IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOSHUA THORNE and DAVID ROBERTS, individually and on behalf of all others similarly situated, Plaintiffs, vs. DONALD J. TRUMP FOR PRESIDENT, INC., a principal campaign committee, Defendant.	Case No. 1:16-cv-04603 Judge John Z. Lee Magistrate Judge Maria Valdez

DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED COMPLAINT

Plaintiffs' Consolidated Complaint ("Complaint") asserts that Defendant Donald J. Trump for President, Inc. ("Trump for President") is liable for using an automatic telephone dialing system (ATDS) to send text messages to cell phones in violation the Telephone Consumer Protection Act ("TCPA"). The Court should dismiss the Complaint for two reasons. First, a complaint must allege facts that support the claim pled, not simply state legal conclusions echoing the elements of the asserted cause of action. Plaintiffs' Complaint, however, fails to allege facts showing that an ATDS was used to send the text messages at issue. In fact, the Complaint's allegations affirmatively suggest that an ATDS was *not* used to send those messages. Second, the legal provision on which Plaintiffs rely—§ 227(b)(1)(A)(iii)—violates both the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment by allowing callers to use ATDS equipment to make calls about certain favored subjects (such as government debts, banking, and healthcare) but not about other disfavored subjects (such as politics).

ARGUMENT

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). Dismissal may rest on either "the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Meyer v. Bebe Stores, Inc.*, No. 14-cv-00267, 2015 WL 431148, *2 (N.D. Cal. Feb. 2, 2015). In this case, Plaintiffs have neither alleged sufficient facts nor identified a cognizable legal theory.

I. PLAINTIFFS HAVE FAILED TO PROPERLY ALLEGE USE OF AN ATDS

To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). In order to satisfy this standard, the complaint must allege "*factual* content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (emphasis added). "[L]abels and conclusions" and "formulaic recitation[s] of the elements of a cause of action" do not suffice, and "are not entitled to the assumption of truth" that attaches to a complaint's factual allegations. *Id.* at 678–79; *see also Twombly*, 550 U.S. at 555. In addition, the factual matter in the complaint must show "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 679. "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.*

These principles apply fully to TCPA lawsuits. *See, e.g.*, *Hanley v. Green Tree Servicing, LLC*, 934 F. Supp. 2d 977, 983 (N.D. Ill. 2013) ("The governing pleading standard 'demands more than an unadorned the-defendant-unlawfully-harmed-me accusation.'"). Numerous courts in the Northern District of Illinois have thus held that a plaintiff must allege

facts raising the reasonable inference that an ATDS was used, rather than simply restate the language of the statute, in order to properly plead a TCPA claim. *See Izsak v. DraftKings, Inc.*, No. 14-cv-07952, 2016 WL 3227299, at *3 (N.D. Ill. June 13, 2016) ("where a fact—here, use of an ATDS—is itself an element of the claim, 'it is not sufficient to recite that fact verbatim without other supporting details'"); *Ananthapadmanabhan v. BSI Fin. Servs., Inc.*, No. 15-cv-5412, 2015 WL 8780579, at *4 (N.D. Ill. Dec. 15, 2015) ("when a fact is itself an element of the claim, . . . it is not sufficient to recite that fact verbatim without other supporting details"); *Martin v. Direct Wines, Inc.*, No. 15-cv-757, 2015 WL 4148704, *2 (N.D. Ill July 9, 2015) ("It is insufficient for plaintiff to simply parrot the language of the TCPA and conclusorily allege that defendants used an ATDS"); *Oliver v. DirectTV, LLC* No. 14-cv-7794, 2015 WL 1727251, at *3 (N.D. Ill. April 13, 2015) ("Absent a plausible inference that Defendant used an ATDS, a necessary element of a TCPA claim, [the] claim must be dismissed"); *Abbas v. Selling Source, LLC*, No. 09-cv-3413, 2009 WL 4884471, at *3 (N.D. Ill. Dec. 14, 2009) (an allegation that "parrot[s] the language" of the TCPA " is a bare legal conclusion entitled to no weight"). Courts in other jurisdictions agree. *See Duguid v. Facebook, Inc.*, No. 15-cv-985, 2016 WL 1169365, at *3–5 (N.D. Cal. Mar. 24, 2016) (plaintiff's allegations did not raise an inference that an ATDS was used to send text messages); *Flores v. Adir International. LLC*, No. 15-cv-00076, 2015 WL 4340020 (C.D. Cal. July 15, 2015) (same).

