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.	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

BRIEF AND REQUIRED SHORT APPENDIX OF APPELLANT PATRIOTIC VETERANS, INC.

Mark J. Crandley [IN Atty #22321-53]
Counsel of Record
Christopher J. Bayh [IN Atty #31880-29]
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Tel: (317) 231-1313
Fax: (317) 231-7433
Email: mcrandley@btlaw.com;
cbayh@btlaw.com

Attorneys for Appellant Patriotic Veterans, Inc.

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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

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

2. The law firm whose partners or associates have appeared for Patriotic Veterans, Inc., in this matter is "Barnes & Thornburg LLP."

3. Patriotic Veterans, Inc. is a corporation but has no parent corporations, and no publicly held company owns 10% or more of its stock.

Dated: June 15, 2016

s/ Mark J. Crandley
Mark J. Crandley

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JURISDICTIONAL STATEMENT

Statement of District Court Jurisdiction: Appellant Patriotic Veterans, Inc. ("Patriotic Veterans") brought this action pursuant to 42 U.S.C. § 1983 seeking a declaratory judgment and permanent injunction against the State of Indiana (through its Attorney General) with regard to certain provisions of the Indiana Automatic Dialing Machine Statute ("ADMS"), Indiana Code § 24-5-14-1, *et seq*. Appendix ("App.") at 13. Patriotic Veterans asserted two grounds: that the ADMS violated the First Amendment of the United States Constitution, and that it was preempted by federal law. App. 13. This Court previously reversed the grant of summary judgment on the grounds that federal law preempted the ADMS. *See Patriotic Veterans, Inc. v. Indiana,* 736 F.3d 1041 (7th Cir. 2013). The Court remanded for review of whether the ADMS violates the First Amendment of the United States Constitution. The district court had subject-matter jurisdiction over this claim under 28 U.S.C. § 1331, which provides the district courts with jurisdiction of civil actions arising under the United States Constitution.

Statement of Appellate Jurisdiction: The parties filed cross-motions for summary judgment and, on April 7, 2016, the district court

filed an Entry on Motions for Summary Judgment and a separate order of Closed Judgment. Short Appendix ("Sh. App.") at 2, 15. The district court therefore entered a final judgment as of April 7, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1291, which provides the courts of appeals with appellate jurisdiction over final judgments of district courts. Appellant Patriotic Veterans timely filed a Notice of Appeal on May 6, 2016. ECF No. 86.

STATEMENT OF THE ISSUES

Patriotic Veterans, Inc. engages in political speech that informs voters of the positions taken by candidates and officeholders on issues of interest to veterans. In disseminating this information, Patriotic Veterans needs to use automated dialing machines to ensure fast, effective, and consistent messages.

However, Indiana prohibits the use of machine-dialed calls not introduced by live operator when made for political purposes. While Indiana allows commercial solicitations and other non-political speech, the State restricts automated political speech through the telephone. The issue on appeal is whether this content-based regulation of political speech can survive strict scrutiny under the First Amendment where the State's only proffered "compelling interest" is to avoid "annoyance" and several alternative means of regulation exist, including the existing do-not-call list the State uses to regulate "annoyance" for other types of calls. Alternatively, even if strict scrutiny does not apply, can the State's virtual ban on automated calls survive intermediate scrutiny given the statute's imposition on core political speech and the limited government interest in "annoyance"?

STATEMENT OF THE CASE

A. Indiana enacted the ADMS in 1988 and did not apply it to political speech for the next 18 years.

Indiana enacted its Automatic Dialing Machine Statute ("ADMS"), Ind. Code § 24-5-14-5 in 1988. The ADMS provides:

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

Ind. Code § 24-5-14-5.

Prior to 2006, Indiana's Attorney General did not enforce the ADMS as to political calls and the ADMS was "widely ignored" during political campaigns. App. 26. Automated calls using the voices of both

First Lady Laura Bush and Former President Clinton featured in the 2004 presidential election in Indiana. App. 29.

B. In defending a challenged to the similar Telephone Privacy Act, the Attorney General conceded that that statute could not permissibly regulate political speech.

In 2005, a group of charities brought an action seeking to have a separate but similar statute – Indiana's Telephone Privacy Act (the "Privacy Act") – declared unconstitutional as applied to calls soliciting donations on behalf of charities. *Nat'l Coalition of Prayer, Inc. v. Carter*, No. 02-0536-C B/S, 2005 WL 225360 (S.D. Ind., Sept. 2, 2005). The Privacy Act created a statewide do-not-call list. *Nat'l Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 784 (7th Cir. 2006). An exception to the Privacy Act allows for calls to be made on behalf of charities, but only if the calls are made by volunteers. *Id.* Like the ADMS, the Privacy Act does not contain an explicit carve out for political speech. *Id.* at 791. Unlike this case, the Attorney General conceded that the Privacy Act contained an implied exception for political calls, for fear that the entire statute be struck down as unconstitutional. *Id.*

Because of that concession, the Court upheld the Privacy Act's call-solicitation ban as applied to charities. *Id.* The Court emphasized that if applied to political calls the result would be different because

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

C. After conceding that the Privacy Act could not regulate political speech, the Attorney General shifted its regulation of political speech to the then-unchallenged ADMS.

On the heels of this Court's admonition that Indiana's Privacy Act raised constitutional concerns as applied to political calls, the Attorney General sought to end such calls by using the ADMS instead of the Privacy Act. For nearly two decades under Indiana's ADMS, candidates and organizations who wished to distribute political messages via autodialed calls did so in Indiana. App. 26.

But in 2006, shortly after the *Nat'l Coalition of Prayer* decision, the Attorney General announced for the first time that it would enforce the ADMS as to political calls and treat the ADMS as a ban on political speech. App. 31-32.

D. Patriotic Veterans engages in political speech.

Patriotic Veterans is a not-for-profit Illinois corporation. App. 33. Its purpose is to inform voters of the positions taken by candidates and officeholders on issues of interest to veterans. App. 33. In disseminating this information, Patriotic Veterans has used, and found effective, automatically dialed phone calls delivering a political message related to a particular candidate or issue. App. 33-34.

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

Patriotic Veterans cannot afford to place live-operator phone calls and still convey its message broadly or effectively. The cost of live operator calls is about eight times more expensive using the vendor that Patriotic Veterans has used. App. 34. Moreover, the majority of the people who receive its messages either listen to the entire message, or

the message is placed on an individual's answering machine. App. 34. Thus, automated phone calls are effective in delivering the messages of Patriotic Veterans and appear to be of interest to the majority of those called. App. 34.

Sometimes, Patriotic Veterans wishes to send messages in a short period of time, such as on the eve of an election or before a significant vote in Congress. In those instances, live operator calls cannot be made fast enough for the messages to be delivered in the time allotted. App. 35.

Patriotic Veterans places automated phone calls in jurisdictions that allow such calls. Generally, Patriotic Veterans' calls consist of a short voice recording in their spokespersons' own voice. These calls are then delivered to a predetermined list in a predetermined time period. App. 37. Patriotic Veterans has experienced that for between 20 to 30 percent of the calls, a live recipient will listen to the entire call. In addition, approximately 35 to 50 percent of calls are left on answering machines, again in their entirety. Thus, 55 to 80 percent of all automated calls are completely delivered. App. 37.

