

**IN THE  
INDIANA SUPREME COURT  
CAUSE NO. 31S00-0803-CV-139**

STATE OF INDIANA,	)	Appeal from Harrison Circuit Court
	)	
Appellant,	)	Cause No. 31C01-0609-MI-78
	)	
v.	)	
	)	The Honorable Larry R. Blanton,
AMERICAN FAMILY VOICES, INC.,	)	Special Judge
JIM GONZALEZ, and	)	
JOHN DOES 2-10,	)	
	)	
Appellees.	)	

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**BRIEF OF APPELLEE  
AMERICAN FAMILY VOICES, INC.**

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## **STATEMENT OF SUPREME COURT JURISDICTION**

Pursuant to Appellate Rule 46(B)(1), Defendant American Family Voices, Inc. (“American Family”) agrees with Appellant’s Statement of Supreme Court Jurisdiction.

## **STATEMENT OF THE ISSUES**

The ambiguity in the Auto-Dialer statute, the criminal penalties imposed by the statute, and the constitutional implications if political speech is curtailed all require this Court to interpret the Auto-Dialer statute narrowly and strictly against imposing a penalty on political speech. Within this framework, the issue on appeal is:

Do the enabling legislation, the statute’s text, the statutory context in which the Auto-Dialer Law is found, and the statute’s interrelationship with other consumer sales laws support a conclusion that the statute applies only to messages involving commercial transactions that promote goods or services, not to political messages?

## **STATEMENT OF THE CASE**

Pursuant to Appellate Rule 46(B)(1), American Family agrees with Appellant’s Statement of the Case.

## **STATEMENT OF FACTS**

The Auto-Dialer Law provides that, “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(b).

The Attorney General sought an injunction preventing American Family from making auto dialer calls, contending American Family did not have the consent of the persons being called and did not have a live operator preceding the pre-recorded message to obtain consent of

the subscriber. (App., p. 12.) The Attorney General acknowledges the calls at issue in this case were made in order to communicate non-commercial, political messages. (State's Brief at 7.)

In addition to an injunction prohibiting American Family from making any telephone calls using Auto-Dialer equipment, the Attorney General is seeking to recover \$5,000.00 for each telephone call made by an autodialing device. (App., p. 13.) If the Attorney General in fact establishes a violation of this law, the Auto-Dialer Law provides that the violation constitutes a criminal act. IND. CODE § 24-5-14-10.

### **STANDARD OF REVIEW**

This Court reviews de novo a trial court's ruling on a Trial Rule 12(B)(6) motion. Paniaguas v. Endor, Inc., 847 N.E.2d 967, 969 (Ind.Ct.App. 2006). A Trial Rule 12(B)(6) motion to dismiss for failure to state a claim upon which relief can be granted tests the legal sufficiency of a claim rather than the facts supporting the claim. Gorski v. DRR, Inc., 801 N.E.2d 642, 644-45 (Ind.Ct.App. 2003).

Dismissal for failure to state a claim is proper if it is apparent that the facts alleged in the complaint are incapable of supporting relief under any set of circumstances. Id. While a plaintiff need not set out in precise detail the facts upon which the claim is based, it must still plead the operative facts necessary to set forth an actionable claim. Miller v. Mem. Hosp. of South Bend, Inc., 679 N.E.2d 1329, 1332 (Ind. 1997). Also, whatever the trial court's dismissal reasoning may be, its ruling will be affirmed "if it is sustainable on any basis found in the record." Id.

## SUMMARY OF ARGUMENT

The restrictions in the Auto-Dialer statute apply only if “the message” the caller seeks to deliver falls within the scope of “the message” the statute seeks to regulate. Although the General Assembly defined several key terms in the statute—“caller,” “automatic dialing-announcing device,” and “subscriber”—it left undefined the term most important term in the statute: “message.”

In contrast to the term “call” used in another part of the statute, the legislature used the term “message”—which implicates the content of the communication—in the operative provision at issue in this case. The resulting ambiguity raises significant due process and free speech issues because a caller who violates the Auto-Dialer Law is automatically guilty of a criminal offense. The legislature’s failure to specifically identify the type of message that is subject to the Auto-Dialer statute’s restrictions requires this Court to construe the statute narrowly and strictly against imposing a penalty and against affecting political speech.

