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**IN THE SUPREME COURT OF INDIANA**

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No. 31S00-0803-CV-139

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Court of Appeals No. 31A05-0803-CV-119

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STATE OF INDIANA,	)	Appeal from the Harrison Circuit Court
	)	
Appellant/Plaintiff,	)	
	)	
vs.	)	Trial Court Case No.:
	)	31C01-0609-MI-78
AMERICAN FAMILY VOICES, INC.,	)	
JIM GONZALEZ, and JOHN DOES 2-10,	)	
	)	Hon. Larry R. Blanton,
Appellees/Defendants.	)	Special Judge

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**BRIEF OF APPELLEE JIM GONZALEZ**

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## **STATEMENT OF SUPREME COURT JURISDICTION**

Appellee-Defendant Jim Gonzalez (“Gonzalez”) agrees with the Statement of Supreme Court Jurisdiction as set forth in the Brief of Appellant submitted by Appellant-Plaintiff the State of Indiana (“Attorney General”).

## **STATEMENT OF THE ISSUE**

Whether the Attorney General’s Amended Complaint fails to state a claim upon which relief can be granted.

## **STATEMENT OF THE CASE**

On September 25, 2006, the Attorney General filed a Verified Complaint against American Family Voices, Inc. (“AFV”) and John Does Nos. 1-10. Appellee’s App. 1-3. AFV’s Verified Complaint alleged the following:

12. By using or connecting to one or more telephone lines in Indiana an automatic dialing-announcing device as described in paragraphs 5 and 6, and not obtaining the subscribers’ consent, as described in paragraphs 9 and 10, Defendants violated Ind. Code §24-5-14-5(b).

Appellee’s App. 2. On September 25, 2006, the Attorney General also filed a Motion for Preliminary Injunction, seeking to enjoin AFV from the following acts:

- a. Making or causing to be made telephone calls via an automated dialing-announcing device, as defined by Ind. Code § 24-5-14-1, and disseminating a prerecorded voice message without first obtaining the knowing and voluntary request, consent, permission or authorization of the subscriber, or preceding said message by a live operator who obtains the subscriber’s consent before the message is delivered, in compliance with Ind. Code § 24-5-14-5(b); and
- b. All other just and proper relief.

Appellee’s App. 5-6. On October 19, 2006, the trial court denied the Attorney General’s Motion for Preliminary Injunction. Appellee’s App. 7. On September 20, 2007, the

Attorney General filed an Amended Complaint that named Gonzalez as John Doe No. 1. Appellant's App. 11. The Attorney General's Amended Complaint alleged that AFV and Gonzalez violated Ind. Code § 24-5-14-5(b). Appellant's App. 12.

On November 16, 2007, Gonzalez filed his Motion to Dismiss. Appellant's App. 22-34. Gonzalez's Motion to dismiss argued the following:

Gonzalez's Motion to Dismiss should be granted because Indiana's Automated Dialing Machine Act, and the liability measures relied upon by the Attorney General for the State of Indiana [], were intended for *consumer* transaction telephone calls. The Verified Amended Complaint for Injunction, Civil Penalties, Reasonable Attorney Fees and Costs [] filed by the Attorney General on September 20, 2007 fails to allege that *consumer* transaction telephone calls are at issue. For these reasons, the Attorney General has failed "to state a claim upon which relief can be granted . . .", and its' Amended Complaint should be dismissed. Ind. Tr. R. 12(B)(6).

Appellant's App. 22. On February 13, 2008, the trial court heard argument on Gonzalez's Motion to Dismiss. Appellant's App. 62-116. At the conclusion of oral argument the trial court stated: "my reading of the statute is that it deals with commercial speech." Appellant's App. 115. In response to the trial court, the Attorney General stated "we don't intend to amend the complaint."<sup>1</sup> Appellant's App. 115. The trial court orally granted Gonzalez's Motion to Dismiss. Appellant's App. 115.

On February 22, 2008, the trial court entered a written order that granted Gonzalez's Motion to Dismiss. Appellant's App. 8-10. The trial court's written order read in part as follows:

9. Gonzalez's Motion to Dismiss was orally granted by the Court on February 13, 2008 hearing. At such hearing, and in light of the

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<sup>1</sup> For clarity, Gonzalez notes that the transcript from the Motion to Dismiss hearing erroneously denotes Ms. Judkins (attorney for AFV) instead of Ms. Sweeney (attorney for Attorney General) beginning at Appellant's Appendix 93 and continuing through Appellant's Appendix 115.

