

**IN THE
INDIANA SUPREME COURT**

No. 31S00-0803-CV-139

STATE OF INDIANA,)	
)	
Appellant (Plaintiff below),)	Appeal from the
)	Harrison Circuit Court
vs.)	
)	Cause No. 31C01-0609-MI-78
GONZALEZ, et al.,)	
)	The Honorable Larry R. Blanton,
Appellees (Defendants below).)	Special Judge
)	
)	

**BRIEF OF *AMICI CURIAE*
THE INDIANA DEMOCRATIC STATE CENTRAL COMMITTEE AND
THE INDIANA REPUBLICAN STATE CENTRAL COMMITTEE
IN SUPPORT OF APPELLEES**

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Statement of Interest

Amici Curiae, the Indiana Democratic State Central Committee, d/b/a the Indiana Democratic Party, and the Indiana Republican State Central Committee, d/b/a the Indiana Republican Party (collectively “the Political Parties”), by counsel, filed this *amici curiae* brief in support of Appellees, American Family Voices, Inc., Jim Gonzalez, and John Does 2-10, seeking this Court to affirm the trial court’s decision below.

The Political Parties have an interest in this matter because the issues in this case significantly impact how political campaigns are conducted in Indiana. Specifically, in light of the State’s briefing, this Court must decide whether the Automatic Dialing Machine Statute at issue, Indiana Code § 24-5-14, applies not only to commercial calls but to all calls, including political calls made over the course of a campaign. The Political Parties, and their candidates, would conduct such calls using robocall technology but for fear of enforcement actions in Indiana. If these enforcement actions are not limited to apply solely to commercial calls, future litigation on constitutional concerns is likely.

This Court granted the Political Parties’ motion to file this brief on May @, 2008. Both the Appellant and the Appellees consented to the filing of this brief.

Introduction

Indiana's Autodialing Machine Law (the "ADM Law"), codified at Ind. Code 24-5-14, unambiguously applies to commercial calls. Both Political Parties believed political calls were excluded when the law was passed in 1998. Such an expectation is legitimate, as "[p]olitical speech has long been considered the touchstone of First Amendment protection in Supreme Court jurisprudence, and courts are prone to strike down legislation that attempts to regulate it." *National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 791 (7th Cir. 2006) (citing *Roth v. United States*, 354 U.S. 476, 484 (1957) (The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.")). The Indiana Constitution also "enshrines pure political speech as a core value," *Price v. State*, 622 N.E.2d 954, 963 (Ind. 1993), that is "even more emphatic than the First Amendment." *Journal-Gazette Co., Inc. v. Bandido's, Inc.* 712 N.E.2d 446, 471 (Ind. 1999) (Sullivan, J., concurring).

Any ambiguity in the ADM Law has been created by the Attorney General. In the event this Court recognizes ambiguity in the meaning and scope of the ADM Law, this Court should construe the law in a manner that would uphold its constitutionality, which requires that the ADM Law only apply to commercial calls. As a result, this Court should uphold the lower court's decision to grant Appellees' *Motion to Dismiss*.

Summary of the Argument

This Court has the obligation of interpreting ambiguous Indiana laws in a way that supports their constitutionality. Consequently, if the ADM Law is ambiguous to this Court, this Court should not adopt Appellant's interpretation of the ADM Law to ban all

calls because the ADM Law would then burden protected political speech under the Indiana Constitution and the First Amendment of the United States Constitution. The ADM Law, passed in 1988, was not understood to regulate political ADM calls until 2006, when Attorney General Carter wrote a letter to the Political Parties indicating it would be enforced against such calls. Since then, the State has filed actions against any caller using ADM, including Appellees.