A narrow construction that protects political speech finds further support in the enabling legislation creating the Auto-Dialer law, the various provisions of the statute itself, the statutory context in which the Auto-Dialer Law is found, and the statute’s interrelatedness to other statutes designed to protect Indiana consumers from deceptive commercial practices.

In particular, when enacting the Auto-Dialer Law, the General Assembly described it as, “An Act to amend the Indiana Code concerning trade regulation” and chose to place the Act in the portion of the Indiana Code regulating consumer sales (Title 24, Article 5). Likewise, when explaining the Act’s requirement that a live operator obtain the subscriber’s consent before the message is delivered, the General Assembly provided that the operator must disclose “The identity or kinds of goods or services the message is promoting,” which presumes that the “messages” regulated by the Act involve goods or services. A live operator introducing a

recorded political message could not comply with this requirement because political messages do not promote “goods or services.”

Further supporting this construction is the fact that the General Assembly provided that violations of the Auto-Dialer statute constitute “deceptive acts” under the Deceptive Practices Act. The purpose of the “Deceptive Practices Act” referenced in the Auto-Dialer statute is to “protect consumers from suppliers who commit deceptive and unconscionable sales acts,” and every deceptive act identified in that statute involves some form of commercial transaction.

Similarly, the remedies provision found in the Deceptive Practices Act and incorporated into the Auto-Dialer statute demonstrates the General Assembly’s intent to regulate only commercial transactions. The remedies available all pertain to commercial transactions involving goods or services, not political speech. The Auto-Dialer law’s incorporation of provisions from other trade regulations designed to protect Indiana consumers from deceptive practices involving the sale of goods or services demonstrate that the Auto-Dialer statute’s reach does not extend to political messages.

Finally, the Attorney General is incorrect when he contends that American Family’s interpretation renders the exceptions contained in the Act “superfluous.” In particular, the restrictions in the Auto-Dialer statute do not apply to messages from “school districts to students, parents, or employees” or messages “advising employees of work schedules.” The exception remains functional under American Family’s interpretation because there are circumstances in which messages from “school districts to students, parents, or employees” and messages “advising employees of work schedules” would otherwise constitute commercial messages that promote goods or services.

This is demonstrated most clearly by Section Eight of the Auto-Dialer statute. That section contains a provision restricting the use of automatic dialing-announcing devices “for

commercial telephone solicitation” to the time period between 9 a.m. and 8 p.m. When enacting this section dealing with “commercial telephone solicitation,” the legislature found it necessary to expressly exempt messages from school districts and messages advising employees of work schedules from this prohibition—showing the General Assembly itself believed these exempted messages could otherwise involve “commercial telephone solicitation.” The Attorney General is incorrect when he contends the exceptions contained in the statute do not reflect or support the statute’s focus on commercial messages that promote goods or services.

The restrictions in the Auto-Dialer statute do not apply to political messages. The enabling legislation, the statute’s text, the statutory context in which the Auto-Dialer Law is found, and the statute’s interrelationship with other consumer sales laws demonstrate the statute applies to messages involving commercial transactions that promote goods or services.

## **ARGUMENT**

### **I. The General Assembly’s failure to define a critical term in the statute creates an ambiguity requiring this Court to interpret the Auto-Dialer statute narrowly and strictly against imposing a penalty on political speech.**

The Auto-Dialer Law provides, “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(b).

When enacting the statute, the General Assembly defined several key terms. “Caller” means “an individual, corporation, limited liability company, partnership, unincorporated association, or the entity that attempts to contact, or contacts, a subscriber in Indiana by using a telephone or telephone line.” IND. CODE § 24-5-14-2. “Automatic dialing-announcing device” is

“a device that [s]elects and dials telephone numbers; and ... disseminates a prerecorded or synthesized voice message to the telephone number called.” IND. CODE § 24-5-14-1.

“Subscriber” is “A person who has subscribed to telephone service from a telephone company;” or “Other persons living or residing with the subscribing person.” IND. CODE § 24-5-14-4.