In 2010, Patriotic Veterans filed this case against the State of Indiana and its Attorney General Greg Zoeller (the "State"), seeking: (1)

a declaration that Indiana Code § 24-5-14-1, *et seq.* (the "ADMS") is invalid; and (2) a permanent injunction of the ADMS's enforcement. App. 13 (Complaint filed June 10, 2010; First Amended Complaint filed Sept. 24, 2010).

Patriotic Veterans asserted two grounds for the ADMS' invalidation. First, it alleged that the ADMS was preempted by federal laws and agency rules that regulated the same subject matter. Second, it alleged that the ADMS, as applied to interstate calls on political or campaign issues, violated the First Amendment of the Constitution by suppressing Patriotic Veterans' speech. App. 13.

Patriotic Veterans and the State first filed cross-motions for summary judgment on these issues in October and November 2010. App. 5-6 . On September 27, 2011, the district court granted summary judgment for Patriotic Veterans, ruling that federal law preempted the ADMS and that therefore the ADMS was invalid. App. 6-7; *Patriotic Veterans, Inc. v. Indiana ex rel. Zoeller*, 821 F. Supp. 2d 1074, 1079 (S.D. Ind. 2011). The district court did not reach the First Amendment issue, as it was unnecessary for the district court's decision. *Id.* at 1079 n. 5.

On October 3, 2011, the State appealed the district court's ruling to this Court. App. 7. Per this Court's instructions, the parties briefed both the federal-preemption and First Amendment issues. App. 877, 1012. On November 21, 2013, this Court reversed the district court's decision, finding that federal law did not preempt the ADMS. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 (7th Cir. 2013). Like the district court, this Court did not address the First Amendment arguments, and remanded this case to the district court for consideration of that issue in the first instance. *Id.* at 1054.

In April 2014 the parties again filed cross-motions for summary judgment. App. 9-10. On April 7, 2014, the district court granted summary judgment for the State, ruling that the ADMS did not violate the First Amendment. Sh. App. 2. This case is an appeal of that order.

SUMMARY OF ARGUMENT

The ADMS is a content-based regulation of speech that must be reviewed under the strict scrutiny standard. The Supreme Court recently made clear that any "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015). The ADMS bars automated political calls

but allows automated calls on commercial and other topics. This distinction between topics of speech is a content-based regulation targeted to the type of core political speech that the First Amendment is intended to protect.

The ADMS cannot survive strict scrutiny review. The State's concerns about "annoyance" do not amount to a compelling government interest, particularly where the ADMS allows that very "annoyance" for other forms of speech. Nor is the ADMS narrowly tailored, as do-not-call lists and other regulations short of the ADMS would meet the same objective.

The ADMS also violates a series of Supreme Court cases that prevent the government from barring the use of an entire mode of communication for political speech. The ADMS accomplishes that by preventing automated calls by political speakers.

Finally, the ADMS is unconstitutional even under intermediate scrutiny. Again, the state has not advanced a sufficient interest to warrant the ADMS's intrusion on core political speech. Moreover, alternative means of communications are not available given that: (1) using live operators is eight times more expensive than automated calls; (2) live operators take the message out of the speakers' hand and injects

the specter of human error; (3) automated calls are more fluid, allowing speakers to reach more listeners on an expedited basis; and (4) automated calls can target core audiences in the days leading up to elections in ways unavailable to other means of communication.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Jackson v. County of Racine*, 474 F.3d 493, 498 (7th Cir. 2007). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The evidence should be viewed in the light most favorable to the party against whom the motion under consideration was made. *Hess v. Reg-Ellen Mach. Tool Corp.*, 423 F.3d 653, 658 (7th Cir. 2005) (quoting *Tegtmeier v. Midwest Operating Eng'rs Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004)). A district court's decision on cross-motions for summary judgment is reviewed "without deference, construing all inferences in favor of the party against whom the motion under consideration is made." *Sellers v. Zurich American Ins. Co.*, 627 F.3d 627, 631 (7th Cir. 2010).

ARGUMENT

Indiana's Attorney General has taken the position that the ADMS applies to political speech. This stance threatens criminal liability if Patriotic Veterans delivers political messages through prerecorded, interstate telephone calls to Indiana residents, including to those who want to hear Patriotic Veteran's message.

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

This criminal penalty for political speech violates the First Amendment in three respects.

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

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

Third, the ADMS is overbroad because its criminal sanction applies even if the call involves political speech sent to willing listeners who would not be "annoyed" to hear messages on topics of public concern. The record shows that willing listeners exist throughout Indiana.

A. The ADMS's burden on automated political speech is content based and cannot survive strict scrutiny.

Free speech on political issues is a cornerstone right under the First Amendment. The very purpose of that Amendment was "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). "Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Federal Election Comm'n*, 558 S.Ct. 310, 340 (2010) (quoting *Federal Election Comm'n v. Wisconsin Right to Life,*

Inc., 551 U.S. 449, 464 (2007)). The ADMS creates this type of burden and should be reviewed under strict scrutiny because it makes a content-based distinction by barring automated calls containing political speech but allowing automated calls for commercial and other content.

1. The ADMS draws content-based distinctions between different types of speech.

Strict scrutiny applies because the ADMS targets political speech both on its face and in the manner in which the State has chosen to enforce it.

a. *Reed v. Town of Gilbert* established a heightened prohibition on content-based speech restrictions.

As traditionally understood, a statute is content-based (and subject to strict scrutiny) if it cannot be "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

However, the Supreme Court recently determined that the *Ward* standard did not go far enough in enforcing content neutrality. In *Reed v. Town of Gilbert*, the Supreme Court explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."

135 S.Ct. 2218, 2227 (2015). The Supreme Court therefore struck down an Arizona town's ordinance that treated the entire category of religious speech differently from political and other types of speech:

> The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign. If a sign informs its reader of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government. *More to the point, the Church's signs inviting people to attend its worship services are treated differently from signs conveying other types of ideas.* On its face, the Sign Code is a content-based regulation of speech.

Id. (emphasis added).

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

is "presumptively unconstitutional" and must be reviewed under the strict scrutiny standard. *Id.*

This Court has since recognized the sea-change created by *Reed*'s expansion of the content-based standard, which represents a material departure from the limited *Ward* standard. For instance, the Court in *Norton v. City of Springfield* applied *Reed* to a panhandling ordinance that allowed signs requesting money but not verbal solicitations. 806 F.3d 411 (7th Cir. 2015). Using *Ward*'s limited framework for content neutrality, the Court originally upheld the ordinance as content neutral because it did not discriminate among competing viewpoints. *Id.* at 412. In a post-*Reed* rehearing opinion, the Court reversed course and struck down the ordinance under *Reed*'s more stringent test for content neutrality:

> *Reed* understands content discrimination differently. It wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Springfield's ordinance regulates "because of the topic discussed." The Town of Gilbert, Arizona, justified its sign ordinance in part by contending, as Springfield also does, that the ordinance is neutral with respect to ideas and viewpoints. The majority in Reed found that insufficient: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." It added: "a speech regulation targeted at specific

> subject matter is content based even if it does not discriminate among viewpoints within that subject matter."