Oliver and *Duguid* are particularly compelling examples. In *Oliver*, the Court held that the complaint raised no plausible inference that the defendant used an ATDS, since the complaint "d[id] not allege that Defendant placed a large number of calls to Oliver or sent Oliver generic advertisements." 2015 WL 1727251, at *3. Although the Plaintiff's allegations were "consistent with Defendant having used an ATDS," the allegations did not "suggest beyond the

'speculative level' that Defendant actually used an ATDS." *Id*. Similarly, in *Duguid*, the Court held that plaintiff's conclusory allegations that "[t]he text messages sent to Plaintiff's cellular phone were made with an ATDS as defined by 47 U.S.C. § 227(a)(1)," and that "[t]he ATDS has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator," were insufficient to support a claim under the TCPA. 2016 WL 1169365 at *4. Accordingly, in granting the motion to dismiss, the court stated that plaintiff's allegations "do not suggest that Facebook sends text messages en masse to randomly or sequentially generated numbers." *Id.* at *5.

Plaintiffs' Complaint here fails to satisfy this standard. The Complaint sets forth a legal conclusion that an ATDS was used to send text messages, but alleges no factual matter to support such a conclusion. (Compl. ¶¶ 28, 40, 41, 71, 72). Specifically, the Complaint states that "[t]he Trump Committee sent, or had sent on its behalf, the same or substantially the same text messages to thousands of wireless telephone numbers or randomly generated phone numbers" (Compl. ¶40) and that the texts were sent "using equipment that had the capacity to store or produce telephone numbers to be called using a random or sequential number generator, and to dial such numbers." (Compl. ¶41) These boilerplate statements simply mirror the statute, which makes it unlawful "to make any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to a . . . cellular telephone service" (47 U.S.C. § 227(b)(1)(A)(iii)) and which defines an automatic telephone dialing system as "equipment that has the capacity—(A) to store and produce telephone numbers to be called and (B) to dial such numbers" (*id.* § 227(a)(1)). There are no factual allegations in the Complaint to allow the Court to infer that the text messages were fully automated or that the text messages were randomly or sequentially sent to numerous consumers as part of a pre-planned telemarketing campaign. In other words,

there are no factual allegations from which the Court may properly infer use of an ATDS. The Complaint is thus precisely the sort of pleading that *Iqbal* and *Twombly* condemn and that numerous district courts have dismissed.

The Complaint is not saved by reference to the capabilities of a third-party company, Tatango, that Plaintiffs allege is the registrant of Defendants' website. (Compl. ¶¶ 43-48) The Complaint nowhere alleges that Tatango's equipment or software can function as an ATDS. Much less does the Complaint allege that the equipment functioned as an ATDS at the time it was used to send messages to Plaintiffs. Plaintiffs' bare allegations regarding the purported use of an ATDS, in sum, constitute nothing more than a "formulaic recitation of the elements of a cause of action." *See Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at 555.

Indeed, beyond simply failing properly to allege use of an ATDS, Plaintiffs' allegations in fact demonstrate that an ATDS was *not used* in this instance. In their Complaint, Plaintiffs allege that "Plaintiff [*sic*] provided his cell phone number to Event Brite in order to obtain a Campaign Rally ticket" (Compl. ¶52) and that Event Brite gave Plaintiffs' cell phone numbers to Trump for President, which then used Plaintiffs' cell phone numbers to send Plaintiffs text messages (Compl. ¶56). In other words, Plaintiffs admit that the text messages at issue were sent *in response* to Plaintiff[s] providing their cell phone numbers. Several courts have held that such allegations affirmatively indicate that an ATDS was *not* used to send the messages in question. *See Duguid*, 2016 WL 1169365, at *5 (where a "'[p]laintiff's own allegations suggest direct targeting that is inconsistent with the sort of random or sequential number generation required for an ATDS,' courts conclude that the allegations are insufficient to state a claim for relief under the TCPA") (quoting *Flores v. Adir International, LLC*, No. 15-cv-00076, 2015 WL 4340020, at *4 (C.D. Cal. July 15, 2015)); *Daniels v. Comunity Lending, Inc.*, No. 13-cv-00488,

2014 WL 51275, at *5 (S.D. Cal. Jan. 6, 2014) (dismissing complaint because the defendant's alleged calls to the plaintiffs were not random, but were instead specifically directed towards the plaintiffs). Accordingly, Plaintiffs not only fail to properly allege the use of an ATDS, but in fact allege facts indicating the failure to use an ATDS.