Left undefined, however, is the term “message”—a term which appears in this statutory provision more often than any other term. The lack of any specific guidance as to this term is a significant omission, as the restrictions in the statute apply only if “the message” the caller seeks to deliver falls within the scope of “the message” the statute seeks to regulate.

And although the General Assembly used the term “caller” to describe the entity using the auto-dialer, it did not use the term “call” to describe the communication itself. Rather, the legislature used the term “message,” which has a much broader reach than “call” and implicates the *content* of the communication. *Compare* NEW COLLEGE MERRIAM-WEBSTER DICTIONARY, p. 729 (1998) (defining “message” as “an underlying theme or idea”), *with* p. 162 (defining “call” as “the act of calling on the telephone”).

This is not an inadvertent word choice, as the legislature demonstrated it knew the difference between “message” and “call.” In another provision, the legislature prohibited the use of an auto-dialing device to make any type of “call” to medical/emergency facilities and institutions, irrespective of the message contained therein. *See* IND. CODE § 24-5-14-12. It must therefore be presumed the legislature chose the word it did—“message” as opposed to “call”—for a reason. *See* Schwartz v. Zent, 448 N.E.2d 38, 40 (Ind.Ct.App. 1983).

Moreover, as used in this statute, “message” cannot refer to the act of leaving a message for the subscriber, as the statute expressly requires the subscriber’s consent *before* the “message” may be “delivered”—something which cannot occur if the subscriber is not physically present to receive the message.

When an undefined word in a statute is capable of more than one meaning, it gives rise to the conclusion that the reach of the statute is ambiguous. See Glotzbach v. State, 783 N.E.2d 1221, 1227 (Ind.Ct.App. 2003); Johnson County Farm Bureau Coop. Ass'n v. Indiana Dep't of State Revenue, 568 N.E.2d 578, 580 (Ind. Tax Ct. 1991).

This Court must therefore look to the statutory scheme as a whole and interpret it in such a way as to consider *both* the “objects and purposes of the statute as well as the effects and repercussions of such an interpretation.” Carter v. Carolina Tobacco Co., 873 N.E.2d 611, 625-626 (Ind.Ct.App. 2007); accord Glotzbach, 783 N.E.2d at 1227; State v. Livengood by Livengood, 688 N.E.2d 189, 193 (Ind.Ct.App. 1997).

As discussed in Section II, the “objects and purposes of the statute” reveal the Auto-Dialer statute’s intended reach was commercial messages that promote goods or services. Carter, 873 N.E.2d at 625-626. Equally important to this case, however, is the required analysis of the “effects and repercussions of [this Court’s] interpretation.” Id.

A caller who violates the Auto-Dialer Law is automatically guilty of a *criminal* offense. IND. CODE § 24-5-14-10 (“A caller who fails to comply with this chapter commits a Class C misdemeanor.”). The legislature’s failure to identify the type of call that is subject to the Auto-Dialer restrictions requires this Court to construe the statute narrowly and strictly against imposing a penalty. See Conrad v. State of Indiana, 747 N.E.2d 575, 594 (Ind. Ct. App. 2001) (noting the “Rule of Lenity” and finding, “It is a familiar principle that statutes which are criminal or penal in their nature or which are in derogation of a common-law right must be

strictly construed. Also, where there is ambiguity it must be resolved against the penalty[.]” ).<sup>1</sup>

The Attorney General contends that the strict construction rule should not apply because this is not a criminal case. (State’s Brief at pp. 14-15.) Courts, however, routinely apply this rule in civil cases where penal or criminal statutes form the basis for liability. See Nance v. Miami Sand & Gravel, LLC, 825 N.E.2d 826, 839 (Ind.Ct.App. 2005); Crandon v. United States, 494 U.S. 152, 168 (1990); United States v. Thompson/Center Arms Co., 504 U.S. 505, 518 (1992); Comm’r v. Acker, 361 U.S. 87, 91 (1959).

This Court’s analysis of the “effects and repercussions” of its statutory interpretation also reveals that this statute has important constitutional implications if its reach is extended to political speech. (See Brief of Amicus Curiae.) This Court is therefore likewise constrained to construe the statute narrowly and strictly against affecting political speech. See Brown v. State, 868 N.E.2d 464, 469 (Ind. 2007); Low v. State, 580 N.E.2d 737, 740 (Ind.Ct.App. 1991).

