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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, )

*Appellant/Plaintiff,* )

v. )

AMERICAN FAMILY VOICES, INC., )

JIM GONZALEZ, and )

JOHN DOES 2-10, )

*Appellees/Defendants.* )

) Appeal from the  
) Harrison Circuit Court

) Cause No. 31C01-0609-MI-78

) Hon. Larry R. Blanton,  
) Special Judge

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**BRIEF OF APPELLANT STATE OF INDIANA**

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## STATEMENT OF SUPREME COURT JURISDICTION

This is an appeal from a final judgment of the Harrison Circuit Court dismissing the State's Amended Complaint on February 22, 2008. App. 8-10. The State filed its notice of appeal on February 27, 2008. App. 7. On March 5, 2008, the State filed in this Court a Combined Verified Motion for Immediate Transfer and Expedited Consideration pursuant to Indiana Rules of Appellate Procedure 4(A)(2), 56(A), and 21(B). The Court granted the State's Rue 56 (A) motion and accepted jurisdiction over the case on March 24, 2008.

## STATEMENT OF THE ISSUE

Whether the Indiana Autodialer Law (Ind. Code § 24-5-14 *et seq.*) prohibits using automatic dialing-announcing devices to distribute pre-recorded telephone messages that do not propose consumer transactions.

## STATEMENT OF THE CASE

On September 25, 2006, the State of Indiana filed a Verified Complaint against American Family Voices and John Does Nos. 1-10, alleging that Defendants made unlawful pre-recorded telephone calls using automatic dialing-announcing devices in violation of Indiana Code § 24-5-14-5(b). App. 1. On September 20, 2007, the State filed an Amended Complaint, naming Defendant Jim Gonzalez as John Doe No. 1. App. 11-14. The State's Amended Complaint alleges that all Defendants made unlawful pre-recorded telephone calls in violation of Indiana Code § 24-5-14-5(b). App. 11-14.

On November 16, 2007, Gonzalez filed a Motion to Dismiss, alleging that the State's Amended Complaint failed to state a claim on which relief could be granted because the Amended Complaint "fails to allege that *consumer* transaction telephone calls are at issue." App. 22. On January 30, 2008, Defendant American Family Voices filed its Notice of Joining In and Incorporating by Reference Defendant Jim Gonzalez's Motion to Dismiss, stating that "[t]he arguments presented by Defendant Gonzalez apply with equal force to AFV." App. 60.

On February 13, 2008, the trial court heard argument on Gonzalez's Motion to Dismiss, and indicated orally that it would grant Gonzalez's Motion to Dismiss because the Autodialer Law applied only to commercial speech. App. 114-15. On February 22, 2008, the trial court entered an order granting Gonzalez's Motion to Dismiss. App. 8-10. The order contains no legal conclusions regarding the proper construction of the Indiana Autodialer Law, and states only that "the Attorney General's Amended Complaint fails to state a claim upon which relief can be granted." App. 9.

### STATEMENT OF FACTS

1. The Indiana Autodialer Law, enacted in 1988, Ind. Pub. L. No. 151-1988, regulates the use of "automatic dialing-announcing devices[s]," which are devices that select and dial telephone numbers and then disseminate pre-recorded messages to those numbers. Ind. Code § 24-5-14-1. The operative language of the Autodialer Law is as follows:

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 Law defines "caller" to be "an individual, corporation, limited liability company, partnership, unincorporated association, or any entity that attempts to contact, or contacts, a subscriber in Indiana by using a telephone or telephone line." Ind. Code § 24-5-14-2.

The Autodialer Law has three narrow exceptions to its broad prohibition on disseminating pre-recorded messages by means of an autodialer: (1) "school districts" may send autodialed, pre-recorded messages "to students, parents, or employees;" (2) a caller may direct pre-recorded messages to recipients "with whom the caller has a current business or personal relationship;" and (3) employers may send pre-recorded messages "advising employees of their work schedules." Ind. Code § 24-5-14-5(a).

The Autodialer Law also requires anyone using an automatic dialing-announcing device to ensure that the device "disconnect[s] within ten (10) seconds after termination of the telephone call" by the recipient. Ind. Code § 24-5-14-6. If a caller chooses to use a live operator to introduce its pre-recorded messages, then the operator must make prescribed disclosures at the beginning of the call, including "(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 that the message is promoting; and (4) if applicable, the fact that the message intends to solicit payment or the commitment of funds.” Ind. Code § 24-5-14-7.

The Autodialer Law places an additional restriction on *commercial* telephone solicitations. Calls made “to solicit the purchase or consideration of the purchase of goods or services” when the caller does not have “a prior business relationship” with the call recipient may occur only between the hours of 9:00 a.m. and 8:00 p.m. See Ind. Code §§ 24-5-14-3, 24-5-14-8.