Court's ruling, the Court inquired whether the Attorney General would be amending its Amended Complaint. The Attorney General indicated it would not be amending its Amended Complaint.

WHEREFORE, the Court now GRANTS Gonzalez's Motion to Dismiss pursuant to Indiana Trial Rule 12(B)(6).

FURTHER, pursuant to Indiana Trial Rules 12(B) and 15(A) the Attorney General has ten (10) days from the service of notice of this ORDER to amend its Amended Complaint.

Appellant's App. 9-10. The Attorney General did not amend its Amended Complaint.

On February 27, 2008, the Attorney General filed its notice of appeal. Appellant's App. 7.<sup>2</sup>

### **STATEMENT OF FACTS**

Title 24 of the Indiana Code is entitled "Trade Regulation." Article 5 of Title 24 of the Indiana Code is entitled "Consumer Sales." Chapter 24-5-14 of the Indiana Code is entitled "Regulation of Automatic Dialing Machines." The Attorney General's Amended Complaint alleges that "[b]y using or connecting to one or more telephone lines in Indiana an automatic dialing-announcing device . . . and not obtaining the subscribers' consent . . . Defendants [AFV and Gonzalez] violated Ind. Code § 24-5-14-5(b)." Appellant's App. 12. The Attorney General's Amended Complaint seeks to enjoin, fine, and recoup its costs and attorney fees from AFV and Gonzalez based upon the provisions of Indiana Code §§ 24-5-14-5(b), 24-5-14-13, and 24-5-0.5-4(c) and (g). Appellant's App. 13.

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<sup>2</sup> Given that the Attorney General's appeal is taken from the trial court's Order granting Gonzalez's Motion to Dismiss under Indiana Trial Rule 12(B)(6), Gonzalez has only raised the Attorney General's failure to state a claim. As such, Gonzalez has yet to answer the Attorney General's Amended Complaint and no assertion in any brief filed with this Court should be construed to infer how he intends to answer should the Attorney General's Amended Complaint be found to have stated an actionable claim against him.

The Indiana Code does not proscribe all phone calls made by an automatic dialing-announcing device. Indiana Code §24-5-14-5 reads as follows:

(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.

Indiana Code § 24-5-14-5(b)(1) and (2) provides additional guidance to subscribers who "consent" to the receipt of messages provided by an automatic dialing-announcing device.

(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.

A subscriber's consent may be obtained as follows:

When a message is immediately preceded by a live operator, the operator must, at the outset of the message, 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. The Indiana Code is silent regarding how to obtain the consent of a subscriber who receives a telephone call from an automatic dialing-announcing device that is not preceded by a live operator. I.C. § 24-5-14-5(b)(1).

The Indiana Code specifically lists certain entities to which a caller is prohibited from making a telephone call by way of an automatic dialing-announcing device.

A caller may not use an automatic dialing-announcing device to make a telephone call to the following:

- (1) A hospital (as defined in IC 16-18-2-179(b)).
- (2) An ambulatory outpatient surgical center (as defined in IC 16-18-2-14).
- (3) A health facility (as defined in IC 16-18-2-167).
- (4) An emergency medical services facility (as defined in IC 16-18-2-111).
- (5) A business providing emergency ambulance services (as defined in IC 16-18-2-107).
- (6) A state institution (as defined in IC 12-7-2-184).
- (7) A private mental health institution licensed under IC 12-25.
- (8) A residential facility (as defined in IC 12-7-2-165).
- (9) A law enforcement agency (as defined in IC 10-13-3-10).
- (10) A fire department (as defined in IC 36-8-17-2).

I.C. § 24-5-14-12. The Attorney General's Amended Complaint does not allege that Gonzalez used an automatic dialing-announcing device to make a telephone call to an entity listed under Indiana Code § 24-5-14-12. Appellant's App. 11-13.

Indiana Code § 24-5-14 *et seq.* does not contain remedy or penalty provisions.

Rather, Indiana Code § 24-5-14-13 provides as follows:

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 under IC 24-5-0.5-4(c), IC 24-5-0.5-4(d), IC 24-5-0.5-4(f), IC 24-5-0.5-4(g), and IC 24-5-0.5-8.