Id. (quoting *Reed,* 135 S.Ct. at 2228, 2230).

While joining the majority, Judge Manion wrote separately in *Norton* "to underscore the significance of the Supreme Court's recent decision" in *Reed. Id.* at 413. His concurrence explained that the pre-*Reed* "standard for content-neutrality . . . was in tension with the Court's developing content-based regulation of speech doctrine." *Id*. The Supreme Court in *Reed* resolved this tension by finding that "*topical* censorship is still censorship." *Id*. (emphasis added). As such, Judge Manion acknowledged the significant change in First Amendment law created by *Reed*:

> Rejecting the idea that the government may remove controversial speech from the marketplace of ideas by drafting a regulation to eliminate the topic, Reed now requires any regulation of speech implicating religion or abortion to be evaluated as content-based and subject to strict scrutiny, just like the aforementioned viewpoint-based restrictions covering more narrow contours of speech. *Few regulations will survive this rigorous standard.*

Id. (citation omitted) (emphasis added).

b. The ADMS triggers strict scrutiny because it regulates political speech while allowing non-political speech.

The ADMS on its face sets political speech apart from other forms of speech, requiring strict scrutiny under *Reed*. The statute creates precisely the type of "topical censorship" against which Judge Manion warned. The ADMS applies with full force to political speech while freely allowing speech on other topics. However, the ADMS allows other species of automated calls by exempting calls from school districts, debt collectors and employers. These exemptions protect many types of commercial speech but not political speech. The State therefore presumes that speech by debt collectors or commercial entities is more important than core political speech. The exemptions allow these preferred forms of speech while simultaneously suppressing core political speech. As *Reed* put it, political speech "is treated differently from [speech] conveying other types of ideas." 135 S.Ct. at 2227. Because political speech is placed in this disfavored position among the categories of speech regulated by the ADMS, the statute must be subject to strict scrutiny.

The district court claimed the ADMS made no distinction between categories of speech by relying on an "implied consent" construct it read

into the statute. Sh. App. 6. In its view, the ADMS simply allowed calls where consent is implied. But the statute on its face allows various types of automated speech regardless of whether the listener wants to receive it.

Nothing in the statute requires schools, employers, or commercial entities to obtain consent. Schools may blast educational messages even when the recipient finds them "annoying." Employers may "harass" their employees with calls about work schedules. The ADMS's almost boundless carve-out for commercial speech is particularly troubling. Commercial entities may contact those with which it maintains a "current business or personal relationship" to discuss commercial matters. Ind. Code § 24-5-14-5. This includes automated calls from debt collectors, arguably the most pernicious and "annoying" use of unsolicited calls in the current marketplace.[1] The ADMS allows Indiana consumers' credit card companies, cable companies, banks, and other service providers to send limitless automated messages, advertising limitless upsells and add-ons. It effectively opens the door to automated

[1] *See, e.g.*, *Last Week Tonight with John Oliver: Debt Buyers*, HBO (Jun. 5, 2016) (available at https://www.youtube.com/watch?v=hxUAntt1z2c) (last visited Jun. 14, 2016).

calls from the hundreds of commercial entities with whom any Indiana citizen shares his or her phone number – a necessary part of many business transactions and online purchases.

Moreover, the district court's implied consent theory conflicts with the fact that the ADMS separately allows automated calls where the recipient "has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message." Ind. Code § 24-5-14-5. This provision would have little meaning if the *other* exceptions to the statute applied only to those who also consented as the district court concluded.

The ADMS therefore suppresses political speech while allowing commercial and other types of speech. Accordingly, the district court's use of a "consent" metaphor to save the statute is not supported by its language, and this methodology runs counter to the "presumptively unconstitutional" lines drawn between categories of speech within the ADMS.

c. In *Cahaly v. LaRosa*, the Fourth Circuit applied *Reed* to invalidate a similar statute.

The Fourth Circuit recently applied *Reed* to strike down South Carolina's similar restriction against automated calls. In *Cahaly v.*

LaRosa, 796 F.3d 399 (4th Cir. 2015), the Court concluded "that South Carolina's anti-robocall statute is content based because it makes content distinctions on its face." *Id.* at 404. The Court explained that "the anti-robocall statute applies to calls with a consumer or political message but does not reach calls made for any other purpose." *Id*. This same defect pervades the ADMS, which allows commercial, educational, or employment related calls but bars political speech. The *Cahaly* case concluded that such a restriction is content-based under *Reed*:

> Applying *Reed's* first step, we find that South Carolina's anti-robocall statute is content based because it makes content distinctions on its face. . . . Here, the anti-robocall statute applies to calls with a consumer or political message but does not reach calls made for any other purpose. Because of these facial content distinctions, we do not reach the second step to consider the government's regulatory purpose.

Id.

Moreover, the district court's attempt to distinguish the statute at issue in *Cahaly* misunderstands the ADMS. The district court reasoned that because the statute in *Cahaly* "prohibited only those robocalls that were 'for the purpose of making an unsolicited consumer telephone call' or were 'of a political nature including, but not limited to, calls relating to political campaigns'" and leaves calls for other purposes untouched, it was materially distinct from the ADMS, which prohibits all automated

calls *except* those from schools, workplaces, and "business or personal" contacts. Sh. App. 7. In other words, the district court found that the present case is different because the ADMS defines its content-based regulation of speech by what it *excludes*, rather than what it includes. But the First Amendment breathes no life into this distinction: either way, the regulation of speech is based on content. Indeed, *Reed* featured the same kind of statute as the ADMS: one that prohibited all of one method of speech, but carved out exceptions based on content. 135 S. Ct. at 2224 ("The Sign Code prohibits the display of [all] outdoor signs . . . but it then exempts 23 categories of signs from that requirement.").

d. The district court and the State have ignored the mandate of *Reed* and *Cahaly*, and instead have relied on pre-*Reed* cases.

Although *Cahaly* is the only post-*Reed* case to review the issue, the State and the district court relied on a series of pre-*Reed* cases that found other states' restrictions on automated calls to be content-neutral. *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); *see also* Sh. App. 7 & n.3 (relying on these pre-*Reed* cases in distinguishing the post-*Reed* case *Cahaly v. LaRosa*). All of these cases apply the framework for content neutrality that

existed before *Reed* and *Cahaly* and are therefore of little value in determining whether the content-based distinction made by Indiana's statute survives after *Reed*.

Moreover, none of the speech-restricting statutes in the cases the State cited below enforced their statutes to target political calls. Because "a law or policy permitting communication in a certain manner for some but not for others raises the specter of content and viewpoint censorship," the ADMS cannot be applied in a manner that targets political speech. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988). *See generally* Tribe, Laurence, THE FEDERAL COMMUNICATIONS COMMISSION'S PROPOSED BROADBAND PRIVACY RULES WOULD VIOLATE THE FIRST AMENDMENT (2016) at 30 (examining unconstitutional content-based distinctions in proposed federal broadband rules; "Precisely the same reasoning applies here, because the very basis for the FCC's proposal is the difference in content between communications-related marketing and non-communications related marketing. Content-based burdens, of course, 'are presumptively invalid.'") (available at http://www.ctia.org/docs/default-source/default-document-library/ctia-ncta-ust-file-tribe-paper.pdf) (last visited Jun. 14, 2016).