If this Court rejects Appellee Gonzalez's construction of the ADM Law and instead allows the Attorney General to continue to apply the ADM Law to political calls, serious constitutional issues will be raised. The ADM Law's constitutionality under Article I, Section 9 of the Indiana Constitution would become suspect. Political speech is a core value protected by Section 9. Material burdens upon such speech are unconstitutional. If the ADM Law reaches political calls, as the Attorney General suggests, the ADM Law imposes a material burden on political speech. Because of the cost prohibitive nature of a live-person introduction of such calls, the ADM Law effectively eliminates an entire medium of communication from the political arena. As a result, the ADM Law should be interpreted to apply only to commercial calls so that the Indiana Constitution is not violated.

Additionally, the ADM Law is a content-based restriction on speech because it creates exceptions based on the content of the speech. If this content-based restriction reaches political speech, it burdens such speech must survive strict scrutiny, through narrow tailoring and by serving a compelling interest, to satisfy the First Amendment of the United States Constitution. If the ADM Law is construed to reach political speech as well

as commercial speech, as the Attorney General advocates, it would neither serve the compelling interest of privacy propounded by the State nor is it narrowly tailored to advance such interest, because the ADM Law's exceptions are just as likely to invade privacy as a political ADM call. Instead, the State's interest in regulating ADM calls is more likely an attempt to prevent what the State perceives as "harassing" calls to Indiana residents. This interest cannot legitimately subvert the First Amendment's political speech protection because the State may not substitute its own judgment for that of individuals where political speech is at stake. So the ADM Law cannot survive strict scrutiny and thus would be unconstitutional if construed to encompass political calls.

Even if the ADM Law is content neutral, it still could not be constitutionally applied to political calls. By requiring a live person to introduce political ADM calls, the State would effectively foreclose a medium of communication without leaving open any reasonably comparable alternatives. Live person ADM political calls would be cost prohibitive, untimely, and less effective. Because the effect the ADM Law would have on political calls would be so burdensome, it should be construed to only encompass commercial calls, not political ones, and thereby ensure its constitutionality.

Argument

I. The Attorney General's Interpretation of The ADM Law Renders It Ambiguous.

As the Attorney General has conceded, this case involves a question of the scope of Indiana's ADM Law. The ADM Law quite clearly apply to commercial calls only, *see* Appellee Gonzalez Br. at Part I, and the Political Parties believed it excluded political

calls when the ADM Law passed in 1988. Any ambiguity in the ADM Law's scope is the byproduct of the Attorney General's broad interpretation of the statute.

Historically, 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*, 455 F.3d at 791 (stating that the Attorney General had read an implied exception for political calls into Indiana's do-not-call statute). Yet, in a letter dated August 22, 2006, the Attorney General expressly stated that the ADM Law would be enforced against those making political calls: "The [ADM] law, which prohibits the use of automatic dialing-announcing devices in most circumstances, does not exempt political calls." *Letter to Political Party Chairmen*, attached. This position has been advanced in this case, with the Attorney General again advancing his position that the ADM Law reaches all calls—including the political calls at issue in this case—except those specifically excluded from the provision. *See Appellant's Br.* at 10-11. The trial court, however, agreed to dismiss this case based on its conclusion that the ADM Law was intended to reach only commercial speech and that no commercial calls were at issue here. *Appellant's App.* at 115 ("THE COURT: . . . my reading of the statute is that it deals with commercial speech"). Yet the State continues to offer a broader interpretation of the scope of ADM Law. This serves to underscore the susceptibility of the ADM Law to "more than one interpretation," and, consequently, may render the provision ambiguous.

To resolve this problem, this Court adheres to rules of construction. If it is clear what the intent of the law is, this Court "must apply the plain language . . . despite perhaps strong policy or constitutional reasons to construe the statute in some other way."

