No. 16-1198

IN THE
Supreme Court of the United States

PATRIOTIC VETERANS, INC., *Petitioner*,

v.

CURTIS T. HILL, JR., ATTORNEY GENERAL OF INDIANA, *Respondent*.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

<u>MISCELLANEOUS</u>

REPLY BRIEF FOR THE PETITIONER

I. THE SEVENTH CIRCUIT STANDS ALONE IN UPHOLDING A PROHIBITION ON AUTOMATED SPEECH AFTER *REED*.

The State asserts there is no circuit split, Br. Op. at 6, despite the conflict between the Fourth Circuit's opinion in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015) and the Seventh Circuit's decision upholding the Indiana Automatic Dialing Machine Statute ("ADMS"). At least one district court already has followed *Cahaly* and invalidated an Arkansas autodialer regulation. *See Gresham v. Rutledge*, 198 F. Supp. 3d 965 (E.D. Ark. 2016). As of yet, the Seventh Circuit remains the only circuit to uphold an autodialer restriction after *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). Dated opinions arising before *Reed* upheld state autodialer laws without applying the scrutiny that *Reed* demands. *See Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996); *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995). The schism between these decisions represents the very definition of a circuit split.

The State focuses on *Cahaly* and asserts that the Court need not consider it because the South Carolina statute expressly "targeted" political speech. Br. Op. 6. This supposed distinction makes no difference. The statutes simply took different paths to achieve the same result — a prohibition on political content while allowing commercial and other speech to go forward. Because of that content-based distinction, *Reed* requires that **both** statutes be reviewed under strict scrutiny.

South Carolina selected certain types of automated

calls to ban, including political calls. S.C. Code Ann. § 16-17-446(A). It left all other calls unregulated, including calls with commercial content. *Id*. Indiana swept up all automated calls, but then gave special protection to commercial, school, and other non-political speech. Ind. Code § 24-5-14-5. Both are content-based distinctions. Indiana did not need to include an express reference to political speech because it included political speech within the broader ADMS prohibition. The fact that Indiana and South Carolina achieved content-based results through different statutory architecture does not negate the fact that both statutes were content-based.

II. THE STATE MISAPPLIES THIS COURT'S TEST FOR CONTENT-BASED REGULATION BY IMPOSING THE "TARGETING" REQUIREMENT *REED* REJECTED.

ADMS sets political speech apart from other favored forms of speech. It restricts speakers from using autodialers to convey political speech even when those political calls serve as the most effective means for groups with fewer resources to reach their audience. By regulating political speech using autodialers — but exempting other content — the statute made a content-based distinction for which *Reed* requires strict scrutiny. *See Reed*, 135 S.Ct. at 2227.

The State attempts to distinguish *Reed* by claiming that ADMS does not "target" political speech. *See* Br. Op. 6. ADMS "targets" political speech by placing it on a lesser plane than favored speech such as commercial

speech. Commercial speech receives the State's blessing to flow through automated dialers; political speech must stand aside.

In any event, *Reed* expressly rejected the "targeting" analysis the State employs. *See Reed*, 135 S.Ct. at 2225. After *Reed*, the government's intent to "target" a particular type of speech is not the test for content-based regulation. *Id*. *Reed* explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 2227. A regulation failing this standard is content-based "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id*. at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)).

Reed therefore made clear that the government's intent to "target" a particular type of speech is not the test for determining whether strict scrutiny must apply. *Id*. So long as a regulation of speech makes distinctions based on the topic addressed in the speech, it is content based and subject to strict scrutiny. *Id.* The State's attempt to inject a requirement that a statute or regulation "target" particular directly contradicts *Reed*.