For instance, the district court and the State heavily relied on *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995) to claim the ADMS survives as a content-neutral regulation. Sh. App. 7 & n.3; App. 906-07. *Van Bergen* treated its exceptions as being "based on relationship rather than content" and therefore content-neutral. 59 F.3d at 1551. But a hypothetical "relationship" does not make the ADMS content neutral. The statute unequivocally exalts commercial and other speech over core political speech. This is "topical censorship." *Id.* That speakers in some circumstances might also have a prior relationship with the listener cannot change the fact that the statute differentiates between categories of speech based on its content. That content discrimination requires strict scrutiny.[2]

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

e. Even if the ADMS is not impermissibly content based on its face, it is as applied.

Even more problematic was the district court's finding that the ADMS was distinct because it did not "target[ ] political speech." Again, content-based regulation of speech triggers strict scrutiny, whether drafted using inclusions ("targets") or exclusions. Sh. App. 7. But more importantly, the ADMS *does* target political speech as applied by the Attorney General. As explained above, the State enforced the ADMS for 18 years while recognizing an exception for political calls, and now has reversed that policy and affirmatively stated its intent to "target" political speech.

This enforcement policy is itself unconstitutional. A statute can violate the First Amendment if it is enforced in a speech-discriminatory manner. *United States v. Marcavage*, 609 F.3d 264, 287 (3d Cir. 2010); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). If there was any doubt about the ADMS's purpose in stopping automated political speech, the State's enforcement of it has made the point perfectly clear. The State did not enforce the ADMS against political calls until after the Court held (based on the State's representation) that the Privacy Act did not apply to political calls. *National Coalition of Prayer*, 455

F.3d at 789. The State did not even record complaints of violations of the ADMS until its representation to this Court about the scope of the Privacy Act in 2006. App. 321-22. At that point, the State changed course and warned political parties that it would target political calls for enforcement under the ADMS. App. 31-32. This effort to enforce the ADMS specifically against political speech requires strict scrutiny.

Accordingly, for the reasons stated above, the ADMS is not content-neutral and bars a form of political speech, and therefore it must satisfy the strict scrutiny standard.

2. The ADMS cannot survive strict scrutiny.

Because the ADMS is not content neutral and bars a form of political speech, it must satisfy the strict scrutiny standard. Strict scrutiny requires a "compelling state interest" to be served by the statute, which in turn must be "narrowly tailored" and must use the "least restrictive means." *Meyer*, 486 U.S. at 424. This standard presumes that the statute is unconstitutional. *Reed*, 135 S.Ct. at 2227. Case law and other authorities often note that it is strict in theory but fatal in fact. *Cf*. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). Strict scrutiny is in fact "well-nigh insurmountable."

Meyer, 486 U.S. at 424. The ADMS satisfies neither of the requirements of the strict scrutiny test and should be invalidated.

a. The ADMS does not serve a compelling state interest.

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

The State claims the ADMS aims to eliminate the fleeting "annoyance" of a ringing phone. App. 885, 913, 923. No matter what formulation is used, "annoyance" is not enough. *Ohio Citizen Action v. City of Mentor-On-The-Lake*, 272 F. Supp. 2d 671, 685 (N.D. Ohio 2003) ("While the government's interest in minimizing annoyance is legitimate, it is not, in and of itself, compelling enough to form the basis for a content-based restriction on free speech."). In short, "the

government cannot restrict speech out of a concern for the discomfort it might elicit in listeners." *Brazos Valley Coalition for Life, Inc. v. City of Bryan*, 421 F.3d 314, 326 (5th Cir. 2005).

The Supreme Court has rejected proffered government interests far more rooted in privacy interests than mere annoyance. *See Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (disclosure of witness names); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496 (1975) (disclosure of victim's names); *Cooper v. Dillon*, 403 F.3d 1208, 1218 (11th Cir. 2005) (disclosure of police investigation).

Here, there is no threat to life or limb. The State's marginal interest in protecting privacy from brief interruption by a ringing telephone from only political sources does not rise to the level of a *compelling* state interest.

Moreover, the State ignores this allegedly "compelling" interest and allows "annoying" phone calls from creditors, commercial entities, schools and employers. And this "annoyance" of a ringing phone would persist even when a live operator calls, which is allowed under the ADMS. Live operators may lawfully call a home hundreds of times a day to deliver a message of any type, but a single political call by a

machine is a criminal act. This topsy-turvy system does not defend a compelling state interest.

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

The State also has argued it does not need to provide any evidence of a compelling government interest but can simply speculate that there might be an interest to be served by the ADMS. The State speculates that a parade of horribles could occur if automated political calls were no longer criminal, citing possibilities such as 400,000 simultaneous calls by one operator, calls repeated to the same location over and over, or calls placed at odd hours. App. 911. There is no evidence to support the State's claim that Patriotic Veterans would inundate Indiana voters in the manner the State describes. The State cannot speculate about some hypothetical harm that could possibly occur, as "speculation does not establish a compelling interest justifying a burden" on protected constitutional rights. *Miller v. Brown*, 503 F.3d 360, 371 (4th Cir. 2007).

As the Supreme Court has instructed, the burden to demonstrate the government's interest "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on . . . speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). *See also Fed. Elec. Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 498 (1985).

b. The ADMS is not narrowly tailored.

Second, the ADMS is not narrowly tailored and does not use the least restrictive means to regulate. Instead, the ADMS creates a virtual ban on a form of political speech. While other less restrictive means exist – such as a do-not-call list for automated political calls, or regulations that fall short of restricting automated calls – the State has chosen a means that sweeps up the most political speech possible. Up to 30 percent of recipients listen to the political messages in their totality. Under the ADMS, none of these listeners would have access to speech they willingly receive.

An obviously narrower approach already exists in the form of the do-not-call-list. The State already uses such a list to carry out the

Privacy Act, and it offers no basis as to why a similar do-not-call list would undermine the purposes of the ADMS.[3]

Again, the Fourth Circuit's treatment of a similar statute in *Cahaly* is instructive. 796 F.3d at 405-06. The Court in *Cahaly* assumed for the sake of argument that the state might be able to show a compelling interest in "tranquility." *Id.* at 405. However, the Court held that the ban on political calls could not survive under the "narrowly tailored" requirement of strict scrutiny because "[p]lausible less restrictive alternatives" exist, "includ[ing] time-of-day limitations, mandatory disclosure of the caller's identity, or do-not-call lists." *Id.* at 406. The same deficiency applies to Indiana's restrictions on automated political calls.

B. The ADMS impermissibly burdens political speech by restricting a medium of political expression.

Even if the Court concludes that the ADMS is content neutral, the statute acts as a virtual ban on protected political speech.