Brownsburg Area Patrons Affecting Change v. Baldwin, 714 N.E.2d 135, 139 (Ind.1999). However, if it is ambiguous, this Court considers the legislative intent of the provision, always mindful of its “overriding obligation” to construe the law “in such a way as to render them constitutional if reasonably possible.” *Id.* at 141. Indeed, “[u]nconstitutional intention will not be attributed to the legislature if reasonably avoidable.” *Id.* (quoting *Price*, 622 N.E.2d at 963). “A statute is ambiguous when ‘it is susceptible to more than one interpretation.’” *Id.* at 140 (citing *In re Lehman*, 690 N.E.2d 696, 702 (Ind. 1997)). In some circumstances, this Court has construed statutes to be more limited than they appear on their face to avoid constitutional questions. *See, e.g., Majors v. Abell*, 792 N.E.2d 22, 25 (Ind. 2003) (“courts, including this one, sometimes find elasticity to preserve constitutionality we consider whether constitutional considerations drive us to find the statute to be more limited than appears on its face.”).

II. If Ambiguous, The ADM Law Must Be Construed To Avoid Constitutional Issues.

If the ADM Law is ambiguous, this Court is obligated to construe it in a constitutional fashion. *Brownsburg*, 714 N.E.2d at 141; *see also Price*, 622 N.E. at 963 (“If an act admits of two reasonable interpretations, one of which is constitutional and the other not, we choose that path which permits upholding the act.”). To do so, this Court must construe the ADM Law’s scope to only reach commercial calls.¹

¹The ADM Law may also be preempted by federal law. *See* 47 C.F.R. § 64.1200(a)(2)(ii) (2005) (prohibiting artificial or prerecorded calls with the express exception of non-commercial calls). However, this brief will focus primarily on the constitutionality of the ADM Law under the free speech provisions found in the Indiana and U.S. Constitutions.

A. The Attorney General's Interpretation of The ADM Law Would Violate Article 1, Section 9 of the Indiana Constitution.

Article I, Section 9 of the Indiana Constitution forbids the legislature from passing any law “restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever.” As such, “§ 9 enshrines pure political speech as a core value,” *Price*, 622 N.E.2d at 963, that is “even more emphatic than the First Amendment.” *Journal-Gazette Co.*, 712 N.E.2d at 471 (Sullivan, J., concurring). The State’s “sole authority over expression is to sanction individuals who commit abuse.” *Price*, 622 N.E.2d at 958.

To determine whether the ADM Law would violate Section 9, the Court must first determine whether the activity in question involves the speech protected by Section 9. *Id.* at 961. If it does, this Court assesses whether the challenged regulation “materially burden[s] the claimant’s political expression.” *Whittington v. State*, 669 N.E.2d 1363, 1370 (Ind. 1996). Speech that results in a tortious harm is an abuse of Section 9 and, as such, is not material burdened if it is regulated. *Price*, 622 N.E.2d at 964. In all other circumstances, if the magnitude of the burden on political speech is such that “the right, as impaired, would no longer serve the purpose for which it would be designed,” it is an unconstitutional material burden on protected speech. *Id.* at 961.

None of the parties dispute that the calls at issue are political calls. *See* Appellant’s Br. at 8; Appellees’ Br. at 21.² Nor do such calls inflict tortious harm on their recipients. As such, they fall within the protection of Section 9. If this Court were to determine that

² An Answer has yet to be filed in this case.

the ADM Law applies not just to commercial calls, but to political calls as well, the burden placed upon political speech would be clear: political speech employing a particular medium, namely, ADM technology, would be effectively foreclosed. The ADM Law's in-person requirement ensures this. *See infra* Part II.B.2.

This burden would be a material burden upon political speech. Indeed, the ADM Law would "dictate[] the means by which political opinion may be voiced" and thereby undermines its efficacy. *Price*, 622 N.E.2d at 963. Political candidates, parties, and individuals would be deprived of a known cost- and time-effective means by which to participate in the rigor of political discussion. The resulting material burden warrants construing the ADM Law to be applicable only to commercial, but not political, calls. To do otherwise exposes the ADM Law to unconstitutionality under Article I, Section 9 of the Indiana Constitution.

