." *Id.* at 22a.

With respect to other decisions addressing robocall prohibitions, the district court cited decisions from the Eighth and Ninth Circuits as support for its analysis and judgment. *Id.* at 15a (citing *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), and *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996)). And while the court acknowledged the Fourth Circuit's decision invalidating a robocall restriction in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015), it distinguished that case because the statute at issue "made facial content distinctions"—namely, it targeted political speech—while the Indiana Autodialer Law "does not target political speech or any other type of speech." App. at 15a–16a.

4. The Seventh Circuit affirmed. Responding to the contention that the Autodialer Law imposes content discrimination under *Reed*, the court said: "We don't get it. Nothing in the statute, including the three exceptions, disfavors political speech." *Id.* at 3a. "[I]f a recipient has authorized robocalls then the nature of the message is irrelevant." *Id.* Likewise, the three exceptions reflect "a form of implied consent," and "depend on the relation between the caller and the recipient, not on what the caller proposes to say." *Id.*

The court also rejected the argument that "the First Amendment [] requires Indiana to make an exception for political speech." *Id.* at 4a. Such a

content-based exception, "if created, would be *real* content discrimination, and *Reed* then would prohibit the state from forbidding robocall advertising and other non-political speech." *Id.* at 4a–5a. Such would constitute the sort of impermissible line-drawing "on the basis of the message presented" that the Fourth Circuit rejected in *Cahaly*. *Id.* at 5a. Here, in contrast, the only line drawn is "consent by the person to be called[.]" *Id.* The court declined to "take a content-neutral law and make it invalid by creating message-based distinctions." *Id.*

With respect to the State's interests, "[n]o one can deny the legitimacy of . . . [p]reventing 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." *Id.* In addition, "[t]he 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." *Id.* at 6a.

Ultimately, said the Seventh Circuit, a law that "does not discriminate by content" and constitutes a "valid time, place, and manner restriction," which seeks to protect Indiana residents' peace and quiet, is "not [] called into question by *Reed*." *Id.* at 6a–7a.

REASONS FOR DENYING THE PETITION

Only five years ago, the Court refused to review another First Amendment challenge to Indiana's Autodialer Law. *State v. Econ. Freedom Fund*, 959 N.E.2d 794 (Ind. 2011), *cert. denied*, 133 S. Ct. 218 (2012). The issue is no more worthy of consideration now than it was then.

I. There Is No Circuit Conflict over Autodialer Laws, Only Diverse Outcomes for Diverse Statutes

The decision below does not conflict with *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015). There, South Carolina's autodialer statute expressly *targeted* robocalls of "a political nature including, but not limited to, calls relating to political campaigns." *Id.* at 402 (quoting S.C. Code Ann. § 16-17-446(A)). That was a prototypical example of a content-based distinction—and one targeting core protected speech at that. It is therefore unremarkable that the Fourth Circuit deemed South Carolina's law "content based because it makes content distinctions on its face." *Id.* at 405.

Indiana's Autodialer Law, in contrast, neither targets political speech nor makes any other content-based facial distinctions. App. at 3a, 14a. Patriotic Veterans would turn that virtue into a vice on the theory that, because the Autodialer Law lacks an *exception* for political calls, it somehow *targets* political calls. *See* Pet. at 16. But the distinction between *targeting* protected activity and *not accommodating* protected activity is as well

established in the First Amendment free speech context as any other. *See, e.g.*, *Van Bergen v. Minnesota*, 59 F.3d 1541, 1550–51 (8th Cir. 1995) (deeming autodialer laws that made no accommodation for political calls to be content neutral); *Bland v. Fessler*, 88 F.3d 729, 733–34 (9th Cir. 1996) (same). This long-established distinction fully explains the different results here and in *Cahaly*. The courts applied the same test and looked for the same content-based flaws, but came to different results based on different statutory text. Accordingly, there is not even a hint of circuit conflict that could justify review.