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[3] The State previously attacked what it calls "internal" do-not-call lists maintained by those making automated calls. App. 925. It offers no evidence to support its conclusion that such lists are ineffective. *Id.* However, even if that was so, the State lauds the effectiveness of its own do-not-call list in deterring unwanted calls. App. 882-83.

1. An entrenched line of Supreme Court cases establishes that states cannot suppress an entire channel of political speech.

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

For instance, in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Supreme Court considered the constitutionality of a city ordinance barring signs on residential property. *Id*. at 54. The Court found that the ordinance was unconstitutional because it almost completely foreclosed a form of political communication that was "unusually cheap and convenient." *Id*. at 57.[4]

Ladue relied largely on *Martin v. City of Struthers*, 319 U.S. 141 (1943). *Martin* held that a local ordinance prohibiting door-to-door

[4] The State previously sought to distinguish *Ladue* by claiming that the speaker in that case was the homeowner. App. 920. That is a distinction without difference given *Ladue's* teaching that the ordinance could not entirely foreclose a form of political speech. 512 U.S. at 57.

canvassing could not be constitutionally applied to a person distributing religious literature. The municipality claimed the ordinance protected homeowners from nuisances and crime. The Supreme Court nonetheless held that the ordinance was unconstitutional because it went too far by "substituting the judgment of the community for the judgment of the individual householder. It submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it." *Id*. at 143-144.

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

Most recently, the Court struck down an ordinance that prohibited door-to-door advocacy without a permit, as applied to "religious proselytizing . . . anonymous political speech, and the distribution of

handbills." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 153 (2002). Relying on *Ladue* and its predecessors, *Watchtower* concluded that the ordinance was so intrusive on political speech it could not survive under any standard of review. *See id.* at 164.

The distinction articulated in *Watchtower* between the compelling governmental interest necessary to justify a prohibition or limitation on political speech under the First Amendment, as opposed to the lesser showing necessary to justify a restriction on commercial speech, was recognized in this Court's decision in *National Coalition of Prayer*, 455 F.3d 783 (7th Cir. 2006). There, the Court upheld the constitutionality of Indiana's Privacy Act, which precluded charities from making fundraising calls through professional marketers. 455 F.3d at 784. In upholding the restriction as applied to that form of speech, the Court explained that "an act that severely impinged on core First Amendment values" might not survive constitutional scrutiny. *Id.* at 790 n.3 (applying a test less rigorous than strict scrutiny). Specifically, the Court noted that the Indiana statute "sharply curtails telemarketing – the speech that was most injurious to residential

privacy – while excluding speech that historically enjoys greater First Amendment protection." *Id*. at 792. As such, the Court stated that:

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

Id. at 791.

2. The ADMS runs afoul of this established precedent by blocking an entire channel of political speech.

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

Here, the grounds for concluding that the ADMS is unconstitutional are even stronger than in the *Martin-City of Ladue-Watchtower* line of cases. This case involves a virtual prohibition on all prerecorded political telephone calls. By their nature, these calls do not present the risk of physical intrusion, coercion, and intimidation, or use

as a pretext for criminal activity that the municipalities advanced as justification for their ordinances in those cases.

3. Automated calls are a natural, modern extension of established forms of protected political speech.

Because "[i]t is frequently feasible to pour new wine into old legal bottles," *Felsher v. Univ. of Evansville*, 755 N.E.2d 589, 599 (Ind. 2001), recent cases have extended the logic of the *Ladue* line of cases to the new legal questions presented by new technology used to communicate with voters. *See Lysaght v. New Jersey*, 837 F. Supp. 646 (D.N.J. 1993) (granting injunction to prevent enforcement of a similar autodialer statute); *Jaynes v. Commonwealth*, 666 S.E.2d 303 (Va. 2008) (finding overbroad a ban on anonymous spam because it might include political speech).

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

> The spoken word is our most popular and, to date, most significant form of communication. Newer forms of

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

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

The State offers only a surface explanation as to why the ADMS should foreclose an entire mode of political speech. Instead of meaningfully distinguishing these cases, the State dismisses this decades-long string of authority by claiming these cases dealt with "venerable" means of communication. App. 919. It is true, as the State notes, that none of them dealt specifically with automatic dialing machines. *Id*. at 919 But simply focusing on the particular device used to communicate – whether it is a knock on the door or a ringing telephone – ignores the actual teachings of those cases. The State cannot prohibit an entire mode of political speech based on "annoyance,"

whether from "venerable" means like canvassing or a similar modern technique like automated calls.

The Supreme Court has explained that no matter the channel of communication, the importance of political speech prevents the State from entirely foreclosing the use of that channel for political speech. *Citizens United,* 130 S.Ct. at 890. The Supreme Court expressly held that the First Amendment takes the courts out of the business of choosing the modes of communication used by political speakers. In *Citizens United,* the Court explained that:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.

Citizens United, 130 S.Ct. at 890.

Further, a preference for so-called "venerable" forms of speech would fly in the face of the basic First Amendment tenet that the speech we may like the least is often the most important to protect. In *National Coalition of Prayer*, Judge Williams concurred separately to

> emphasize the importance of applying full constitutional scrutiny . . . because First Amendment protections, of course, reside at the core of our democratic process and are crucial to the free exchange of ideas. In the present case, applying lowered constitutional scrutiny may initially appear less troubling because the form of the speech here (i.e., solicitation calls placed by telemarketers) is plainly disfavored by many. But providing such a potentially broad circumvention from full First Amendment scrutiny may prove to be an unfortunate choice when less-disfavored forms of speech are at issue in the future.

455 F.3d at 800 (Williams, J., concurring). This warning is exactly on point here: the State is entitled to no such "broad circumvention from full First Amendment scrutiny" simply because its blanket political-speech prohibition "may initially appear less troubling because" automated telephone solicitation is "disfavored by many." A decision to the contrary sets a dangerous precedent and threatens fundamental First Amendment protections.

4. The ADMS is not saved by the fact that a group with a political message can technically avoid its prohibitions if it has limitless resources.

Finally, the State has previously argued the ADMS does not completely ban automated calls because those calls may be placed so long as they are preceded by a live operator. Under the ADMS, an automated call can be placed only if it is preceded by a live operator who obtains the listener's consent and gives certain disclosures. Ind.

Code § 24-5-14-7,-14. This live operator requirement is disconnected from the State's claimed purpose of preventing intrusion or annoyance. For those who do not consent, the annoyance of a ringing telephone exists regardless of whether consent is sought (or disclosures made) by a live operator or a machine. The effect on residential privacy in having these questions asked by a prerecorded, interactive call is no different than if a live operator is used (who would then create the risk of human error). Once the telephone rings, it does not matter if the call is initiated by an operator or a machine.

Moreover, an automated call is capable of recording the listener's consent and can give prerecorded disclosures. While the State has claimed there is no evidence that electronic consent can be given, App. 926, the record unequivocally shows technology allows calls to seek consent and respond accordingly. App. 37.