B. The ADM Law Violates The First Amendment If It Encompasses Political Calls.

"The calls at issue [are] political-campaign calls that solicit[] neither sales nor contributions." Appellant's Br. at 8. To reach such speech, the ADM Law must be interpreted to ban not just commercial speech but pure political speech as is advocated by the Attorney General. *See id.* But to do so ensures the ADM Law's unconstitutionality under the U.S. Constitution.

1. The ADM Law Is An Unconstitutional Content-Based Regulation When It Reaches Political Calls.

To survive a federal First Amendment challenge under the free speech clause, a law must either be a content-neutral regulation or, if it is content-based, be narrowly tai-

lored to serve a compelling interest. *Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75 (2002). It also may not be facially overbroad, reaching a substantial amount of political speech. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). If the ADM Law were construed to encompass political speech, it would be unconstitutional under the First Amendment because of its facial overbreadth.

The ADM Law is a content-based burden on political speech. The ADM Law is a complete ban on all ADM calls, *see* Appellant's Br. at 10-11, but allows certain types of ADM calls based on the content of their message: messages from schools to students, parents, or employees; from a caller to a subscriber with a current business or personal relationship; or from any source advising an employee of work schedules. IC 24-5-14-5(a). None of these exceptions relate to time, place, or manner, but rather on the content of the speech involved. Workers may be informed of their work schedules, and schools may contact its students, their parents, and its employees regarding presumably non-commercial, school-related matters. Appellant's Br. at 11-12. In other words, whether or not an ADM call is permissible is premised wholly upon the content of the speech. This makes the ADM Law content-based on its face. *See Whitton v. City of Gladstone*, 54 F.3d 1400, 1404 (8th Cir. 1995) (stating that a regulation of political signs was content-based because "it makes impermissible distinctions based *solely* on the content or message conveyed by the sign." (emphasis in original)).

Because it is content-based, construing it to encompass political speech would subject the provision to strict scrutiny analysis under the First Amendment. *White*, 536

U.S. at 774. This requires the law to be narrowly tailored to serve a compelling interest. *Id.* It is not.

The purported state interest advanced by the ADM Law is privacy. *See* Appellant's App. at 99-100. However, this is an unlikely purpose for the ADM Law, because the exceptions in the statute suggest otherwise. Schools making ADM calls to parents, or employers to their employees amounts to an invasion of privacy as much as any other type of ADM call would. Indeed, *any* call, whether automated or otherwise, is arguably an invasion of privacy and ADM calls are permissible, if introduced with a live person and meets the disclosure requirements. *See* IC-24-5-14-5(b). As the State indicated to the court below, "you can't unring that phone." Appellant's App. at 101. As a result, the ADM Law is underinclusive and the argument that it is justified by a privacy interest is doubtful. *See White*, 536 U.S. at 780 (*citing City of Ladue v. Gilleo*, 512 U.S. 43, 52-53 (1994)) (noting that underinclusiveness "diminishes the credibility of the government's rationale for restricting speech").

What motivates this particular law, then, is more likely an effort to prevent the perceived annoyance of Indiana residents who receive such calls, on the assumption that ADM calls made in certain excepted cases would be well-received. This interest, however, is not legitimate. *Martin v. Struthers*, 319 U.S. 141 (1943) (finding unconstitutional an ordinance banning door-to-door leafleting, including political leafleting). Much like the ordinance in question in *Martin*, the ADM Law would "substitute[] the judgment of the community for the judgment of the individual householder. It submits the [caller] to [] punishment for annoying the person [] whom he calls, even though the recipient of the

[political call] is in fact glad to receive it.” *Id.* at 143-44. And, like the ordinance at issue in *Martin*, the ADM Law is not necessary for this purpose: “The dangers of [political calls] can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will [take and continue the call], that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.” *Id.* at 147.