The Attorney General's Amended Complaint relies on the following remedy and penalty provisions:

(c) The attorney general may bring an action to enjoin a deceptive act.

.....

(3) order the supplier to pay to the state the reasonable costs of the attorney general's investigation and prosecution related to the action; and

.....

(g) If a court finds any person has knowingly violated section 3 or 10 of this chapter, other than section 3(a)(19) of this chapter, the attorney general, in an action pursuant to subsection (c), may recover from the person on behalf of the state a civil penalty of a fine not exceeding five thousand dollars (\$5,000) per violation.

I.C. §24-5-0.5-4(c)(3) and (g). These remedy and penalty provisions are found in Chapter 24-5-0.5 of the Indiana Code, entitled “Deceptive Consumer Sales.”

Section 24-5-0.5-1 of the Indiana Code reads as follows:

(a) This chapter shall be liberally construed and applied to promote its purposes and policies:

(b) The purposes and policies of this chapter are to:

- (1) simplify, clarify, and modernize the law governing deceptive and unconscionable consumer sales practices;
- (2) protect consumers from suppliers who commit deceptive and unconscionable sales acts;
- (3) encourage the development of fair consumer sales practices.

The Attorney General’s Amended Complaint does not allege that Gonzalez used an automatic dialing-announcing device to make a telephone call concerning sales.

Appellant’s App. 11-13.

### **SUMMARY OF THE ARGUMENT**

The Indiana legislature intended § 24-5-14-5(b) to prohibit *commercial or consumer* telephone calls made by an automatic dialing-announcing device that were not excepted from such prohibition or otherwise consented to by the subscriber.

The specific exceptions to the prohibition of automatic dialing-announcing device calls listed in Indiana Code § 24-5-14-5(a), the “consent” exceptions of § 24-5-14-5(b), and the list of specific entities to which all automatic dialing-announcing device calls are prohibited under § 24-5-14-12, demonstrate that it was not the intent of the legislature to

prohibit *all* automatic dialing-announcing device telephone calls regardless of content. A requisite to obtaining a subscriber's consent to receive an automatic dialing-announcing device message is the disclosure by a live operator of the "goods or services" a telephone message is promoting. I.C. § 24-5-14-7(3). The nature of this requisite disclosure and the remedy provisions of § 24-5-0.5-4, which contains additional consumer sales language, support the conclusion that § 24-5-14-5(b) was not intended as a prohibition against *all* messages delivered by an automatic dialing-announcing device, but rather is directed at commercial or consumer sales messages. This seems clear.

At *worst*, the intended scope of Indiana Code § 24-5-14-5(b) is ambiguous. A finding of ambiguity would necessitate judicial interpretation of the provisions of Indiana Code §§ 24-5-14 *et seq.* and 24-5-0.5-4 to ascertain the intent of the legislature. Upon interpretation, including consideration of the objects and purposes of Chapter 14's liability and remedy sections, as well as the effects and repercussions of the Attorney General's desired interpretation, it is again clear that the Indiana legislature intended § 24-5-14 *et seq.* to be applied to *commercial* or *consumer* telephone calls made by an automatic dialing-announcing device.

Indiana Code § 24-5-14-10 further provides that "[a] caller who fails to comply with this chapter commits a Class C misdemeanor[.]" dictating that this Court review Indiana Code § 24-5-14 *et seq.* and § 24-5-0.5-4 with strict scrutiny against the Attorney General. Under strict scrutiny, §§ 24-5-14-5(b) and 24-5-0.5-4 fail to provide fair warning to Gonzalez concerning his potential liability or penalty *if* he used an automated dialing-announcing device to deliver a non-commercial telephone message to Indiana subscribers.

## **STANDARD OF REVIEW**

A motion to dismiss for failure to state a claim tests the legal sufficiency of the claim, not the facts supporting it. *Charter One Mortg. Corp. v. Condra*, 865 N.E.2d 602, 604 (Ind. 2007). This Court's review of the trial court's grant of Gonzalez's Motion to Dismiss is conducted *de novo*. *Id.* An Indiana appellate court will affirm a motion to dismiss under Indiana Trial Rule 12(b)(6) when a complaint states a set of facts which, even if true, would not support the relief requested in the complaint. *Hosler v. Caterpillar, Inc.*, 710 N.E.2d 193, 196 (Ind. Ct. App. 1999).