Without adequate supporting factual allegations, Plaintiffs' ATDS-related legal conclusions are insufficient to satisfy the federal pleading requirements set forth in *Iqbal* and *Twombly*. Accordingly, Plaintiffs' Complaint should be dismissed.

II. SECTION 227(b)(1)(A)(iii) VIOLATES THE FIRST AMENDMENT AND EQUAL PROTECTION CLAUSE

As discussed above, the TCPA defines an "automatic telephone dialing system" as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." § 227(a)(1). Section 227(b)(1)(A) prohibits using an ATDS to make a call—"other than a call made for emergency purposes or made with the prior express consent of the called party"—to three types of telephone lines. Clause (i) prohibits ATDS calls to emergency telephone lines such as 911. Clause (ii) prohibits ATDS calls to patient rooms at hospitals. And clause (iii)—the provision at issue here—prohibits ATDS calls to wireless telephone numbers, "unless such call is made solely to collect debt owed to or guaranteed by the United States."

The TCPA empowers the Federal Communications Commission to exempt certain calls from clause (iii). § 227(b)(2)(C). Exercising this authority, the Commission has granted exemptions to "banks and other financial institutions" for calls concerning "(1) transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money

transfers." Rules and Regulations Implementing the TCPA, 30 FCC Rcd 7961, 8023 (2015 TCPA Order). The Commission has likewise granted exemptions to healthcare providers for calls concerning "appointment and exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, pre-operative instructions, lab results, post-discharge follow-up intended to prevent readmission, prescription notifications, and home healthcare instructions." *Id.* at 8030. Although the Commission has accommodated the needs of banks and healthcare companies, it has not made comparable concessions to political campaigns.

The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." And the Equal Protection Clause of the Fourteenth Amendment—applicable to the Federal Government through the Due Process Clause of the Fifth Amendment (*United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013))—provides that government may not "deny to any person . . . the equal protection of the laws." Clause (iii) violates both of these constitutional guarantees. It abridges freedom of speech and denies equal protection by impermissibly discriminating on the basis of content—favoring speech about government debts, banking, and healthcare over speech about other subjects (such as politics). In addition, it abridges freedom of speech by suppressing far more communication than the Government's interests justify.

A. The ATDS Restriction Impermissibly Discriminates On The Basis Of Content

1. Section 227(b)(1)(A)(iii) triggers strict scrutiny because it is content-based

The Free Speech Clause means that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Brown v. Entertainment Merchs. Ass'n*, 564 U.S. 786, 790–91 (2011) (some punctuation omitted). And the Equal Protection Clause means that government has no power to "discriminat[e] among speech-related activities" because of "the content of the [speaker's] communication." *Carey v. Brown*, 447 U.S.

455, 460-61 (1980). As a general matter, content-based regulation of speech complies with the Constitution only if the Government "can demonstrate that it passes strict scrutiny." *Entertainment Merchs.*, 564 U.S. at 799.

A law is content-based if it "draws distinctions based on the message a speaker conveys" (*Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)) or "accords preferential treatment to the expression of views on one particular subject" (*Carey*, 447 U.S. at 461). For example, a restriction on picketing near schools that exempts picketing on labor issues "is based on . . . content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 102 (1972). So is a restriction on picketing near houses that exempts labor picketing. *Carey*, 447 U.S. at 460–61. And so is a restriction on billboards that does not apply to billboards carrying commercial messages. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 516 (1981) (plurality opinion).