II. The Courts Below Properly Applied *Reed*

Both the district court and the Seventh Circuit properly applied *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), when determining that the Autodialer Law is content neutral. There is no conflict between the decision below and *Reed*—or any other Supreme Court precedent—that can justify certiorari.

In *Reed*, the Court explained that content-neutrality analysis is a two-step process: a court must "determin[e] whether the law is content neutral on its face," and, if so, then "turn[] to the law's justification or purpose." *Id.* at 2228. The sign code at issue in *Reed* was "content based on its face" because the applicable restrictions depended "entirely on the communicative content of the sign," namely whether it was "ideological," "political," or "directional" and "temporary." *Id.* at 2227.

Here, the Autodialer Law "does not draw a distinction based on the content of speech, the topic discussed, or any message expressed." App. at 14a. Moreover, "its exceptions are based on implied consent due to the prior relationship between the parties, not the content of the caller's message." *Id.*; *see also id.* at 3a ("The three exceptions . . . depend on the relation between the caller and the recipient, not on what the caller proposes to say.").

Patriotic Veterans asserts that the absence of an express exception for political speech constitutes subject-matter discrimination. *See* Pet. at 16. But every circuit to consider the issue has agreed that permitting robocalls because an existing relationship implies consent does not constitute content discrimination. App. at 3a ("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."); *Van Bergen*, 59 F.3d at 1551 (explaining that "[t]he three exceptions merely identify groups of [recipients] 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"); *Bland*, 88 F.3d at 733 (declaring that "[t]hese exemptions rest not on the content of the message, but on existing relationships implying consent to the receipt of [robocalls]").

What is more, Patriotic Veterans unreasonably assumes political callers are somehow excluded from the statutory exceptions that already exist. The exceptions for employers and schools, for instance,

are really just specific applications of the exceptions for current business and personal relationships, which apply to political callers as much as anyone else. Indeed, Patriotic Veterans identifies no messages it is prohibited from sending via robocall where one could *reasonably* infer the consent of call recipients. That is likely because its real objective is to call innumerable people with whom it has no real relationship.

Because the Autodialer Law treats all current business and personal relationships the same regardless whether they are commercial, non-profit, or political, there is no reason for the Court to revisit content neutrality.

III. The Autodialer Law Permissibly Protects Residential Privacy by Regulating an Intrusive Method of Communication

Finally, under the test applicable to content-neutral regulations of methods of communication, there can be little doubt the Autodialer Law is narrowly tailored to advance a significant state interest and leaves ample alternative channels for communication.

1. The State's interest supporting the Autodialer Law is significant. "[T]he 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." App. at 6a. This

"makes the call frustrating for the recipient but cheap for the caller," said the Seventh Circuit, "which multiplies the number of these aggravating calls in the absence of legal controls." *Id.*

The vexatious prevalence of robocalls has no historical antecedent and is a modern-day nuisance, to say the least. *See* Fed. Commc'ns Comm'n, *Robocall Strike Force Report* 1 (Oct. 26, 2016), *available at* https://transition.fcc.gov/cgb/Robocall-Strike-Force-Final-Report.pdf (identifying robocalls as "the number one source of consumer complaints at the FCC"). Indeed, "[w]hat was once a nuisance has become a plague to U.S consumers receiving an estimated *2.4 billion* robocalls per month in 2016," or approximately 29 billion for the year. *Id.* (emphasis added).

The Seventh Circuit's affirmation of the State's significant objective aligns with the Eighth Circuit, which said, "we do not believe that external evidence of the disruption [robocalls] can cause in a residence is necessary: It is evident to anyone who has received such unsolicited calls when busy with other activities." *Van Bergen*, 59 F.3d at 1554. The Ninth Circuit, moreover, has said that robocalls "create a much greater problem" than other types of telephone solicitations "because of their 'sheer quantity' and the fact that they offer recipients who want to hang up immediately no opportunity to tell the caller not to call again." *Bland*, 88 F.3d at 732.

Even Congress has concluded that 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," do not automatically disconnect after hang up, and consume message storage space. *Id.* at 4–5. Accordingly, 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.