## **ARGUMENT**

### **Indiana Code § 24-5-14 et seq. and the remedy provisions of Indiana Code § 24-5-0.5-4 are intended to address commercial callers and consumer sales practices.**

Indiana Code § 24-5-14 *et seq.* clearly and unambiguously prohibits automatic dialing-announcing device telephone calls delivering *consumer sales messages* without the consent of the subscriber and further prohibits those automated dialing-announcing device telephone calls delivered to entities specifically delineated under Indiana Code § 24-5-14-12. At *worst*, Indiana Code § 24-5-14-5(b) is ambiguous concerning the type and scope of speech the legislature intended to prohibit beyond consumer sales messages delivered by automated dialing-announcing device telephone calls. However, upon statutory interpretation, with consideration of the objects and purposes of Indiana Code §§ 24-5-14 *et seq.* and 24-5-0.5-4, it remains clear that the Indiana legislature intended to prohibit *commercial callers* and *consumer sales practices*. This result avoids any unconstitutional intention.

### A. Statutory Construction.

A basic principle of statutory construction is that in construing a statute the intent of the legislature must be given effect. *Coons by Coons v. Kaiser*, 567 N.E.2d 851, 852 (Ind. Ct. App. 1991). To this end, the sections of an act are read together so that no part is rendered meaningless if it can be harmonized with the remainder of the statute.

*Heidbreder, Inc. v. Board of Zoning Appeals of City of Crown Point*, 858 N.E.2d 199, 200 (Ind. Ct. App. 2006). It is also presumed that the legislature intended language in a statute to be applied logically and in a manner that will not produce an “*unjust*” or “*absurd*” result. *Id.* (emphasis added).

The interpretation of a statute is a legal question. *Golden Rule Ins. Co. v. McCarty*, 755 N.E.2d 1104, 1106-07 (Ind. Ct. App. 2001). If a statute is unambiguous, the courts may not interpret it, but must give the statute its clear and plain meaning. *Elmer Buchta Trucking, Inc. v. Stanley*, 744 N.E.2d 939, 942 (Ind. 2001). “If a statute is ambiguous, however, we must ascertain the legislature's intent and interpret the statute so as to effectuate that intent. A statute is ambiguous where it is susceptible to more than one interpretation.” *Id.*

If interpretation is necessary, the express language of the statute controls and the rules of statutory construction apply. *Bushong v. Williamson*, 790 N.E.2d 467, 471 (Ind. 2003). We are required to determine, give effect to, and implement the legislative intent underlying the statute and to construe the statute in such a way as to prevent absurdity and hardship and to favor public convenience. *Id.* “*In so doing, we should consider the objects and purposes of the statute as well as the effects and repercussions*[<sup>3</sup>] *of such a*

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<sup>3</sup> Given that this is an appeal from a Motion to Dismiss under Indiana Trial Rule 12(B)(6), many of the “effects and repercussions” have not yet been litigated and therefore are not addressed in any detail in this brief. However, a preview of some of the potential “effects and repercussions” is apparent from the issues raised in the *amicus curiae* brief.

*statute.*” *Id.* The legislative intent governing the provision as a whole prevails over the strict literal meaning of any word or term. *Id.*

*Med. Assurance of Ind. v. McCarty*, 808 N.E.2d 737, 741 (Ind. Ct. App. 2004) (emphasis added). “The purpose of any construction [of a statute] is to ascertain the intent of Legislature. ‘Liberal’ or ‘narrow’ may characterize the attitude of approach but the final question is whether . . . the conclusion reached is consistent with that which the Legislature reasonably and probably have (sic) intended.” *Nash Engineering Co. v. Marcy Realty Corp., Inc.*, 54 N.E.2d 263, 269-70 (Ind. 1944).

**B. The Indiana legislature intended the liability provisions of Indiana Code § 24-5-14 et seq. to prohibit certain automatic dialing-announcing device telephone calls from delivering consumer or commercial messages.**

The Attorney General’s Amended Complaint does not describe the content of the automatic dialing-announcing device telephone calls allegedly made by Gonzalez. Appellant’s App. 11-13. Rather, the Attorney General’s Amended Complaint chooses simply to assert that Gonzalez breached Indiana Code §24-5-14-5(b) as follows:

13. By using or connecting to one or more telephone lines in Indiana an automatic dialing-announcing device . . . , and not obtaining the subscribers’ *consent*, . . . , [Gonzalez] violated Ind. Code §24-5-14-5(b)

Appellant’s App. 12 (emphasis added).<sup>4</sup> Indiana Code § 24-5-14-5(b) in turn reads as follows:

(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.