III. THE STATE ELEVATES PRIVACY OVER THE FIRST AMENDMENT, UNDERMINING HOUSEHOLDER CONSENT.

The State contends that "the Indiana General Assembly enacted ADMS to protect the residential **privacy** of Hoosiers from unwanted robocalls." Br. Op. at 1 (emphasis added).[1] It describes ADMS as permitting **only** those robocalls: (i) where "'the [recipient] has knowingly or voluntarily requested, **consented** to, permitted, or authorized receipt of **the message**'"; or (ii) "when the recipient has given **consent** to a live operator **immediately prior** to delivery of **the message.**" *Id.* at 1-2 (emphasis added). Afterward, it elaborates on these two themes — privacy and consent — contending that the "Autodialer Law **narrowly but effectively protects the privacy** of the home and **vindicates individual consent**." *Id.* at 12 (emphasis added). In truth, ADMS is neither narrow nor effective as a protection

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[1] The State's Reasons for Denying the Petition opens with the misleading claim that "[o]nly five years ago, the [Supreme] Court refused to review another First Amendment challenge to Indiana's Autodialer Law. *State v. Econ. Freedom Fund*, 959 N.E.2d 794 (Ind. 2011), *cert. denied*, 133 S. Ct. 218 (2012)." Br. Op. at 6. In 2011, the Supreme Court of Indiana decided a challenge to ADMS based on the Indiana Constitution, making clear that the "First Amendment claim is not properly before this Court at this time...." 959 N.E.2d at 801. Although the Indiana Supreme Court included a short First Amendment analysis, *id.* at 801-02, it clearly did not rule on that issue. Furthermore, denial of a petition for certiorari is never precedential. *See Darr v. Burford*, 339 U.S. 200, 226 (1950) (Frankfurter, J. dissenting) ("This Court has said again and again and again that such a denial has no legal significance whatever bearing on the merits of the claim.").

of householder privacy, and does not vindicate, but rather undermines, the consent of the call recipient.

A. ADMS Offers Patriotic Veterans Only One Realistic Method to Obtain Consent.

The State adopts the district court's view that the statute allows Patriotic Veterans to obtain consent not just by a "live operator," but also by "prior consent." (*Patriotic Veterans v. Indiana*, 177 F. Supp. 3d 1120, 1128 (2016)). *See* Br. Op. at 3. The district court assumed both options to be available simply because the statute said so. There is, however, nothing in the record showing how such "prior consent" actually could be obtained.[2] The statute requires that consent to a call must be specific to "the message." An exception in the statute implies consent for businesses to call their customers anytime (*Ind. Code* § 24-5-14-5), but there is no provision authorizing organizations like Patriotic Veterans to acquire the "prior consent" required to call registered voters who have no prior connection to the organization, but who are believed to have an interest in the subject matter of the call. Pet. Cert. at 34; Cir.

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[2] Due to the lack of guidance in the statute and the severe penalties, any attempt at prior consent would certainly require prior approval of the Attorney General. Such a system of licensing was found impermissible when vested in a city manager in *Lovell v. Griffin*, 303 U.S. 444, 449, 451 (1938), and is not improved when power is vested in a politically elected State Attorney General.

App. 35.[3] There really is only one way for organizations such as Patriotic Veterans to comply — using a live operator who initiates the call and obtains the recipient's consent to play the message. (As to that requirement, there was unrebutted evidence in the record that Patriotic Veterans could not afford to use live operators. *See, e.g.,* Cir. App. 34, 38.)

B. The Live Operator Option Is Not Protective of Privacy.

The State defends its statute on the ground that it protects the privacy and serenity of Hoosiers. Br. Op. at 9-15. But without a "prior consent" option, ADMS provides no privacy protection.[4] The State borrows from a Minnesota decision's characterization of the "shrill and imperious ring of the telephone." Br. Op. at 1 (citation omitted). Many times in its brief, the State asserts that automated calls invade the recipient's privacy, asserting:

- "disturb[s] [the] relative peace" (*id.* at 1);
- "'unsolicited, harassing'" (*id.* at 3);
- "'frequently ringing with unwanted calls'" (*id.* at

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[3] Although the State gives the impression that Patriotic Veterans seeks to make an "unlimited" number of calls (Br. Op. at 2, 10, 11), no organization would incur the expense to make calls except to persons who it believes would be open and responsive to its call.