The next section demonstrates that interpreting the term “message” to encompass commercial messages that promote goods or services—not political messages—is consistent with the Auto-Dialer statute. It is also consistent with this Court’s mandate to construe the ambiguous Auto-Dialer statute narrowly and strictly in light of the penal and constitutional implications raised in this case.

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<sup>1</sup> That is particularly true given that Indiana does not maintain legislative histories of statutes. Other courts often rely upon legislative histories to inform them about legislative intent. The United States Supreme Court noted in Dixson v. United States, “As is often the case in matters of statutory interpretation, the language of [the statute]. . . . We must turn, therefore, to the legislative history of the [statute] to determine whether these materials clarify which of the proposed readings is consistent with Congress’ intent. If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.” 465 U.S. 482, 491 (1984). In our case, American Family is without the benefit of any legislative history or even a single court decision interpreting the scope of the Auto-Dialer law. Without that guidance, strict construction is even more important so that persons are not found liable under a criminal statute for which there are no guiding decisions providing forewarning of the statute’s broad sweep.

**II. When viewed in its entirety, the Auto-Dialer statute reveals that the type of messages sought to be regulated are commercial messages that promote goods or services, not political messages.**

The enabling legislation creating the Auto-Dialer law, the various provisions of the statute itself, the statutory context in which the Auto-Dialer Law is found, and the statute's interrelatedness to other statutes designed to protect Indiana consumers from deceptive commercial practices support the conclusion that the Auto-Dialer law does not apply to political messages, but instead applies to commercial messages that promote goods or services.

**A. The enabling legislation, the other provisions of the Auto-Dialer statute, and the statutory context in which the Auto-Dialer Law is found reveal the statute's focus is on commercial messages that promote goods or services, not political messages.**

The enabling legislation, the other provisions of the Auto-Dialer statute, and the statutory context in which the Auto-Dialer Law is found reveal the statute's focus is on commercial messages that promote goods or services, not political messages.

First, when enacting the Auto-Dialer Law, the General Assembly described it as "An Act to amend the Indiana Code concerning trade regulation." IND. PUB. L. No. 151-1988; *See* INDIANA GENERAL ASSEMBLY BILL DRAFTING MANUAL, [www.in.gov/legislative/session/manual/chap03/index.html](http://www.in.gov/legislative/session/manual/chap03/index.html), last visited May 12, 2008. Likewise, the Act is found within the portion of the Indiana Code regulating consumer sales (Title 24, Article 5). The legislature's own characterization of the statute's purpose as regulating "trade" and the statutory context in which the Auto-Dialer Law is found offers further support for the conclusion that the Auto-Dialer Law was designed to restrict only commercial transactions, not political speech.

The Attorney General ignores where the General Assembly placed this statute within the Code. This omission is telling because "[i]n determining legislative intent, it is important to note where the statute at issue is located within the Indiana Code." Kohl v. Pennington, 846 N.E.2d

1036, 1047 (Ind.Ct.App. 2006) (internal citations omitted). Likewise, “when construing a statute, we may look to the titles and the headings of the statute and to the grammatical structure of the clause or sentence in issue.” Foster v. Evergreen Healthcare, Inc., 716 N.E.2d 19, 26 (Ind.Ct.App. 1999).

Second, when explaining the statute’s requirement that a live operator obtain the subscriber’s consent before the message is delivered, the General Assembly provided that the operator must disclose the following: “(1) The name of the business, firm, organization, association, partnership, or entity for which the message is being made; (2) The purpose of the message; (3) *The identity or kinds of goods or services the message is promoting*; (4) If applicable, the fact that the message intends to solicit payment or the commitment of funds.” IND. CODE § 24-5-14-7 (emphasis added).

This disclosure requirement presumes that the “messages” regulated by the Act involve goods or services because a live operator is required to identify the goods or services the recorded message will promote. A live operator introducing a recorded political message could not comply with this requirement because political messages do not promote “goods or services.”