(Emphasis added).

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<sup>4</sup> The Attorney General chose not to amend its Amended Complaint.

As repeatedly acknowledged by the Attorney General, the language of Indiana Code §24-5-14 *et seq.* is clearly not intended to proscribe *all* automatic dialing-announcing device calls.

The language of Ind. Code 24-5-14-5(b) is clear and unambiguous. It prohibits *most* telephone calls made by automatic dialing-announcing devices.

Appellant's App. 41 ("Memorandum in Opposition to Jim Gonzalez's Motion to Dismiss" (emphasis added)). On appeal the Attorney General stated its reading of Indiana Code §24-5-14 *et seq.* somewhat differently:

The Indiana Autodialer Law, Ind. Code § 24-5-14 *et seq.* unambiguously prohibits *all* callers – *with exceptions not applicable here* – from disseminating pre-recorded telephone calls by means of an autodialer without prior consent of the recipients.

Appellant's Br. 5 (emphasis added in bold). Nevertheless, it would appear that both Gonzalez and the Attorney General (despite the Attorney General's conflicting emphasis placed on such phrases as "*all* callers" (Appellant's Brief 5) and "*all* telephone calls" (Appellant's Brief 10)) read Indiana Code §24-5-14-5 as providing exceptions to any legislative prohibition on automatic dialing-announcing device telephone calls.

Accordingly, Gonzalez begins his review of the liability sections of Indiana Code § 24-5-14 *et seq.* much as the legislature chose to order Chapter 14, with the automatic dialing-announcing device calls the legislature *did not* intend to prohibit being discussed first. Here, Gonzalez and the Attorney General disagree on the number and scope of the limitations that the legislature placed on any prohibition of automatic dialing-announcing devices. Specifically, Gonzalez reads Indiana Code §24-5-14-5 as providing at least three categories of automatic dialing-announcing device calls which are not prohibited:

1) the exceptions listed under Indiana Code § 24-5-14-5(a) for school districts, callers and

subscribers with a current business or personal relationship, and employers advising their employees of their work schedules; 2) the exception for calls “knowingly or voluntarily requested, consented to, permitted, or authorized . . .” under Indiana Code § 24-5-14-5(b)(1); and 3) the exception for messages preceded by a live operator who obtains the caller’s consent.

Despite these *three* exceptions, the Attorney General emphatically asserts:

The only limitations on the General Assembly’s general prohibition of autodialed calls that deliver pre-recorded messages are contained in Indiana Code § 24-5-14-5(a).

Appellant’s Br. 11. The Attorney General chooses to wholly ignore the consent exceptions contained in Indiana Code § 24-5-14-5(b)(1) and (2).

By enacting Indiana Code §24-5-14-5(b)(1) and (2) the Indiana legislature also permitted callers to *consent* to the receipt of certain messages, despite their delivery by an automatic dialing-announcing device. The subject matter of the messages intended to be addressed in these subscriber-consent scenarios plainly conveys the type of speech that our legislature sought to affect under Indiana Code § 24-5-14 *et seq.*

When a message is immediately preceded by a live operator, the operator must, at the outset of the message, 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.

I.C. § 24-5-14-7 (emphasis added). Despite the dictates of Indiana Code §24-5-14-7, the Attorney General argues the following:

. . . if the message does not promote goods or services, an operator would simply omit that inapplicable part of the disclosure. There would be no

contravention of the disclosure requirements, because there are no goods or services to disclose. And whatever the ambiguities of the disclosure requirements, they do not limit or call into question the plain text of the general prohibition against *all* autodialed calls delivering pre-recorded messages.

Appellant's Br. 13. The legislature would not have drafted this section beginning with "the operator must" had it intended anything but compliance with the requisite disclosures to follow. I.C. § 24-5-14-7. By requiring the disclosure of "goods or services," prior to obtaining a subscriber's consent, this section makes clear that the legislature intended § 24-5-14-5(b) to be applied to the *commercial* caller or the *consumer* related message.