Indeed, the Seventh Circuit, in reviewing the Indiana’s do-not-call statute in *Carter*, 455 F.3d 783, strongly suggests that an exception of political calls from the statute is what preserves it from constitutional challenge. There, the Court upheld Indiana’s Telephone Privacy Act, which prohibited professional telemarketers from fundraising by placing calls to those on a do-not-call list. *Id.* at 784. In doing so, it pointed out the significance of the State’s implicit exception to the statute for political speech, noting that

it is not surprising that the Indiana Attorney General has fashioned an “implicit exception” for political speech, even if that speech comes from professional telemarketers. Political speech has long been considered the touchstone of First Amendment protection in Supreme Court jurisprudence, and courts are prone to strike down legislation that attempts to regulate it.

Id. at 791. In finding the provision constitutional, the court suggested that it is because of the political speech exclusion that the provision was upheld. *Id.* at 792 (“Because the Act sharply curtails telemarketing—the speech that was most injurious to residential privacy—while excluding speech that historically enjoys greater First Amendment protection, we are satisfied that the Act is not underbroad.”).

So if the ADM Law encompasses political calls, it would be unconstitutional under the First Amendment, because it is a content-based restriction that is not narrowly tai-

lored to serve a compelling interest. To preserve the law's constitutionality, therefore, this Court should construe the law to apply to only commercial calls.

2. Even If It Is Content-Neutral, The ADM Law As Construed By The Attorney General Would Be Unconstitutional As Applied to Political Calls.

Even assuming the ADM Law is content-neutral, as did the U.S. Supreme Court in *Gilleo*, 512 U.S. 43, for a sign ordinance, the ADM Law would still be unconstitutional, if applied to political speech as the Attorney General advocates. In *Gilleo*, the Court reviewed an as-applied challenge to an ordinance that banned residential lawn signs in all but ten circumstances. *Id.* at 46. In particular, the ordinance was challenged, because it was applicable to political signs. *Id.* Critical to the Court's analysis was the foreclosure of a communication medium by the challenged ordinance:

Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent-by eliminating a common means of speaking, such measures can suppress too much speech.

Id. at 55. Recognizing that content-neutral laws could have the cumulative effect of silencing core political speech, the Court highlighted prior decisions which found unconstitutional as applied to protected speech content-neutral bans upon various modes of communication: handbills on the public streets, *Jamison v. Texas*, 318 U.S. 413, 416 (1943), the door-to-door distribution of literature, *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 164-165 (1939), and live entertainment. *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981). It then stated that "even regulations that do not foreclose an entire medium of expression, but merely shift the time, place, or manner of its use, must 'leave open ample alternative channels for communication.'" *Gilleo*, 512 U.S. at 56 (*quoting Clark v.*

Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)). If they do not, the law in question “may make the difference between participating and not participating in some public debate.” *Id.* at 56.

The *Gilleo* Court relied principally on *Meyer v. Grant*, 486 U.S. 414 (1988), in which the Supreme Court held that a Colorado law that prohibited the use of paid employees to circulate initiative petitions violated the First Amendment. The Court found that the prohibition against the use of paid circulators “limits the number of voices who will convey [their] message and the hours they can speak and, therefore, limits the size of the audience they can reach.” *Id.* at 422-23. It also found that the prohibition on this communication mechanism “has the inevitable effect of reducing the total quantum of speech on a public issue.” *Id.* at 423. The Court concluded that the statute restricted “access to the most effective, and perhaps economical avenue of political discourse” and held it unconstitutional under the First Amendment. *Id.* at 424. The Court emphasized that merely because the provision “leaves open ‘more burdensome’ avenues of communication does not relieve its burden on First Amendment expression” and that not only is the right to speak protected under the First Amendment, “but also [the right] to select what [one] believe[s] to be the most effective means for so doing.” *Id.* It is this right that the ADM Law would undermine if this Court construes the ADM Law to apply to political calls.³