The Attorney General argues that “if the message does not promote goods or services, an operator would simply omit that inapplicable part of the disclosure.” (State’s Brief at 13.) As explained below, the Act itself contradicts the Attorney General’s argument, as it contemplates that a disclosure of what goods or services the message promotes is *always* applicable.

As noted above, Section Seven contains four disclosure requirements. The General Assembly expressly contemplated that only the *fourth* requirement—disclosures concerning monetary solicitations—would not always apply, and it therefore qualified subsection four with the words, “If applicable.” IND. CODE § 24-5-14-7(4). By failing to use the words “if

applicable” with the other sections, the General Assembly signaled that such disclosures are always intended and necessary.

Because the disclosure required by subsection three is not applicable to political messages, the Act does not extend to such messages. Moreover, construing the Auto-Dialer law so that it applies only to commercial solicitation calls also avoids this court’s need to adjudicate thorny constitutional questions. *See Ajabu v. State*, 693 N.E.2d 921, 938 (Ind. 1998) (“When possible, statutory provisions should be construed in such a way as to avoid unconstitutionality rather than simply void them on the basis of an interpretation which renders them constitutionally infirm.”).

The enabling legislation, the other provisions of the Auto-Dialer statute, and the statutory context in which the Auto-Dialer law is found reveal the statute’s focus is on commercial messages that promote goods or services, not political messages.

**B. The Auto-Dialer statute’s invocation of other statutes designed to protect Indiana consumers from deceptive commercial practices supports the conclusion that the Auto-Dialer law does not apply to political speech.**

In addition to the criminal penalties at issue in the Auto-Dialer statute, the Act also provides that “A caller who violates this chapter commits a deceptive act that is actionable by the attorney general under IC 24-5-0.5-4 and that is subject to the remedies and penalties [of that section].” IND. CODE. § 24-5-14-13. By characterizing violations of the Auto-Dialer statute as “deceptive acts” under the Deceptive Practices Act, the General Assembly again evidenced its intent that the Auto-Dialer statute applies to commercial transactions involving goods or services.

The purpose of the “Deceptive Practices Act” referenced in the Auto-Dialer statute is to “protect consumers from suppliers who commit deceptive and unconscionable sales acts.” IND.

CODE § 24-5-0.5-1. Likewise, as shown below, every single one of the nineteen separate categories of deceptive acts identified in that statute involves some form of commercial transaction:

The following acts . . . are deceptive acts:

- (1) That such subject of a consumer transaction has sponsorship, approval, performance, characteristics, accessories, uses, or benefits it does not have which the supplier knows or should reasonably know it does not have.
- (2) That such subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not and if the supplier knows or should reasonably know that it is not.
- (3) That such subject of a consumer transaction is new or unused, if it is not and if the supplier knows or should reasonably know that it is not.
- (4) That such subject of a consumer transaction will be supplied to the public in greater quantity than the supplier intends or reasonably expects.
- (5) That replacement or repair constituting the subject of a consumer transaction is needed, if it is not and if the supplier knows or should reasonably know that it is not.
- (6) That a specific price advantage exists as to such subject of a consumer transaction, if it does not and if the supplier knows or should reasonably know that it does not.
- (7) That the supplier has a sponsorship, approval, or affiliation in such consumer transaction the supplier does not have, and which the supplier knows or should reasonably know that the supplier does not have.
- (8) That such consumer transaction involves or does not involve a warranty, a disclaimer of warranties, or other rights, remedies, or obligations, if the representation is false and if the supplier knows or should reasonably know that the representation is false.
- (9) That the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a sale or lease in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit, rebate, or discount is contingent upon the occurrence of an event subsequent to the time the consumer agrees to the purchase or lease.
- (10) That the supplier is able to deliver or complete the subject of the consumer transaction within a stated period of time, when the supplier knows or should reasonably know the supplier could not. If no time period has been

stated by the supplier, there is a presumption that the supplier has represented that the supplier will deliver or complete the subject of the consumer transaction within a reasonable time, according to the course of dealing or the usage of the trade.