To apply the requirements of Indiana Code § 24-5-14-7 to the non-commercial caller or non-consumer message is to stretch the section beyond logic. *See Heidbreder, Inc.*, 858 N.E.2d at 200 (holding in part it that it is presumed that the legislature intended language in a statute to be applied logically and in a manner that will not produce an "unjust" or "absurd" result). Is it reasonable to further believe that our legislature intended to create *consent exceptions* under Indiana Code § 24-5-14-5(b) for commercial or consumer automatic dialing-announcing device calls but to wholly ban the same mechanism from delivering political speech?<sup>5</sup> Or, that a citizen was to guess whether the Attorney General would agree he could skip a step under Indiana Code § 24-5-14-7?

Indiana Code § 24-5-14-8 addresses time restrictions on a caller's use of an automatic dialing-announcing device "for commercial telephone solicitation" as well as addresses the non-application of these time restraints to automatic dialing-announcing device calls between those entities listed in § 24-5-14-5(a). Again, is it reasonable to

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<sup>5</sup> Any potential state or federal constitutional issues raised by such a broad ban have not yet been litigated by Gonzalez. This should not be necessary.

believe that our legislature intended to simply limit the hours of a consented-to commercial telephone solicitation delivered by an automatic dialing-announcing device, but to wholly ban that same mechanism from delivering the political messages now referenced by the Attorney General?

Had the Indiana legislature intended to prohibit *all* calls utilizing an automatic dialing machine, regardless of content, it would not have set about creating the above-discussed exceptions nor needed to specifically proscribe automated calls to specific entities as listed in Indiana Code § 24-5-14-12:

A caller may not use an automatic dialing-announcing device to make a telephone call to the following:

- (1) A hospital (as defined in IC 16-18-2-179(b)).
- (2) An ambulatory outpatient surgical center (as defined in IC 16-18-2-14).
- (3) A health facility (as defined in IC 16-18-2-167).
- (4) An emergency medical services facility (as defined in IC 16-18-2-111).
- (5) A business providing emergency ambulance services (as defined in IC 16-18-2-107).
- (6) A state institution (as defined in IC 12-7-2-184).
- (7) A private mental health institution licensed under IC 12-25.
- (8) A residential facility (as defined in IC 12-7-2-165).
- (9) A law enforcement agency (as defined in IC 10-13-3-10).
- (10) A fire department (as defined in IC 36-8-17 -2).

The specific exceptions to the prohibition of automatic machine calls listed in Indiana Code § 24-5-14-5(a), the “consent” exceptions of § 24-5-14-5(b), and the list of specific entities to which all automatic calls are prohibited in the above Indiana Code §24-5-14-12, demonstrate that it was not the intent of the legislature to prohibit *all* automatic dialing-announcing device telephone calls based solely on the mechanism delivering the call.

The Attorney General appears to argue that because the legislature clearly defined the mechanism of an automatic dialing-announcing device that the prohibitions contained in § 24-5-14-5(b) are equally clear, unambiguous, and content neutral. However, the legislature enacted multiple sections within Chapter 14 which specifically address the content of messages. See I.C. § 24-5-14-3 (“Commercial Telephone Solicitation”), I.C. § 24-5-14-7 (addressing “goods and services”), § I.C. 24-5-14-8 (addressing “commercial telephone solicitation”), as well as the multiple references to “consumer” and “supplier” in the remedy provisions of I.C. § 24-5-0.5-4 (*supra.* at part “C.”).

Had the legislature intended to prohibit *all* automatic dialing-announcing device telephone calls, would it not have plainly said so at the commencement of Chapter 14? The Attorney General’s attempt to now stretch the parameters of Indiana Code § 24-5-14 *et seq.* to include prohibitions on political speech is not what the Indiana legislature “reasonably and probably have [sic] intended.” *Nash Engineering Co. v. Marcy Realty Corp., Inc.*, 54 N.E.2d at 70 (Ind. 1944).

**C. The Indiana legislature intended the remedy provisions of Indiana Code § 24-5-0.5-4 to address consumer or commercial transactions.**

There are no monetary remedies or penalties specifically provided for under Indiana Code § 24-5-14 *et seq.* Rather, Indiana Code § 24-5-14-13 ties liability under Chapter 24-5-14 to the remedy provisions contained in § 24-5-0.5-4 as follows.