[4] Despite the fact that Patriotic Veterans makes no calls to cell phones (Pet. Cert. at 26, n.2), the State interjects that red herring here, citing the district court's (erroneous) discussion of the ringing of the phone "in one's pocket." Br. Op. at 5. Calls to cell phones are completely irrelevant to this "as applied" challenge.

5);

- "'aggravating calls'" (*id.*);
- "'frustrating for the recipient'" (*id.* at 10); and
- "'nuisance has become a plague'" (*id.*).

However, these characterizations of robocalls apply equally to live operator calls. Yet the State, relying on the district court below, contends that robocalls without a live operator are much more intrusive than robocalls with one, relying on a Senate Report (S. Report 102-178; Oct. 8, 1991) which related to the enactment of the Automated Telephone Consumer Protection Act, 105 Stat. 2394. *See* Br. Op. at 10-11. This opinion stands in opposition to the record evidence in this case that "people are more comfortable hanging up on a recording rather than a live operator." Cir. App. 38. Also, that Senate Report asserted the constitutionality of the Senate bill based on two inapposite Supreme Court cases involving sound trucks and broadcast of indecent language. Lastly, the Senate Report's assertions related to a Senate bill that was amended prior to passage to authorize the FCC to exempt completely noncommercial robocalls by organizations such as Patriotic Veterans, which the FCC has done. *See* 47 U.S.C. § 227(b)(2)(B) and 47 C.F.R. § 64.1200(a)(3)(ii).

C. ADMS Robs Householders of Control of What Is Heard in Their Own Homes.

The State maintains that "'the live operator and prior consent options allow the continued use of [robocalls] while protecting the interests of the recipient" in "'residential privacy.'" *Id.* at 3. In truth,

Indiana is interjecting itself between the caller and the person called, granting permission to some calls and refusing it to others. Indiana substitutes the judgment of the legislature for the judgment of the householder. Privacy, like consent, presupposes opportunity and individual choice, and the statutory requirement of a live operator would — because of dramatically increased costs — reduce the number of recipients who might have chosen to hear Patriotic Veteran's robocalls. Further, as discussed *supra*, one's privacy is intruded upon by the ring of a telephone whether or not the robocall is accompanied by a live operator. After all, it is the frequency of ringing with unwanted calls — not the call's contents — that invades the "privacy and tranquility" of the home. 177 F. Supp. 3d. 1120, 1127. As the court of appeals below observed: "'Every call uses some of the phone owner's time and mental energy, both of which are precious.'" Br. Op. at 5. In either case — live operator or autodialer — the homeowner can choose not to pick up the phone (with the caller often being revealed on caller ID), or to pick up the phone and listen for a few seconds before hanging up.

In any event, the Indiana legislature's generic concern for "residential privacy" cannot outflank this Court's First Amendment precedents, as the State has contended. Br. Op. at 11-12. In support, the State cites three cases which have no application to the issue presented here. For example, the State invokes *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), where this Court upheld a city ordinance prohibiting "residential picketing" on the ground that "individuals are not required to welcome unwanted speech into their own

homes and that the government may protect this freedom." Although a homeowner may need the police to step in to disperse a screaming crowd, he does not need the involvement of any government official to answer his phone. Unlike *Frisby* and two other cases relied upon by the State, assertions about state protection of homeowners' "privacy" do not override the householder's "full" First Amendment right to exercise his authority as editor-in-chief of what is read and heard in his home, as this Court affirmed 74 years ago in *Martin v. City of Struthers*, 319 U.S. 141 (1943).

IV. THE STATE'S ATTEMPT TO RESTRICT THE FIRST AMENDMENT TO ANTIQUATED METHODS OF COMMUNICATION IS UNAVAILING, AND IGNORES THE PEOPLE'S RIGHT TO PETITION GOVERNMENT.