Violations are subject to enforcement actions by the Attorney General. See Ind. Code § 24-5-14-13. Available remedies include injunctions against further violations and fines for past violations. See Ind. Code §§ 24-5-0.5-4(c), 24-5-0.5-4(g).

2. In this case, the Attorney General’s Amended Complaint alleges that on or about July 18, 2006, Defendants “made or caused to me be made telephone calls to certain telephone numbers in Indiana.” App. 12. The Amended Complaint alleges that Defendants made those calls using an automated announcing-dialing device and that the calls disseminated pre-recorded messages. App. 12. The Amended Complaint further alleges that the Defendants are “callers” and that the call recipients are “subscribers,” as those terms are defined by the Law. App. 12. Moreover, the Amended Complaint alleges that because the recipients did not consent to receiving the calls, and because the calls were not preceded by a live operator, the calls were made in violation of the prohibition in Indiana Code § 24-5-14-5(b). App. 12.

## SUMMARY OF THE ARGUMENT

This is a simple matter of straightforward application of the plain text of a statute. 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. *See* Ind. Code § 24-5-14-5(b). The statute nowhere limits this prohibition to calls proposing commercial transactions.

The Court should reject Defendants' call to engraft a "consumer transaction telephone call" requirement onto the Autodialer Law. The Law nowhere defines or uses that particular term, and it refers to "commercial telephone solicitations" only when restricting permissible calling hours, not when prohibiting the use of autodialers to spread pre-recorded messages. If the Law's basic prohibition against using autodialers were understood to apply only to commercial telephone solicitations, it would have been unnecessary for the General Assembly to exempt calls from schools to students concerning school matters or calls from employers to employees concerning work schedules, which it did. *See* Ind. Code § 24-5-14-5(a).

Furthermore, neither the Law's compulsory operator disclosure requirements, *see* Ind. Code § 24-5-14-5(b), nor its incorporation of remedies and penalties from other portions of the Code, *see* Ind. Code § 24-5-14-13, in any way overrides or undermines the straightforward application of the Law's prohibition against autodialers to non-commercial calls. The disclosure requirements that affect non-commercial calls apply to them, and the single disclosure requirement

that affects only commercial calls does not. The text of the statute plainly contemplates that the disclosures might apply differently to different types of calls.

As for the incorporation of remedies, the Autodialer Law merely invokes the remedies from Indiana Code § 24-5-0.5-4 for transgressions of rules created by the Autodialer Law itself. It does not also incorporate the substantive rules defined in that chapter. Accordingly, there is no textual basis for inferring that the Autodialer Law is engrafted with the substantive law boundaries of Indiana Code § 24-5-05-4.

### STANDARD OF REVIEW

This Court reviews dismissal of a civil complaint *de novo*. “[W]e stand in the shoes of the trial court and must determine if the trial court erred in its application of the law.” *Lawson v. First Union Mortg. Co.*, 786 N.E.2d 279, 281 (Ind. Ct. App. 2003). Thus, this Court must “view the facts in the light most favorable to the non-moving party” to determine “if the facts alleged in the complaint are incapable of supporting relief any under set of circumstances.” *Id.*

Moreover, according to the Court of Appeals, “when a trial court grants a motion to dismiss without reciting the grounds relied upon, it must be presumed on review that the court granted the motion to dismiss on all the grounds in the motion.” *Id.* Here, the trial court’s order granting Gonzalez’s Motion to Dismiss gave no explanation for the dismissal. App. 8-10. The order stated only that “the Attorney General’s Amended Complaint fails to state a claim upon which relief can be granted” and provides no other legal conclusions supporting dismissal. App. 9. Thus, under the Court of Appeals’ doctrine, the Court’s review should include a

review of “the arguments . . . presented in the motion to dismiss.” *Godby v. Whitehead*, 837 N.E.2d 146, 149 (Ind. Ct. App. 2005).

## ARGUMENT

### The Autodialer Law Applies to *All* Calls, Not Just “Consumer Sales” Calls

#### A. The calls at issue here were calls distributing political messages

In his Motion to Dismiss, Gonzalez made only one argument: that the Autodialer Law was “intended for *consumer* transaction telephone calls” only. App. 22. Gonzalez argued that the State’s Amended Complaint “does not allege telephone calls soliciting the purchase or consideration of goods or services, and as such fails to assert an actionable claim under Indiana law.” App. 20. Gonzalez did not, however, cite any statutory section using the term “consumer transaction telephone calls,” much less one defining that term to mean “telephone calls soliciting the purchase or consideration of goods or services.” App. 19-34.