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 under IC 24-5-0.5-4(c), IC 24-5-0.5-4(d), IC 24-5-0.5-4(f), IC 24-5-0.5-4(g), and IC 24-5-0.5-8.

(Emphasis added). Specifically, the Attorney General contends that the following remedies and penalties apply:

(c) The attorney general may bring an action to enjoin a deceptive act.

.....

(3) order the *supplier* to pay to the state the reasonable costs of the attorney general's investigation and prosecution related to the action; and

.....

(g) If a court finds any person has knowingly violated section 3 or 10 of this chapter, other than section 3(a)(19) of this chapter, the attorney general, in an action pursuant to subsection (c), may recover from the person on behalf of the state a civil penalty of a fine not exceeding five thousand dollars (\$5,000) per violation.

Ind. Code §24-5-0.5-4(c)(3) and (g) (emphasis added). A review of the provisions of Indiana Code Chapter 24-5-0.5 indicates that the remedies provided therein were intended by the Indiana legislature to apply to consumer sales transactions.

The remedies and penalties sought by the Attorney General are found in Chapter 24-5-0.5 of the Indiana Code, entitled “Deceptive Consumer Sales”, the construction and purposes of which are defined at § 24-5-0.5-1 as follows:

(a) This chapter shall be liberally construed and applied to promote its purposes and policies.

(b) The purposes and policies of this chapter are to:

(1) simplify, clarify, and modernize the law governing deceptive and unconscionable *consumer sales practices*;

(2) *protect consumers from suppliers* who commit deceptive and unconscionable sales acts; and

(3) encourage the *development of fair consumer sales practices*.

(Emphasis added).

The words “consumer” and “supplier” appear no less than a dozen times each amidst the provisions of Indiana Code § 24-5-0.5-4. Even within section 4(c)(3), which

the Attorney General looks to for recovery of its costs and attorney fees, commercial solicitation terms are present:

(c)(3) [The court may] order the *supplier* to pay the state the reasonable costs of the attorney general's investigation and prosecution related to the action; . . .

I.C. § 24-5-0.5-4(c)(3) (emphasis added). Similarly, Indiana Code § 24-5-0.5-4(g), which the Attorney General cites for possible recovery of civil fines, in turn references Indiana Code §§ 24-5-0.5-3 and 10 – which are plainly intended for trade regulation remedies as between *consumers* and *suppliers*. Consistent with what the Indiana legislature proscribed in regulating certain *commercial* telephone solicitations under Indiana Code § 24-5-14 *et seq.*, the Indiana legislature provided remedies to consumers and penalties against *commercial* solicitors under Indiana Code § 24-5-0.5-4. The Attorney General's Amended Complaint does not assert that Gonzalez sought to solicit a consumer for commercial purposes.

The Attorney General appears to assert that it was the Indiana legislature's intent to regulate a mechanism, namely, an "automatic dialing-announcing device" – no matter how used. Yet the language of the statutes defining the liability and relief which may stem from such a mechanism repeatedly set about defining the commercial *content* of the message and the *supplier- to- consumer relationship* of those disseminating and receiving the message. So much so, that it is clear the legislature intended Indiana Code § 24-5-14 *et seq.* to apply to commercial callers and consumer sales messages. The Attorney General has misconstrued the effect intended by the Indiana legislature and its Amended Complaint fails to plead a deceptive act actionable by the Attorney General under Indiana Code § 24-5-14-13. The Attorney General's effort to divorce liability provisions from

remedy provisions fails – it cannot turn a set of statutes aimed at one problem into something else.

*At worst*, there exists ambiguity related to the scope of speech the legislature intended to regulate or prohibit when delivered via an automatic dialing-announcing device. If such an ambiguity is found to exist, and interpretation of Indiana Code § 24-5-14 *et seq.* is necessary, then the Court should consider the objects and purposes of Chapter 14’s liability and remedy sections, as well as the effects and repercussions of construing the statute as the Attorney General desires.

Under this analysis, the Court has an “overriding obligation” to construe the law “in such a way as to render them constitutional if reasonably possible.” *Brownsburg Area Patrons Affecting Change v. Baldwin*, 714 N.E.2d 135, 141 (Ind. 1999). Any “[u]nconstitutional intention will not be attributed to the legislature if reasonably avoidable.” *Id.* (quoting *Price v. State*, 622 N.E.2d 954, 963 (Ind. 1993)). In the past, the Attorney General has not enforced statutes like these against political calls and specifically disavowed such application in litigation in the Seventh Circuit. *See National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 791 (7<sup>th</sup> Cir. 2006) (stating that the Attorney General had read an implied exception for political speech into Indiana’s do-not-call statute). For the reasons given in the *amicus curiae* brief, the Attorney General should not be allowed to begin regulating political speech now.