Section 227(b)(1)(A)(iii)—which prohibits using ATDS equipment to call cell phone numbers "unless such call is made solely to collect a debt owed to or guaranteed by the United States"—regulates speech on the basis of its content. The law "draws distinctions based on the message a speaker conveys" (*Reed*, 135 S. Ct. at 2227): A caller may use an ATDS to collect a government debt, but not (for example) to urge church attendance, solicit a charitable contribution, or (as here) publicize a campaign rally. The law also "accords preferential treatment to the expression of views on one particular subject" (*Carey*, 447 U.S. at 461): Just as the laws in *Carey* and *Mosley* singled out labor picketing for special favor, this law singles out calls about government debts for special favor. The preferential treatment here is not just *content* discrimination, but actual *viewpoint* discrimination—a "blatant" and "egregious form of content discrimination" (*Rosenberger v. Rector*, 515 U.S. 819, 829 (1995)). In a particularly stark and self-serving example of that discrimination, the federal government has authorized callers to use

an ATDS to tell a debtor that he should pay the *government*, but not to tell the debtor that he should pay a *private company*, or, for that matter, to tell the debtor to avoid paying the government by negotiating a settlement, challenging the debt in court, or declaring bankruptcy.

The exemptions granted by the Commission inject even more content discrimination into § 227(b)(1)(A)(iii). *Cf. Vono v. Lewis*, 594 F. Supp. 2d 189, 200 (D.R.I. 2009) (considering implementing regulations when determining whether a statute is content-based); *Thorne v. U.S. Dept. of Defense*, 916 F. Supp. 1358, 1366–69 (E.D. Va. 1996) (same). As discussed earlier, the Commission has granted exemptions to calls conveying "certain . . . messages about . . . financial and healthcare issues"—such as "calls regarding money transfers" and "appointment and exam confirmations and reminders." 2015 TCPA Order, 30 FCC Rcd at 8023, 8025, 8031. As a result of these exemptions, § 227(b)(1)(A)(iii) "draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227. Banks may use an ATDS to tell its customers about money transfers, but Bernie Sanders may not use an ATDS to tell his supporters about plans to break up the banks. Hospitals may use an ATDS to remind patients to attend checkups, but Donald Trump may not use an ATDS to remind voters to attend campaign rallies. These exemptions grant facial "preferential treatment" to expression about some government-favored subjects. *Carey*, 447 U.S. at 461. Speech about banking and healthcare enjoys greater protection than speech about (for instance) politics and religion. That is textbook content discrimination.

To be sure, this Court and other courts have previously concluded that the TCPA's restriction on ATDS equipment is content-neutral. *See, e.g.*, *Abbas v. Selling Source, LLC*, No. 09-3413, 2009 WL 4884471, at *1 (N.D. Ill. Dec. 14, 2009); *In re Jiffy Lube Int'l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253, 1260–61 (S.D. Cal. 2012). As an initial matter, these cases generally involved mundane commercial speech, not core political speech of the sort at issue

here. Commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values" (*Board of Trs. of State University of New York v. Fox*, 492 U.S. 469, 477 (1989)); political speech, in contrast, "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection" (*Snyder v. Phelps*, 562 U.S. 443, 452 (2011)).

In all events, even beyond the difference between political and commercial speech, the just-mentioned decisions are out of date. First, they considered an earlier version of § 227(b)(1)(A)(iii) that did not include any of the content-based distinctions discussed above. The Federal Communications Commission adopted the exemptions for calls about banking and healthcare issues only in June 2015. *See* 2015 TCPA Order, 30 FCC Rcd at 8023. And Congress adopted the exemption for calls to collect government debts only in November 2015. *See* Bipartisan Budget Act of 2015, Pub. L. 114-74, § 301(a)(1)(A) (creating government-debt exception). Second, the cases also predate the Supreme Court's 2015 decision in *Reed v. Town of Gilbert*. *Reed* "clarified the content-neutrality inquiry" and 'abrogate[d] [many lower courts'] previous descriptions of content neutrality." *Cahaly v. Larosa*, 796 F.3d 399, 404–05 (4th Cir. 2015); *see also BBL, Inc. v. City of Angola*, 809 F.3d 317, 326 n.1 (7th Cir. 2015) ("In its recent decision in [*Reed*], the Supreme Court clarified the concept of 'content-based' laws"). In short, regardless of whether the ATDS restrictions used to be content-neutral, they no longer remain content-neutral today.

2. Section 227(b)(1)(A)(iii) fails strict scrutiny on its face and as applied to campaign speech

A content-based speech restriction complies with the First Amendment only if it satisfies "strict scrutiny"—only if "the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct.