³ In 1995, the Eighth Circuit held that a ban on automatic dial announce devices did not violate the First Amendment. *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995). However *Van Bergen* was wrongly decided because it failed to follow the *Ladue-Struthers* line of cases discussed above, which review statutes that prohibit an entire medium for communicating political

The use of ADM technology is not only common for commercial use, it is a common form of communication by candidates, office holders and other individuals or groups who want to educate the public on issues they deem to be of great importance. Regardless of who makes them, such calls are core speech under the First Amendment. A ban, or even a severe restriction, on such calls prohibits one of the most effective, fundamental and economical forms of political communication, which permits a person who seeks to educate the citizenry of his point of view to communicate directly, quickly and in a cost-effective manner, with a large number of people. To ban these calls is to reduce the number of calls that can be made, and the size of the audience that will receive, political messages. The effect, then, is to increase the cost and thereby reduce the amount of speech that proponents of political issues can communicate to the public.

ADM technology is an important part of political campaigns because it offers salient advantages of permitting targeted communication with a large number of residences within a short period of time and in a cost-effective manner. In 2008, states that already have held a primary or caucus have had more than 44% of voters reached through such calls. *See Robo-Calls Now Top Type Of Campaign Outreach*, Pew Research Center for the People and the Press (April 3, 2008), at <http://pewresearch.org/pubs/785/robo-calls-election-2008>. Such calls can include messages reminding residents to register to vote, or encouraging them to vote on election day. A prohibition on such calls would take away

speech, based on the false assumption that no residents wish to receive such speech. The Ninth Circuit relied on *Van Bergen* when it issued a similar decision in 1996. *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996). Both cases were decided before advances in technology made it possible to disconnect the phone quickly and to offer the recipient of the call the option to add him or herself to a speaker-specific do-not-call list. *Van Bergen*, 59 F.3d at 1555; *Bland*, 88 F.3d at 731.

“access to the most effective, fundamental and perhaps economical avenue of political discourse.” *Meyer*, 486 U.S. at 424. Other media, such as newspaper and broadcast or live operator calls, cannot adequately substitute for these features, especially if their relative costs are taken into account.

The requirement to introduce ADM political calls with a live operator effectively bans an entire medium of communication with the citizenry by raising costs exponentially and preventing calls from being completed in a timely manner. And as discussed *supra* Part II.B.1, nothing about such an introduction alleviates the State’s purported interest in protecting the privacy of Indiana residents. Persons receiving such calls are free to either not answer (especially if they have caller-id) or hang up, just as those desiring not to talk to door-to-door solicitors are free to either not answer or shut the door.

Thus, even if the ADM Law is content-neutral, it is unconstitutional as applied to political speech, because it would foreclose an effective medium for political speech without leaving in place reasonable alternatives. This Court should construe the ADM Law to avoid such unconstitutionality by limiting its scope to commercial calls.

Conclusion

The ADM Law unambiguously reaches only commercial calls. However, if this Court determines that the ADM Law is ambiguous, this Court should construe the ADM Law’s scope to reach only commercial calls. The Attorney General’s interpretation to include political calls would render the Law unconstitutional under the Indiana and United States Constitutions.

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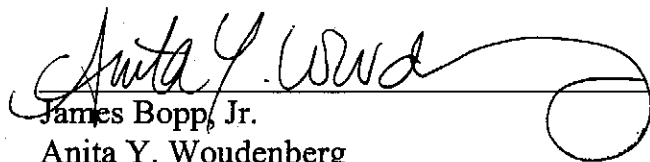
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Conclusion

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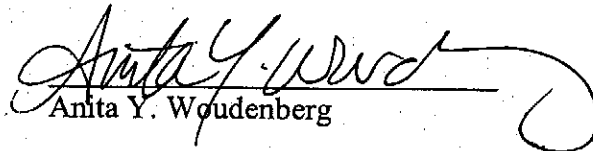
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I certify that a copy of the foregoing has been served upon the following counsel of record via First Class U.S. Mail, postage prepaid, this 30th day of May, 2008:

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