Presumably, though it did not say so expressly in its order, the trial court dismissed the State’s complaint because it erroneously agreed with Gonzalez that Indiana’s Autodialer Law applies only to “consumer telephone solicitations,” whatever those might be, and because the State did not specifically allege in its Amended Complaint that the calls at issue were in fact such “consumer telephone solicitations.” *Cf.* App. 115 (orally granting Motion to Dismiss because “my reading of the statute is that it only deals with commercial speech”). Accordingly, the trial court improperly held the Attorney General to a code pleading standard and, more importantly, misconstrued the application of the Autodialer Law.

political in nature, and the complaint (and the law) is all the Court may consider when reviewing the trial court's dismissal. App. 118-19.

It is not clear whether Gonzalez actually disputes the State's characterization of the content of the calls or simply thinks there is an advantage in pretending the content is unknown. Regardless, the State has provided its characterization of the calls at issue only so the Court will not mistakenly assume that there is some chance that the State might prove that the calls solicited commercial transactions (which proof, again, would be perfectly consistent with the Amended Complaint as pleaded). Beyond that, the State agrees that the content of the calls is irrelevant. The point remains that the State believes the Autodialer Law applies to *all* pre-recorded calls made using autodialers—and here seeks to enforce it against calls that did not propose commercial transactions—while Gonzalez and the trial court apparently believe that the Autodialer Law applies *only* to calls soliciting commercial transactions.

**B. The plain text of the statute prohibits the distribution of pre-recorded political messages using an autodialer without permission**

It is an elemental tenet of statutory construction that a court may not “interpret” a plain and unambiguous statute. See *Boone County State Bank v. Andrews*, 446 N.E.2d 618, 620 (Ind. Ct. App. 1983). “[I]t must be noted that when a statute is clear and unambiguous, on its face, the court need not, and indeed *may not*, interpret the statute.” *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1047 (Ind. Ct. App. 1993) (emphasis added). “If the intent of a statute is unmistakable

and its meaning so plain and unambiguous that there is no room for judicial construction, [the court] will adopt the meaning plainly expressed." *State v. Turner*, 386 N.E.2d 208, 209 (Ind. Ct. App. 1979).

The language of Indiana Code § 24-5-14-5(b) is clear and unambiguous. By its terms, the statute prohibits any "caller," *i.e.*, any "individual . . . or . . . entity that attempts to contact, or contacts, a subscriber in Indiana by using a telephone or telephone line," Ind. Code § 24-5-14-2, from "connect[ing] to a telephone line an automatic dialing-announcing device" unless the caller has previously obtained consent from the call recipient or uses a live operator to obtain the recipients' consent before playing the pre-recorded message. Ind. Code § 24-5-14-5(b). This prohibition thus applies to *all* telephone calls made by automatic dialing-announcing devices as a means to distribute pre-recorded messages, regardless of content, and its reach is in no way limited to commercial or consumer telephone solicitations.

1. Gonzalez has argued that, because the Autodialer Law defines the term "commercial telephone solicitation" in another section, *see* Ind. Code § 24-5-14-3, the prohibition against using autodialers applies only to such calls. App. 26-27. The code uses the term "commercial telephone solicitation," however, only to limit the reach of the regulation concerning permissible hours of calling. *See* Ind. Code § 24-5-14-8.

There is no rule of statutory construction permitting the Court to engraft on one operative portion of a code chapter a statutory term used only in another

operative portion of that same code chapter. In fact, "where a restriction is not general but is provided in a specific instance, such application of the specific instance will not be carried into other statements which do not provide such limitations." *State ex rel. White v. Grant Superior Court*, 202 Ind. 197, 209, 172 N.E. 897, 901 (1930); *see also Trabue v. State*, 164 Ind. App. 409, 411, 328 N.E.2d 743, 744 (1973); *Fort Wayne Transit, Inc. v. Ind. Motor Bus Co.*, 158 Ind. App. 290, 298, 302 N.E.2d 786, 790 (1973). Here, the term "commercial telephone solicitation" has a specific, limited use. The General Assembly did not use it to limit the reach of the general prohibition against autodialers, so the Court should not do so either.

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). The General Assembly chose to permit these calls in three limited circumstances: 1) "school districts" may use pre-recorded messages "to students, parents, or employees"; (2) a caller may direct pre-recorded messages to recipients "with whom the caller has a current business or personal relationship"; and (3) employers may use pre-recorded messages "advising employees of their work schedules." Ind. Code § 24-5-14-5(a).

If the Autodialer Law were interpreted as Gonzalez suggests and, therefore, applied only to commercial calls, these exceptions would be rendered superfluous. Surely, a call from a school district to its students, their parents, or its employees would not be "commercial" in nature and, therefore, would not need an express exemption from the general prohibition. Likewise, calls from employers "advising

employees of their work schedules” are not commercial in nature and, therefore, would not need an express exemption. Thus, to read the statute as Gonzalez suggests would render Indiana Code § 24-5-14-5(a) useless and thereby violate the “basic tenet of statutory interpretation that we will strive to avoid an interpretation that renders any part of the statute meaningless or superfluous.” *Hatcher v. State*, 762 N.E.2d 189, 192 (Ind. Ct. App. 2002).