Moreover, the "virtues" ascribed to robocalls by Patriotic Veterans—that they can be made cheaply and efficiently by computers—situate robocalls starkly outside of the "venerable means of communication" embraced by this Court as "unique and important." *City of Ladue v. Gilleo*, 512 U.S. 43, 54–55 (1994) (listing pamphleting, handbilling, door-to-door distribution of literature, and live entertainment). Impersonal, indiscriminate robo-calls, where minimal cost enables brute-force dialing of as many as 100,000 recipients in a three-hour period, flout individual privacy in ways that more labor-intensive methods of communication in the public forum do not. Cir. App. at 37.

Regardless, the Court has long held that one's right to privacy at home prevails over another's right to speak and has upheld laws designed to protect that privacy. *See, e.g.*, *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (observing that "individuals are not required to welcome unwanted speech into their own

homes and that the government may protect this freedom"); *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("Our decisions reflect no lack of solicitude for the right of an individual to be let alone in the privacy of the home, sometimes the last citadel of the tired, the weary, and the sick." (internal quotation marks omitted)); *see also Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) ("The preferred position of freedom of speech in a society that cherishes liberty for all does not require legislators to be insensible to claims by citizens to comfort and convenience.").

Ultimately, the Autodialer Law protects residential privacy, and the "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." *Carey*, 447 U.S. at 471.

2. The Autodialer Law narrowly but effectively protects the privacy of the home *and* vindicates individual consent.

The overbreadth of the anti-solicitation laws invalidated in *Martin v. City of Struthers*, 319 U.S. 141 (1943), and *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), is irrelevant because those cases involved paternalistic governmental oversight of the venerable practice of door-to-door handbilling. *Martin*, 319 U.S. at 142, 146 (suggesting the law should "leav[e] to each householder the full right to decide whether he will receive strangers as visitors"); *Watchtower Bible*, 536 U.S. at 154–55. In contrast, the Autodialer Law permits calls with

individual consent, and, as described above, robocalling is hardly a "venerable" means of communicating.

The "evil" to be prevented here—residential deluge of unwanted calls—is not "merely a possible by-product" of robocalling, but rather is inherent in the activity, much as visual blight inherently follows from permitting posting of signs on public property. *See Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984). Accordingly, banning robocalls absent consent of the call recipient, like banning signs on public property, "responds precisely to the substantive problem" that legitimately concerns the State and "curtails no more speech than is necessary to accomplish its purpose." *Id.*

3. Patriotic Veterans complains that no other method of communication is as inexpensive and pervasive, but there is no First Amendment entitlement to employ the cheapest means of communication, no matter the social cost. In *Kovacs*, 336 U.S. at 87–88, the Court upheld a prohibition against raucous sound trucks on public streets, including residential thoroughfares, on the grounds that they disturbed the peace, even though "people may be more easily and cheaply reached by sound trucks[.]" *See also 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.").

Even in the context of a traditional method of expression such as leafletting, this Court has said that "[a] distributor of leaflets has no right simply to scatter his pamphlets in the air—or to toss large quantities of paper from the window of a tall building or a low flying airplane." *Taxpayers for Vincent*, 466 U.S. at 809. Such actions may spread a message inexpensively, but they impose harms on others that the State may seek to prevent. Accordingly, "[c]haracterizing such an activity as a separate means of communication does not diminish the State's power to condemn it as a public nuisance." *Id.* The same analysis applies with no less force to prohibitions against indiscriminate robocalls.

Ultimately, Patriotic Veterans 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." App. at 6a. The district court came up with even more. *Id.* at 22a (radio advertising and interviews, debates, door-to-door visits, mailings, flyers, posters, billboards, bumper stickers, e-mail, blogs, and YouTube videos).

Such a rich array of alternatives keeps the Autodialer Law well within limits set by the First Amendment. And if Patriotic Veterans' target audience is such a narrow segment of the population that they cannot be reached through one of these many channels, procuring advance consent should

itself be a viable alternative—if that audience really *wants* to be bombarded by robocalls, that is.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated: May 19, 2017