The live operator requirement serves no purpose other than to drive up costs and limit political speech. It is a false barrier intended to artificially prevent political calls from being made. It creates a *de facto* ban on calls by imposing a burdensome live operator requirement that no party could actually meet. Patriotic Veterans does not bemoan merely that it costs too much to hire live operators. The use of live

operators fundamentally changes the form of communication both in terms of the scope of the audience and the ability to quickly reach an audience with messages candidates can control. In practical terms, the cost renders it unusable.

Accordingly, for the reasons explained above, the ADMS violates the First Amendment by impermissibly blocking an entire channel of political speech.

C. The ADMS cannot satisfy the intermediate review applied to time, place and manner restrictions.

Even if the Court concludes that the ADMS is content-neutral, it still must satisfy the test for time, place and manner restrictions and incidental burdens on speech. *See Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989). This test is known as intermediate scrutiny. *E.g.*, *Schultz v. City of Cumberland*, 228 F.3d 831, 845 (7th Cir. 2000). "Proper time, place, or manner restrictions must be narrowly tailored to serve a significant government interest unrelated to the suppression of free expression and leave open alternative channels for communication." *Pleasureland Museum, Inc. v. Beutter*, 288 F.3d 988, 1000 (7th Cir. 2002). The ADMS cannot satisfy this standard because it

does not serve a significant government interest, is not narrowly tailored and does not leave open alternative channels of communication.

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

The ADMS does not rest on a significant government interest unrelated to the suppression of speech. The only justification the State offers for the ADMS's restrictions on political speech is to avoid "annoyance." But robust and timely political speech is a core value of our federal constitution, not an "evil" to be stamped out. App. 926. There is no governmental interest in sanitizing away political speech. Moreover, far from a substantial interest, the State's interest here is to prevent the minor annoyance of having to answer the telephone, something Hoosiers do dozens of times a day.

The State – and, in turn, the district court opinion – makes much of the fact that Patriotic Veterans' vendor uses advertising that stating that a ringing telephone "stops people and demands attention." App. 913. That statement goes right to the point, as the telephone is a powerful and, at times, the only available medium for reaching voters with the malleable messages that come into play in the waning days of political campaigns. What little marginal intrusion political calls could

cause would be in addition to the other momentary intrusions life inflicts in a normal day. That interest pales in comparison to the importance automated calls have in modern political debate.

Whatever interest the State has in preventing "annoyance" is not served for people who wish to receive political messages, as even the State's expert admits the obvious conclusion that people are not annoyed by messages with which they agree or find interesting. App. 331-33. To the extent the State's alleged interest lies in preventing fraud, autodialed calls reduce that risk by not giving live operators access to sensitive voter information which can be acquired before or during the call. A machine is not capable of identity theft. Moreover, the State's purported "fraud" concern is inconsistent with the State's deliberate decision to use the ADMS to block political speech, rather than to enact a regulation targeting fraudulent calls.[5]

The State has relied largely on data it developed under the Privacy Act. App. 882. That data shows that 25 percent of Hoosiers have chosen *not* to join the Act's do-not-call list even as to commercial

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

solicitations. This means that more than 800,000 people are not disturbed even when a telephone call solicits a mere commercial transaction, much less a communication containing core political speech. [6]

The State's argument that the ADMS prevents intrusion by requiring a live operator is also not supported by the record. The intrusion the State cites – the ringing of the phone – is the same whether a call is placed by a machine or a live person. The phone must ring either way. Indeed, the State's expert agrees that some individuals would find a live operator to be a *more* significant intrusion than an automated call because an "individual could . . . try and be persuasive to

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

try and . . . talk them into listening while a pre-recorded message obviously can't in any way adjust its pitch to an individual." App. 338-339. To the State's expert, the "norm of politeness" could make live operator calls even more burdensome on unwilling recipients:

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

App. 338.[7]

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

The ADMS is also not "narrowly tailored" to any governmental interest. *Ward*, 491 U.S. at 796.

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[7] The State claims that it is fair to require speakers to incur the extra cost of live operators because it believes the costs "to residential privacy" is so much greater than the costs to the speaker using an automated calling system. App. 927. The State justifies the live operator requirement by claiming that it corrects an "externality" by making the caller – and not the listener – incur the burden of the call. *Id*. at 927. This claimed interest is simply not supported by the record given the State's concession that live calls can in fact be more intrusive. No matter who places it, the call occurs and the intrusion is had. Far from rectifying an externality, the State has created an artificial barrier to entry that serves no purpose other than to prevent political speech from occurring.

a. The Privacy Act already addresses the State's purported "annoyance" interest.

To the extent the State's interest lies in reducing the amount of intrusions by way of telephone calls, the State has already done so through the Privacy Act. The State repeatedly cites the efficacy of the Privacy Act and lauds the reduction in telephone calls it has produced, going so far as to claim that it has reduced calls even to individuals *not* on the do-not-call list. But if it is true that the Privacy Act has already greatly reduced the amount of invasive telephone calls, the State cannot claim that there is a *significant* interest to be served by an even greater reduction in telephone calls. If, as the State contends, the Privacy Act has already greatly reduced the number of invasive calls, the only purpose left for the ADMS is the elimination of whatever *marginal* calls remain after the prohibition of the Privacy Act went into place. The State has not shown that this a significant interest, particularly in light the undeniable burden the ADMS imposes on protected political speech. To allow the wishes of those who might be "annoyed" at the limited intrusion of a ringing phone would create a "heckler's veto," in which

the wishes of some individuals override the political speech of others. *Ovadal v. City of Madison*, 416 F.3d 531, 533-34, 537 (7th Cir. 2005).[8]

b. The ADMS is extremely broad, not narrow.

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

Moreover, a statute fails the "narrowly tailored" test if it is not designed "to protect only unwilling recipients of the communications." *Id.* Under the intermediate scrutiny standard for time-place-and-manner restrictions, the State must demonstrate that its restriction on prerecorded political calls does not sweep protected speech within its

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

prohibition. *See e.g., Weinberg v. City of Chicago*, 310 F.3d 1029, 1038 (7th Cir. 2002).

The State and the district court failed to consider the plethora of narrower time-place-and-manner restrictions that would serve the interests advanced by the State. It could, for example, enact a "do-not-call list" for automated political calls. Technology also allows the recipients of automated calls to simply press a button to opt-out of further calls. Requiring callers to follow this process would also further the State's claimed interest without the same substantial burden imposed by the State's restriction on automated political calls.

Moreover, a narrowly tailored statute must leave open "adequate" alternative means of communication. *U.S. Postal Serv. v. Council of Greenburgh Civic Associations,* 453 U.S. 114, 132 (1981). There must be more than some theoretical alternative avenue, but instead a meaningful option to the prohibited time, place or manner of speech. *See United States v. Playboy Entm't Group*, 529 U.S. 803 (2000). In the *Playboy* case, the Supreme Court held that a statute blocking certain adult channels for all cable subscribers was unnecessarily restrictive because it could have allowed subscribers who did not wish to receive these channels to "opt out" of receiving them. *Id. at 814-85.*

The State claims that there is an adequate alternative to automated calls because speakers could employ live operators. But the record proves that live operators are not a realistic or adequate alternative to automated calls. The facts are undisputed that live operator calls impose on speakers burdens that are more than *8 times* greater than automated calls. App. 34. Knowing this, the State's choice to require live operators is simply a proxy for saying "make no calls at all." As such, speakers have fundamentally different access to their audience through automated means, a fact even the State's expert does not dispute. App. 37. ("There's some cost related factors, the automated with only either a synthesized voice or a recorded human voice are significantly less costly.").