2. As noted above, part of the Autodialer Law provides that when a caller chooses to disseminate pre-recorded messages by introducing the calls with a live operator, the operator must disclose (1) “[t]he 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 of goods or services the message is promoting,” and (4) “if applicable, the fact that the message intends to solicit payment or the commitment of funds.” Ind. Code § 24-5-14-7.

Gonzalez has argued that these required disclosures suggest that the entire Autodialer Law applies only to commercial calls because, “[g]iven the character of disclosures . . . it is clear that the Indiana legislature sought only to address messages of a commercial context, with *protections for consumers from solicitors*.” App. 28. Gonzalez’s reasoning proceeds as follows: Non-commercial calls would not promote any good or service, and callers making such calls cannot comply with the requirement to disclose the goods or services being promoted; therefore, the Law cannot be understood to apply to non-commercial calls.

It is inaccurate, however, to suggest that a non-commercial caller cannot comply with the disclosure requirements. Such a caller can obviously disclose the entity calling and the purpose of the call. See Ind. Code § 24-5-14-7(1)-(2). And with respect to the solicitation disclosure requirement, the qualification “if applicable” contemplates that some regulated calls will not solicit payment or the commitment of funds—a circumstance that could not exist if the Law applied only to commercial solicitations. See Ind. Code § 24-5-14-7(4).

Similarly, 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. See Ind. Code § 24-5-14-5(b).

3. Gonzalez also has argued that the remedies Indiana seeks in its Amended Complaint are applicable only to commercial telephone calls. App. 28-31. The Autodialer Law itself, however, says in plain language that “[a] caller who violates this chapter commits 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.” Ind. Code § 24-5-14-13. In turn, Indiana Code § 24-5-0.5-4(c) authorizes the Attorney General to bring an action to enjoin a deceptive act, and Indiana Code § 24-5-0.5-

4(g) provides that the Attorney General “may recover . . . on behalf of the state a civil penalty of a fine not exceeding five thousand dollar (\$5,000) per violation.”

In the face of this straightforward incorporation of remedies, Gonzalez has said that Indiana Code § 24-5-14-13 “does not expressly address penalties for violations” of the Autodialer Law, and that “the Indiana legislature saw fit to use Ind. Code § 24-5-14-13 as a bridge to the relief provisions of § 24-5-0.5-4(g)—a chapter which never uses the phrase ‘automatic dialing-announcing device’ but rather is replete with terms applicable to the regulation of *consumer sales*.” App. 29.

What that has to do with incorporating those remedies into the Autodialer Law for purposes of addressing non-commercial calls that violate the Law is not clear. The language of Indiana Code § 24-5-14-13, however, is clear and unambiguous: Violators of the Autodialer Law are subject to remedies and penalties set forth elsewhere in specific provisions of the Indiana Code. Gonzalez’s argument that the limitations on those remedies and penalties found in Indiana Code § 24-5-0.5-4 should be incorporated into Indiana Code § 24-5-14-13 has no textual or doctrinal foundation. Again, if the General Assembly had intended to incorporate those limitations into the Autodialer Law, it could have done so expressly, but it did not. The General Assembly simply chose to save time by not recodifying remedies and penalties is had enumerated in another context.

4. Finally, Gonzalez has argued that the Autodialer Law is a penal statute that should be strictly construed against the State. App. 31-32. However, this is

not a criminal case, and the Autodialer Law is not ambiguous. Therefore, no “strict construction” under the rule of lenity is warranted. *See State v. Terre Haute Brewing Co.*, 186 Ind. 248, 115 N.E. 772 (1917).

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. Automated, pre-recorded calls are “uniquely intrusive.” *See Van Bergen v. Minnesota*, 59 F.3d 1541, 1554 (8th Cir. 1995). And a non-commercial pre-recorded call delivered by an autodialer is just as intrusive as a commercial telephone solicitation delivered the same way. To infer a special exception for non-commercial calls that violate the Autodialer Law is illogical and unnecessarily narrow. Statutes are to be construed “to prevent absurdity or a result the legislature, as a reasonable body, could not have intended.” *Chavis v. Patton*, 683 N.E.2d 253, 258 (Ind. Ct. App. 1997). Hence, it is necessary to conclude that the Autodialer Law applies to calls using autodialers to distribute pre-recorded non-commercial messages.

## CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order dismissing the Amended Complaint in this matter.

Respectfully submitted,

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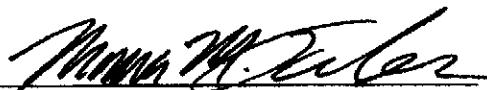
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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant State of Indiana was served on the following counsel of record via email and by First-Class United States mail, postage prepaid, on May 1, 2008, prior to 4:00 p.m.

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