The State dismisses this Court's decisions in *Martin v. City of Struthers* and *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 546 U.S. 150 (2002), as "irrelevant because those cases involved **paternalistic** governmental oversight of the **venerable** practice of **door-to-door handbilling**."[5] Br. Op. at 12 (emphasis added). The State would have the Court believe that these cases protected only

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[5] "In fact, it may be argued that automated calls are *less* intrusive than the door-to-door canvassers, because one may answer a phone call without the need to make oneself presentable or even get out of one's chair, assuming the phone is within reach." Brief *Amicus Curiae* of Free Speech Coalition, *et al*. at 10-11 (May 5, 2017).

antiquated methods of communication. Interestingly, the State's term "venerable" is found in neither of those cases, but in *City of Ladue v. Gilleo*, 512 U.S. 43, 54 (1994), where it was used to describe residential signs displayed in public. There is no authority for the proposition that the First Amendment protects only methods of communication which date back to antiquity. Indeed, if visiting a home with a printed handbill is a protected method of communication, telephone calls likewise should be protected — even if made using automated technology.

The political preferences of state legislators who no doubt would prefer to prohibit groups like Patriotic Veterans from efficiently and effectively informing their constituents as to how they are conducting the People's business, are not dispositive of the First Amendment issue. Politicians must not be allowed to bar use of the most effective and modern methods of communication used to facilitate citizen grassroots lobbying.

As for the State's implied claim that Indiana's ban on robocalls is not paternalistic, Br. Op. at 12, there is no doubt that, as in *Struthers* and *Watchtower*, the Indiana legislature is "stepping into the shoes of its citizens to decide which speakers they may hear on ... political and policy matters." Brief *Amicus Curiae* of Victor Gresham and Conquest Communications Group, LLC at 11 (May 5, 2017). Individual homeowners are not being "protected from" robocalls because of their own preferences, but because of Indiana legislators' preferences that their constituents not receive calls from Patriotic Veterans and other organizations on

pending legislation — particularly when those calls generate numerous "live transfer" calls to their legislative offices.

Indeed, the State has failed to respond to Patriotic Veterans' contention that the "automated calls" it utilizes enable "the most humble citizen to exercise his First Amendment right to 'petition [the Government] for redress of their grievances,'" citing *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Pet. Cert. at 36-37. Patriotic Veterans uses automated telephone equipment to generate large numbers of grassroots communications to elected officials by means of "live transfer" calls directly to the voters' representative in the state legislature. As *amici curiae* U.S. Justice Foundation, *et al.* explained, the frequently used "'robocall' ... is an economical method by which some of the most disenfranchised citizens ... may petition increasingly unresponsive political leaders...." U.S. Justice Foundation *Amicus Curiae* Brief at 7 (May 5, 2017). The right of the people to petition must be jealously guarded lest the voices of the people be drowned out by the moneyed class who have personal access to the nation's elected lawmakers and appointed bureaucrats.

V. THE STATE FAILS TO DISTINGUISH AWAY THIS COURT'S FREEDOM OF THE PRESS AUTHORITIES.

In an attempt to distinguish *Struthers* and *Watchtower*, the State errs, having overlooked the fact that *Watchtower* and *Struthers* rest on both the Freedom of Speech as well as of the Press. Br. Op. at

12-13. Both *Struthers* and *Watchtower* require that privacy give way to Freedoms of Speech and Press — not the other way around. Indeed, *Struthers* relied heavily upon *Lovell v. Griffin*, *supra* — one of this Court's seminal opinions regarding the freedom of the press. The *Lovell* ordinance required pamphleteers to acquire and possess a permit before circulating literature. In response, the Court found the ordinance invalid on its face because "it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." *Lovell* at 451.

As with the *Lovell* ordinance, ADMS is effectively a licensing system empowering the Attorney General to determine whether a robocaller has obtained the requisite prior consent of a potential recipient of a robocall. *See Ind. Code* § 24-5-14-5(b). And Ind. Code § 24-5-14-7 activates the government's role as censor by banning calls that do not meet its arbitrary standards.

ADMS also thrusts the State "into the function of editor[]." *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974). It prohibits a caller from using the critical first few seconds of every call to explain the important reason for the call. Rather, the caller must communicate the government's message — thereby altering the nature and impact of the call by altering the first impression the recipient of the call receives. "The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content ... whether fair or unfair — constitute the exercise of editorial control and judgment...." *Id.* at 258.

Respectfully submitted,

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