To state a claim under the liability provisions of § 24-5-14 *et seq.* the Attorney General’s Amended Complaint must either give notice of an automatic dialing-announcing device telephone call of a commercial or consumer nature that was not

consented to or identify an entity prohibited from being called under § 24-5-14-12. The Attorney General's Amended Complaint does neither.

**D. Indiana Code § 24-5-14-10 dictates strict construction.**

As shown, the objects and purposes of Indiana Code § 24-5-14 *et seq.* and § 24-5-0.5-4 support a consumer related or commercial transaction construction. Even if the Court still finds the at-issue statutes ambiguous, the rule of lenity requires Gonzalez's consumer/commercial construction. Indiana Code § 24-5-14-10 provides that "[a] caller who fails to comply with this chapter commits a Class C misdemeanor[,]" dictating that this Court review I.C. Chapter 24-5-14 with strict scrutiny against the Attorney General. *See Ellis v. State*, 736 N.E.2d 731, 737 (Ind. 2000) (quoting *Walker v. State*, 668 N.E.2d 243, 246 (Ind. 1996) (holding that the rule of lenity requires that "criminal statutes be strictly construed against the state."))

The rule of lenity is based upon the ideas that " 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed' " and the idea that legislatures, not courts, should define criminal activity. *United States v. Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 522, 30 L. Ed. 2d 488, 496-97 (1971) (quoting *McBoyle v. United States*, 283 U.S. 25, 27, 51 S. Ct. 340, 341, 75 L. Ed. 816, 818 (1931)). The result of these principles is the strict construction of penal statutes. *See Healthscript, Inc. v. State*, 770 N.E.2d 810, 815-16 (Ind. 2002); *Ellis v. State*, 736 N.E.2d 731, 737 (Ind. 2000).

On appeal, the Attorney General maintains the following argument:

Even if the Court finds the statute ambiguous, "[t]he construction of a penal statute should not be unduly technical, arbitrary, severe, artificial or narrow. In this regard, while penal statutes are to be strictly construed, they need not be given unnecessarily narrow meaning in

disregard of the obvious legislative purpose and intent . . . .” *B.K.C. v. State*, 781 N.E.2d 1157, 1167-68 (Ind. Ct. App. 2003).

The General Assembly clearly intended to prohibit callers from disturbing Indiana residents with repeated and annoying pre-recorded telephone calls.

Appellant’s Brief 15. As to the political calls the Attorney General *now* seeks to include within the prohibitions of Indiana Code § 24-5-14-5(b), the Indiana legislature’s “purpose and intent” as to the prohibition of any non-commercial calls made via an automatic dialing-announcing device remains anything but “obvious” and Gonzalez should not be made to answer (by misdemeanor, enjoinder, fine or literally by the filing of a responsive pleading (an *answer*)) for the Attorney General’s stretched construction of the such statute.

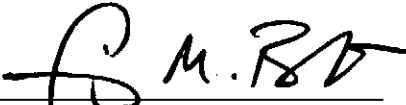
### **CONCLUSION**

Assuming the facts as alleged in the Attorney General’s Amended Complaint to be true, namely, that Gonzalez made or caused to be made telephone calls via an automated dialing-announcing device to Indiana telephone subscribers without their consent, such facts alone do not invoke the provisions of Indiana Code § 24-5-14 *et seq.* or the relief provisions of § 24-5-0.5-4, which were intended to address messages of a commercial or consumer sales nature. For this reason, the Attorney General’s Amended Complaint – in the only form he wants to make it - fails to state a claim upon which relief can be granted and this Court should affirm the trial court’s order of dismissal.

Respectfully submitted,




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**WORD COUNT CERTIFICATE**

I verify that this brief contains no more than 14,000 words, and I verify that this brief has 5,657 words.

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief of Appellee Jim Gonzalez was served on the following counsel of record via email and by First-Class United States mail, postage prepaid, on May 27, 2008, prior to 4:00 p.m.

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