2806, 2817 (2011). The restriction complies with equal-protection principles only if it satisfies "carefu[l] scrutin[y]"—only if "any distinctions it draws" serve a "substantial state interes[t]" and are "finely tailored" to serve that interest. *Carey*, 447 U.S. at 461-62. It is the "rare" case in which a content-based restriction satisfies these exacting standards. *Entertainment Merchs.*, 564 U.S. at 799. This is not one of those rare cases.

Plaintiffs cannot show that the speech restriction imposed by § 227(b)(1)(A)(iii) satisfies First Amendment scrutiny. First, the ATDS restriction's purported goal—protecting cell phone owners from unwanted automated calls—is not a compelling interest. An objective qualifies as a compelling interest only if it is a public goal "of the highest order" (*Reed*, 135 S. Ct. at 2232)—on par with "combating terrorism" (*Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010)) or "preventing . . . election fraud" (*Burson v. Freeman*, 504 U.S. 191, 206 (1992) (plurality opinion)). Protecting listeners from speech they might find annoying does not meet this standard. To the contrary, the Government ordinarily lacks the power "to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erzoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975).

Second, at a minimum, the objectives served by § 227(b)(1)(A)(iii) are not compelling enough to justify restricting *campaign speech*. The Supreme Court has "identified only one legitimate governmental interest for restricting . . . campaign finances"—"preventing corruption or the appearance of corruption." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1450 (2014) (plurality opinion). But § 227(b)(1)(A)(iii) has nothing to do with corruption or the appearance of corruption. It therefore fails strict scrutiny at least as applied to speech "uttered during a campaign for political office"—speech that is "central to the meaning and purpose of the First Amendment." *Wisc. Right to Life State PAC v. Barland*, 664 F.3d 139, 148–49 (7th Cir. 2011).

Third, even assuming that § 227(b)(1)(A)(iii) serves a compelling interest, it is not narrowly tailored to achieve that interest. As discussed below (*infra* part II.B.2), the ATDS restriction is not even sufficiently tailored to satisfy the intermediate scrutiny applicable to content-neutral regulations; it necessarily follows that it is not sufficiently tailored to satisfy the strict scrutiny applicable to content-based regulations.

Plaintiffs also cannot show that § 227(b)(1)(A)(iii)'s "differential treatment" of various types of speech (*Mosley*, 408 U.S. at 95) satisfies equal-protection scrutiny. No conceivable public interest can justify treating speech about politics, religion, and economics less favorably than speech about debt collection, money transfers, and appointment reminders. Indeed, the distinctions drawn by § 227(b)(1)(A)(iii) are particularly objectionable because they disfavor campaign speech. "[F]ashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," the constitutional free-speech guarantee "has its fullest and most urgent application . . . to the conduct of campaigns for political office." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) (internal quotation marks omitted). Section 227(b)(1)(A)(iii)'s content-based regime turns this principle upside-down by deeming speech meant to help someone *execute a money transfer* more important than speech meant to help someone decide how to *vote*. *Cf. Metromedia*, 453 U.S. at 513 & n.18 (billboard ordinance that "afford[s] a greater degree of protection to commercial than to noncommercial speech" is "a peculiar inversion of First Amendment values").

The Court should therefore hold that § 227(b)(1)(A)(iii) violates the First Amendment and equal-protection principles—on its face, but at a minimum as applied to campaign speech.

B. The ATDS Restriction Prohibits Far More Speech Than The Government's Interests Justify

1. Section 227(b)(1)(A)(iii) at a minimum triggers intermediate scrutiny

Content-neutral restrictions on the time, place, or manner of speech are subject to intermediate scrutiny. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Section 227(b)(1)(A)(iii) regulates the manner of speech; it forbids speakers from using particular types of equipment to engage in speech. *See id.* at 790–91 (treating content-neutral restriction on equipment that can be used for speech as a time, place, and manner regulation). Thus, § 227(b)(1)(A)(iii) would trigger intermediate scrutiny even if it were content-neutral.