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

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

Moreover, live operator calls cannot be made on the same expedited basis as automated calls. App. 35. The record shows that the bulk of calls that Patriotic Veterans' service provider places in a given year are made within three weeks of an election. *Id*. at 35. It would be impossible for its service provider to handle such a volume over this busy time period using live operators. *Id.* at 35. Autodialed calls,

however, can be prepared and disseminated within a few hours. Placing 100,000 automated calls by a machine takes three hours. App. 37. Placing the same amount of calls by a live operator takes approximately two to five days. *Id*. Live operator calls are not an "adequate" substitute for automated political calls.

The State claims that there is no right for speakers "to use the most efficient channels of communication" and bemoans that a contrary rule "would mean that the government could not regulate sound trucks, for example, if some speakers would thereby be economically unable to spread their messages." App. 923. But this case is not a circumstance of mere limitation. It is a prohibition. The State does not limit the hours when calls can be made, the volume of calls that could be made, or the persons who may be called under a do-not-call list. Instead, the ADMS takes the *most* burdensome route by restricting all political calls without offering any alternative channels that bear any likeness to the automated calls.

Requiring live operators is also not an adequate alternative avenue because operators fundamentally change this form of communication. Automated calls have a unique ability to convey a political message in a swift fashion to a wide audience. There is no

dispute that automated calls allow for timely messages that are carefully crafted and controlled. The speaker can know precisely what is said to the listener. An autodialed call can be in the candidate's *own voice* with a message conveyed precisely as that candidate intends. By contrast, live calls place the message in the hands of a human operator and exposes the candidate to human error. Live operator calls cannot guarantee the uniformity or clarity of the speaker's message.

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

Finally, the State suggests that passive media such as websites or television commercials might serve the same purpose. App. 919. Those forms of communication are simply not analogous, as they lack the immediacy, timeliness, and expediency of automated calls. A person has to affirmatively seek out these messages, depriving a speaker of the audience otherwise available by automated calls. Despite these unique features of automated calls, the State has virtually foreclosed this mode of communication through a sweeping bar that does not leave in place any similar or adequate means of communication.

Modern campaigns live within the 24-hour news cycle. Besides their expense, traditional media are not capable of responding quickly to the needs of modern campaigns as new issues suddenly and unexpectedly arise. Campaigns can be so fluid (and messages so time-sensitive) that traditional media are either too slow to reach the desired amount of voters or the time is impossible to obtain. Rapid-fire allegations arise in the abbreviated news cycle faced by modern campaigns. App. 35. Patriotic Veterans will therefore need to send messages in compact periods of time, such as on the eve of an election or before a vote important to it. App. 35. The ADMS prevents it from using the critical tool necessary to keep up in this political environment.

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

D. The ADMS is overbroad because it restricts a substantial amount of political speech.

The ADMS is unconstitutional as an overbroad restriction on a substantial amount of protected speech. Because of the chilling effect that can occur when statutes prohibit activities related to speech, state regulation of speech may be struck if it is "overbroad." *Virginia v. Hicks*, 539 U.S. 113, 123 (2003). A statute is overbroad if there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S.

789, 801 (1984). In other words, a "showing that a law punishes a 'substantial' amount of protected free speech, 'judged in relation to the statute's plainly legitimate sweep,' suffices to invalidate *all* enforcement of that law, 'until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression.'" *Hicks,* 539 U.S. at 118-19 (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)).

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

The ADMS undeniably stamps out the right of willing listeners to receive messages on political topics. Patriotic Veterans places calls in multiple states that do not burden automated calls. App. 38. In its experience, 55 to 80 percent of calls are placed in their entirety. *Id.* at 38. For example, on October 15, 2010, Patriotic Veterans placed 68,628 calls in West Virginia. *Id.* at 38. The recipients of 20,965 of those calls listened to the entire political message. *Id.* at 38.

Similarly, the State has argued – and the district court appeared to accept – that these individuals stay on the line only to determine who made the call so they could lodge a complaint. App. 914. Alternatively, the State suggested that these recipients "seethe at the disruption" throughout the call. *Id.* at 914. There is nothing in the record to support this speculation, and it defies logic to believe that recipients would waste time listening to messages only to "seethe." At a minimum, it defies the summary judgment standard for the district court to accept the State's "facts" as true while ruling against Patriotic Veterans.

Moreover, evidence in the record confirms that a substantial number of Indiana residents have had their desire to listen to automated calls foreclosed by the ADMS. App. 379-386. These

individuals are willing listeners for political calls but cannot do so because of the ADMS.

If there was any doubt about the point, even the State's expert acknowledges that individuals within Indiana would like to receive political messages through automated means. App. 348, 352. As the expert explained, "how many people would have a preference, a desire to get pre-recorded calls, political or otherwise, would be a small number of people, but they're *undoubtedly* are some." App. 352 (emphasis added).

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

Under the First Amendment's overbreadth analysis, a statute is overbroad if it will "significantly compromise recognized First

Amendment protections of parties not before the Court." *Vincent*, 466 U.S. at 801 (1984). In

CONCLUSION

Patriotic Veterans respectfully requests that the Court reverse the district court's grant of summary judgment and remand for entry of judgment in favor of Patriotic Veterans.

Respectfully submitted,

s/Mark J. Crandley
Mark J. Crandley
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 236-1313
Facsimile: (317) 231-7433
Email: mark.crandley@btlaw.com

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I certify that the Brief of Appellant complies with the type-volume requirement set forth in Federal Rule of Appellate Procedure 32. Based on the word count program contained in Microsoft Word XP, the Brief of Appellant contains 12,094 words.

/s/*Mark J. Crandley*
Mark J. Crandley

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2016, a copy of the foregoing was filed with the Court. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Ashley Tatman Harwel, Esq.
INDIANA OFFICE OF THE ATTORNEY GENERAL
302 W. Washington Street
IGCS – 5th Floor
Indianapolis, IN 46204
Ashley.hartwell@atg.in.gov

/s/ Mark J. Crandley
Mark J. Crandley

CIRCUIT RULE 30(d) STATEMENT

In compliance with Circuit Rule 30(d), I certify that the Short Appendix included and bound with this Brief of Appellant includes all the materials required to be so included by Circuit Rule 30(a), and that Appellant's Appendix, Volumes I through IV, also being filed herewith includes all the materials required to be so included by Circuit Rule 30(b).