- (11) That the consumer will be able to purchase the subject of the consumer transaction as advertised by the supplier, if the supplier does not intend to sell it.
- (12) That the replacement or repair constituting the subject of a consumer transaction can be made by the supplier for the estimate the supplier gives a customer for the replacement or repair, if the specified work is completed and:
  - (A) the cost exceeds the estimate by an amount equal to or greater than ten percent (10%) of the estimate;
  - (B) the supplier did not obtain written permission from the customer to authorize the supplier to complete the work even if the cost would exceed the amounts specified in clause (A);
  - (C) the total cost for services and parts for a single transaction is more than seven hundred fifty dollars (\$750); and
  - (D) the supplier knew or reasonably should have known that the cost would exceed the estimate in the amounts specified in clause (A).
- (13) That the replacement or repair constituting the subject of a consumer transaction is needed, and that the supplier disposes of the part repaired or replaced earlier than seventy-two (72) hours after both:
  - (A) the customer has been notified that the work has been completed; and
  - (B) the part repaired or replaced has been made available for examination upon the request of the customer.
- (14) Engaging in the replacement or repair of the subject of a consumer transaction if the consumer has not authorized the replacement or repair, and if the supplier knows or should reasonably know that it is not authorized.
- (15) The act of misrepresenting the geographic location of the supplier by listing a fictitious business name or an assumed business name (as described in IC 23-15-1) in a local telephone directory if:
  - (A) the name misrepresents the supplier's geographic location;

- (B) the listing fails to identify the locality and state of the supplier's business;
  - (C) calls to the local telephone number are routinely forwarded or otherwise transferred to a supplier's business location that is outside the calling area covered by the local telephone directory; and
  - (D) the supplier's business location is located in a county that is not contiguous to a county in the calling area covered by the local telephone directory.
- (16) The act of listing a fictitious business name or assumed business name (as described in IC 23-15-1) in a directory assistance database if:
- (A) the name misrepresents the supplier's geographic location;
  - (B) calls to the local telephone number are routinely forwarded or otherwise transferred to a supplier's business location that is outside the local calling area; and
  - (C) the supplier's business location is located in a county that is not contiguous to a county in the local calling area.
- (17) That the supplier violated IC 24-3-4 concerning cigarettes for import or export.
- (18) That a supplier knowingly sells or resells a product to a consumer if the product has been recalled, whether by the order of a court or a regulatory body, or voluntarily by the manufacturer, distributor, or retailer unless the product has been repaired or modified to correct the defect that was the subject of the recall.
- (19) That the supplier violated 47 U.S.C. 227, including any rules or regulations issued under 47 U.S.C. 227.

IND. CODE § 24-5-0.5-3.

Similarly, the remedies provision found in the Deceptive Practices Act and incorporated into the Auto-Dialer statute demonstrates the General Assembly's intent to regulate only commercial transactions. The remedies statute speaks in terms such as "suppliers," "goods," "real estate transactions," and "offers to cure." *See* IND. CODE § 24-5-0.5-4. Those are terms relevant to commercial transactions involving goods or services, not to the offerings of political speech the Attorney General is now seeking regulate.

The Auto-Dialer law’s incorporation of provisions from other trade regulations designed to protect Indiana consumers from deceptive practices involving the sale of goods or services demonstrates that the Auto-Dialer statute does not extend to political messages. “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole,” and even a facially unambiguous statute can be rendered ambiguous by its interaction with and its relation to other statutes. Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); Tinder v. Music Operating, Inc., 142 N.E.2d 610, 620 (Ind. 1957); 2 SUTHERLAND STATUTORY CONSTRUCTION § 46:04, p. 153 (2000).

By treating violations of the Auto-Dialer statute as “deceptive acts” under the Deceptive Practices Act, and by relying on the Deceptive Practices Act in order to fashion an appropriate remedy, the General Assembly’s intent that the Auto-Dialer statute apply to only commercial transactions involving goods or services is once again made evident.

**C. The exceptions contained in the statute do not affect the statute’s focus on commercial messages.**

The Auto-Dialer statute, on its face, exempts certain entities from its prohibitions. *See* IND. CODE § 24-5-14-5(a). The Attorney General contends American Family’s interpretation renders these exceptions “superfluous.” (State’s Brief at 11-12.) The Attorney General is wrong.