2. Section 227(b)(1)(A)(iii) fails intermediate scrutiny on its face and as applied to campaign speech

A time, place, and manner regulation complies with the First Amendment only if it is "justified without reference to the content of the regulated speech," "narrowly tailored to serve a significant governmental interest," and "leave[s] open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791. Narrow tailoring requires targeting "no more than the exact source of the 'evil' [the regulation] seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The Government must restrict only the speech that *actually* causes the problem it seeks to solve; it may not sweep in speech that merely has the *potential* to do so. For example, a government that wishes to prohibit littering may punish "those who actually throw papers on the streets," but may not punish the distribution of handbills on the theory that any such distribution has the potential to lead to littering. *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939). Similarly, a government that wishes to prevent petition circulators from harassing patrons outside post offices may target harassment "precisely," but may not prohibit petition-circulating altogether on the theory that any petition-circulating involves "the potential" for harassment. *Initiative & Referendum Inst. v. USPS*, 417 F.3d 1299, 1307 (D.C. Cir. 2005).

Section 227(b)(1)(A)(iii) is not narrowly tailored to serve any substantial government interest. The "exact source" of the problem the Act seeks to remedy is, of course, calls that are autodialed. Yet rather than prohibiting calls that are *in fact* autodialed, § 227(b)(1)(A)(iii) prohibits calls placed from devices that have the *capacity* to autodial—regardless of whether the caller used that capacity when making the call in question. *See, e.g.*, *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 951 (9th Cir. 2009) ("a system need not actually store, produce or call randomly or sequentially generated telephone numbers, it only need to have the capacity to do it"). "Capacity," in turn, includes (according to the Commission's 2015 TCPA Order) not just the device's present abilities but also its "potential functionalities" if modified. 30 FCC Rcd at 7974. Section 227(b)(1)(A)(iii) is thus far removed from the "exact source" of the problem it sets out to solve: It prohibits calls from a device that could be modified in such a way that it could have the ability to autodial, regardless of whether the modification is ever made or the ability ever used. In doing so, it threatens to "capture many of contemporary society's most common technological devices," because "in today's world, the possibilities of modification and alteration are virtually limitless." *Gragg v. Orange Cab Co.*, Inc., 995 F. Supp. 2d 1189, 1193 (W.D. Wash. 2014). Section 227(b)(1)(A)(iii)'s "prophylaxis-upon-prophylaxis approach" violates the First Amendment, especially with respect to campaign speech. *McCutcheon*, 134 S. Ct. at 1458.

It makes no difference that this Court concluded in *Lozano v. Twentieth Century Fox Film Corp.*, that "the fact that the TCPA . . . prohibits the use of equipment with the capacity to randomly dial numbers" did not render the provision unconstitutional. 702 F. Supp. 2d 999, 1011 (N.D. Ill. 2010). For one thing, the test applied in *Lozano* is more forgiving than the test the Court should apply here. Because *Lozano* involved commercial speech, the Court applied the

balancing test for restrictions on commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), asking whether there was a "reasonable fit" between § 227(b)(1)(A)(iii) and the Government's interests. 702 F. Supp. 2d at 1011–12. Because this case involves political speech, the Court must apply (at a minimum) the intermediate-scrutiny test set forth in *Ward* and *Frisby*, asking whether § 227(b)(1)(A)(iii) targets the "exact source" of the problem to be remedied. A restriction's constitutionality as applied to commercial speech does not prove its constitutionality as applied to political speech. For another thing, *Lozano* predates the Commission's conclusion that equipment's "capacity" includes its potential functionalities. That conclusion makes the misfit between the speech restriction and the Government's interest starker today than it was when *Lozano* was decided.

The Court should therefore hold that § 227(b)(1)(A)(iii) violates the First Amendment—on its face, but at a minimum as applied to the core political speech at issue here.

CONCLUSION

For the foregoing reasons, the Court should grant Trump for President's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

July 29, 2016

Respectfully submitted,

DONALD J. TRUMP FOR PRESIDENT, INC.

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CERTIFICATE OF SERVICE

I, Martin W. Jaszczuk, an attorney, do hereby certify that I caused **DEFENDANT DONALD J. TRUMP FOR PRESIDENT, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS** to be served on all persons and entities registered and authorized to receive such service through the Court's Case Management/Electronic Case Files (CM/ECF) system on July 29, 2016.

By: /s/ Martin W. Jaszczuk