/s/ Mark J. Crandley
Mark J. Crandley

ATTACHED REQUIRED SHORT APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PATRIOTIC VETERANS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cause No. 1:10-cv-723-WTL-MPB**
	)	
STATE OF INDIANA, et al.,	)	
	)	
Defendants.	)	

ENTRY ON MOTIONS FOR SUMMARY JUDGMENT

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

I. BACKGROUND

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

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

> (b) A caller may not use or connect to a telephone line an automatic dialing-announcing device unless:
>
> (1) the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message; or
> (2) the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered.[1]

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

In an earlier ruling, the Court held that the Telephone Consumer Protection Act preempted the IADMS. *Patriotic Veterans, Inc. v. Indiana*, 821 F. Supp. 2d 1074 (S.D. Ind. 2011). The Seventh Circuit reversed the Court's ruling on preemption and remanded the case for the Court to evaluate "whether Indiana's statute violates the free speech rights protected by the First Amendment to the United States Constitution." *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041, 1054 (7th Cir. 2013).

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

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

II. DISCUSSION

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

A. Overbreadth

The Plaintiff first argues that the IADMS is overbroad. Specifically, the Plaintiff argues that the IADMS "sweeps into its scope protected political speech, including speech listeners wish to receive." Dkt. No. 33 at 14. To support a claim of overbreadth, the party before the court must identify a significant difference between its claim that the statute is invalid on overbreadth grounds and its claim that it is unconstitutional as applied to its particular activity. *See Members of City Counsel of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 802 (1984). Here, the Plaintiff's overbreadth challenge rests on the IADMS' application to political messages. The Plaintiff separately challenges the IADMS' application to its own political messages. Nothing in the record indicates that the IADMS will have any different impact on third parties' interests in free speech than it has on the Plaintiff's interests. *See id.* Thus, the Court will limit its review of the IADMS to the case before it and analyze it as applied to the Plaintiff.

B. Content Neutrality

The First Amendment prohibits the enactment of law "abridging the freedom of speech." U.S. Const. I. A government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of*

Gilbert, Ariz., 135 S. Ct. 2218, 2227 (2015). Content-based speech restrictions are subject to strict scrutiny, *id.*, while content-neutral laws are to be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227 (quoting *Sorrell v. IMS Health, Inc.* 131 S. Ct. 2653, 2664 (2011)). Distinctions based on message may define regulated speech by particular subject matter or may define regulated speech by its function or purpose. *Reed*, 135 S. Ct. at 2227.

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

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

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

> Indiana's statute . . . does appear to be a prohibition – it prohibits automatic dialing devices unless consent is first obtained. There are indeed other enumerated exemptions to the statute, but each describes a form of implied consent: Autodialers may be used to make calls "(1) from school districts to students, parents, or employees; (2) to subscribers with whom the caller has a current business or personal relationship; or (3) advising employees of work schedules." Ind.Code § 24–5–14–5. By accepting a job, an employee impliedly consents to phone calls from his employer for work related scheduling purposes, as do families who enroll children at school or people who enter into business relationships.

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

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

In the second step of the *Reed* analysis, a facially content-neutral law can still be categorized as content based if it "cannot be 'justified without reference to the content of the regulated speech'" or if it was "adopted by the government 'because of disagreement with the message the speech conveys.'" 135 S. Ct. at 2227 (brackets omitted) (quoting *Ward*, 491 U.S. at 791). The Defendants' stated justification for the IADMS – their interest in protecting residential privacy from unsolicited, harassing telephone calls – does not require reference to the content or message. Therefore, the IADMS is content neutral.

This finding is consistent with decisions from other circuits. In *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit examined a statute similar to the IADMS.[3] The court found that the Minnesota statute regulating the use of telephone ADADs was content neutral because it limited the time and manner, not the content, of the communications. Likewise, in *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996), the Ninth Circuit found that California statutes that regulated the use of ADADs were content neutral. The Plaintiff argues that the Court's decision should be guided by the Fourth Circuit's decision in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015), where the court found the anti-robocall statute did not survive a strict scrutiny analysis. However, the statute at issue in that case prohibited only those robocalls that were "for the purpose of making an unsolicited consumer telephone call" or were "of a political nature including, but not limited to, calls relating to political campaigns." S.C. Code Ann. § 16-17-446(A). Based on the express language of the statute, the Fourth Circuit found that it was content based; the statute made facial content distinctions and thus was subject to strict scrutiny. *Cahaly*, 796 F.3d at 405. By contrast, the IADMS does not target political speech or any other type of speech.

The Plaintiff argues that the IADMS burdens political speech and therefore requires the Court to apply a strict scrutiny analysis.[4] However, the Supreme Court has analyzed content-neutral laws that impact political communications using the time, place, and manner scheme

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

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

applied to other content-neutral laws. *See, e.g.*, *Members of the City Council of Los Angeles*, 466 U.S. at 803-05 (holding that a law prohibiting signs on public property in order to preserve aesthetics could be applied to political-campaign signs).

The Plaintiff attempts to analogize the present case to cases in which the statutes at issue specifically targeted political speech. However, any comparison to the statutes at issue in those cases is inapposite because the IADMS does not target political speech. For example, the Plaintiff cites to *Meyer v. Grant*, 486 U.S. 414 (1988), but that case dealt with a statute that specifically prohibited the use of paid petition circulators to gather signatures to have a proposed state constitutional amendment placed on the general election ballot.[5] Likewise, any reliance on *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), is misplaced. There, the Court held that the statute at issue suppressed political speech on the basis of the speaker's corporate identity. By contrast, the IADMS does not govern specific subject matter, s*ee Reed*, 135 S. Ct. at 2230 (citation omitted), and any burden to political speech is incidental.[6]

C. Time, Place, or Manner Restriction

Because the IADMS is content-neutral, it must be analyzed under the standards applicable to restrictions on the time, place, or manner of engaging in free speech. *See Ward*, 491 U.S. at 791. Accordingly, the IADMS does not run afoul of the First Amendment so long as it is

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

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

"narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication of [ ] information." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Ward*, 491 U.S. at 791).

1. Significant Governmental Interest

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

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

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

> and consistent with the constitution to impose greater restrictions on automated calls than on calls placed by "live" persons.

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

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

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

2. Narrowly Tailored

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

not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799.

The Plaintiff argues that using a live operator would be prohibitively expensive; however, a live operator initiating the calls would be more efficient than a live operator making and delivering the entire message. An operator could announce the source of the call and determine if the listener wanted to hear the message and immediately move on to the next call after hearing the response. Use of a live operator also would allow recipients the chance to not only decline to listen to the message at that time but also to request that the caller not call again. As such, recipients could reduce the number of such calls that they receive.

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

3. Alternative Channels of Communication

Finally, the IADMS leaves open ample alternative channels for communication. "[E]ven regulations that do not foreclose an entire medium of expression, but merely shift the time, place,

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

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

III. CONCLUSION

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

SO ORDERED: 4/7/16

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

Copies to all counsel of record via electronic communication.

ECF 85

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PATRIOTIC VETERANS, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Cause No. 1:10-cv-723-WTL-MPB**
	)	
STATE OF INDIANA, et al.,	)	
	)	
Defendants.	)	

JUDGMENT

The Court having granted the Defendants' motion for summary judgment, judgment is hereby **ENTERED** in favor of the Defendants and against the Plaintiff on all claims.

SO ORDERED: 4/7/16

William T Lawrence

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

Laura Briggs, Clerk

BY: _____
Deputy Clerk, U.S. District Court

Copies to all counsel of record via electronic notification