In particular, the restrictions in the Auto-Dialer statute do not “apply to messages: (1) From school districts to students, parents, or employees; . . . or (3) Advising employees of work schedules.” IND. CODE § 24-5-14-5(a).<sup>2</sup> As described below, there are circumstances in which

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<sup>2</sup> Subsection (2) exempts messages to subscribers with whom the caller has an existing “business relationship.” IND. CODE § 24-5-14-5(a)(2). The Attorney General does not argue that this category could not involve commercial messages.

the “messages” sent from school districts and the “messages” sent to employees advising them of work schedules *would* constitute commercial messages that promote goods or services— recognition expressly made by the legislature itself in another section of this statute. Rather than being superfluous, these exceptions serve the purpose for which they were intended.

First, the legislature *itself* explicitly recognized that “messages” sent from school districts and “messages” sent to employees advising them of work schedules could involve commercial messages that promote goods or services. Section Eight of the Auto-Dialer statute contains a provision restricting the use of automatic dialing-announcing devices “for commercial telephone solicitation” to the time period between 9 a.m. and 8 p.m. IND. CODE. § 24-5-14-8(b). When enacting this section dealing with “commercial telephone solicitation,” the legislature found it necessary to expressly exempt messages from school districts and messages advising employees of work schedules from this prohibition. *See* 465 U.S. 482, 491 (1984).

This is an express recognition that the General Assembly itself believed these exempted “messages” could involve “commercial telephone solicitation.” To borrow from the Attorney General’s Brief, were this not the case, this exemption in Section Eight would be “superfluous.”

A more concrete example of why the exemption is not rendered superfluous by American Family’s interpretation is the fact that the statute currently exempts fundraising messages from schools. Fundraising messages promoting goods or services would otherwise fall squarely within the ambit of commercial messages under the Act, yet these messages have been exempted by operation of section 24-5-14-5(a).

Likewise, messages advising employees of work schedules can involve a commercial transactions when an employer provides job placement services for employees. For example, an employment service such as Manpower, Inc. may schedule temporary employees to work at a factory. Manpower is thereby providing a commercial service to both the factory owners and the

temporary employees, by matching those who want work with those who need their services. By informing temporary workers of their schedules, Manpower is promoting its services. Again, although these messages would otherwise come within the reach of the restrictions on commercial messages in the Auto-Dialer law, they have been exempted by operation of section 24-5-14-5(a).

The Attorney General is incorrect when he contends the exceptions contained in the statute do not reflect or support the statute's focus on commercial messages that promote goods or services.

**III. The Attorney General cannot acknowledge that he is attempting to regulate political speech and then complain that notice pleading requires reversal.**

The Attorney General admits that the calls at issue in our case were “calls distributing political messages.” (State’s Brief at 7.) The Attorney General therefore squarely places before this Court a question raised by implication in the motion to dismiss—whether the Auto-Dialer statute is drafted so as to allow the Attorney General to regulate political speech.

Having now squarely presented it, he cannot complain that the rules of notice pleading prevent this Court from reaching the issue. *See, e.g., Irish v. Woods*, 864 N.E.2d 1117, 1120 (Ind.Ct.App. 2007); *Tregenza v. Great American Communications, Co.*, 12 F.3d 717, 718 (7th Cir. 1994).

**CONCLUSION**

The restrictions in the Auto-Dialer statute do not apply to political messages. The enabling legislation, the statute's text, the statutory context in which the Auto-Dialer Law is found, and the statute's interrelationship with other consumer sales laws demonstrate the statute applies to messages involving commercial transactions that promote goods or services.

Respectfully submitted,

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**VERIFIED STATEMENT OF WORD COUNT IN BRIEF OF APPELLEE  
AMERICAN FAMILY VOICES, INC.**

Pursuant to Appellate Rule 44(F), the undersigned counsel hereby verifies that the foregoing contains 5240 words in compliance with Appellate Rule 44(E), exclusive of the items listed in Appellate Rule 44(C), as counted by the word processing system used to prepare the Brief, MS Word XP.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

Service of the foregoing was made by placing a copy of the same into the United States

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