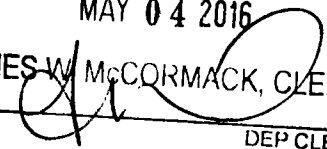


FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

MAY 04 2016

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

JAMES W. McCORMACK, CLERK
By: 
DEP. CLERK

_____)
VICTOR GRESHAM,)
and)
CONQUEST COMMUNICATIONS)
GROUP, LLC)
))
Plaintiffs,)
))
v.)
))
LESLIE RUTLEDGE)
in her official capacity as)
Attorney General of the)
State of Arkansas)
))
Defendant.)
_____)

Civil Action No.: 4:16-cv-341-JLH

This case assigned to District Judge Holmes
and to Magistrate Judge Harris

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

The Plaintiffs, Victor Gresham and Conquest Communications Group, LLC (collectively, "Plaintiffs") appear, by counsel, and in support of their Complaint state as follows:

PLAINTIFFS' NAMES AND ADDRESSES

1. Plaintiff Victor Gresham is a citizen of the United States and the Commonwealth of Virginia, with an address of Stage Junction Road, Columbia, Virginia. Gresham, through his company, engages in political communications, including through automated telephonic communications on behalf of political clients.

2. Plaintiff Conquest Communications Group, LLC is a limited liability company with its principal place of business at Emerywood Parkway, Suite 103, Richmond, Virginia. Conquest Communications Group, LLC is engaged in the business of political communications, including through automated telephonic communications on behalf of political clients.

DEFENDANT'S NAME AND ADDRESS

3. Defendant Leslie Rutledge is the Attorney General of the State of Arkansas, located at 323 Center Street, Suite 200, Little Rock, Arkansas, 72201. The Attorney General has the authority to enforce the criminal provision of the Arkansas Code Section prohibiting automated telephone solicitations. *See* Ark. Code § 5-63-204(b).
4. Defendant Rutledge has the authority to sue and be sued within the course and scope of her official capacity.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343.
6. This Court has the authority to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.
7. Venue in this Court is proper under 28 U.S.C. § 1391(b).

FACTUAL ALLEGATIONS

8. Ark. Code § 5-63-204(a)(1) and (b) states, in part:

It is unlawful for any person to use a telephone for the purpose of offering any goods or services for sale, or for conveying information regarding any goods or services for the purpose of

soliciting the sale or purchase of the goods or services, or for soliciting information, gathering data, or for any other purpose in connection with a political campaign when the use involves an automated system for the selection and dialing of telephone numbers and the playing of recorded messages when a message is completed to the called number.

...

Any person who violates any provision of this section upon conviction is guilty of a Class B misdemeanor and shall be punished accordingly.

9. Defendant has authority to enforce the provisions of Ark. Code § 5-63-204(a)(1) prohibiting speech “in connection with a political campaign.”
10. Defendant has the explicit authority to enjoin a party from making speech believed to be prohibited by Ark. Code § 5-63-204, and to seek criminal punishments for such speech with a Class B misdemeanor.
11. Former Attorney General Dustin McDaniel, Defendant’s predecessor in that office, issued an advisory opinion claiming that the provision of § 5-63-204 prohibiting automated calls “in connection with a political campaign” was constitutionally “highly suspect” based on the “highest level of scrutiny” applied to this “content-based” restriction on speech. Att’y Gen. Op. No. 2010-151 (Apr. 8, 2011).
12. Plaintiff Gresham is a political consultant who, through Plaintiff Conquest Communications Group, LLC, has engaged in political speech in the State of Arkansas, and who desires to engage in additional political speech in the future in the State of Arkansas.
13. Plaintiffs specifically desire to conduct automated telephone calls in the State of Arkansas. These automated telephone calls would include those of a political nature and on behalf of politically-interested clients, and would include automated telephone

surveys, automated telephone get-out-the-vote messages, express advocacy calls, and other calls related to political campaigns. These automated telephone calls would play pre-recorded messages to individuals who answer the phone, as well as to an answering machine, voicemail, or other recording device recognized by the automated dialing system.

14. Plaintiffs further specifically desire to engage in automated telephone calls of a political nature and on behalf of politically-interested clients, in which the number dialed is selected by an automated system and the call is placed by an automated system. If the call is answered by an individual, a live operator then speaks with that individual. However, if an answering machine, voicemail, or other recording device recognized by the automated dialing system answers the call, the automated dialing system then plays a pre-recorded message.
15. Plaintiffs further specifically desire to engage in automated telephone calls, on behalf of political clients, in the State of Arkansas following a script substantively similar to the following, in all respects except for client details: “This is a call from *CLIENT NAME FOR SENATE*. Hi, this is Senator *CLIENT NAME*. I’m just calling to remind you that Election Day is coming up on Tuesday, and that we need your support to defeat my opponent. If we can count on your support on Tuesday, please press 1 now. Thanks for your support and have a great day. Paid for by *CLIENT NAME FOR SENATE, 318-555-1212*.”
16. Plaintiffs further specifically desire to engage in “telephone town hall” automated telephone calls, of a political nature and on behalf of political clients, in the State of Arkansas. Telephone town hall telephone calls begin with an automated outbound call,

which asks an individual who answers the automated call whether he or she would like to join and participate in a live, town hall-style forum conducted with a politician or officeholder. If the automated call is answered only by an answering machine, voicemail, or other recording device recognized by the automated dialing system, the system plays a pre-recorded message.

17. Plaintiffs have been chilled and restrained, and are currently chilled and restrained, from placing automated telephone communications on behalf of political clients in Arkansas, and has therefore been unlawfully restrained from engaging in political speech within Arkansas.

18. Plaintiffs continues to be harmed due to the chill and restraint on political speech contained within Arkansas Code § 5-63-204, and the potential criminal enforcement of that political speech prohibition by the Attorney General.

COUNT I: VIOLATION OF THE FIRST AMENDMENT

42 U.S.C. § 1983 Violation of Plaintiffs' Right to Freedom of Speech
Under the First and Fourteenth Amendments to the United States Constitution

19. Plaintiffs incorporate by reference as if fully stated herein paragraphs 1-18.

20. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, constitute an unconstitutional abridgement of Plaintiffs' free speech rights guaranteed by the First and Fourteenth Amendments to the United States Constitution, and therefore violate 42 U.S.C. § 1983.

21. The First Amendment to the U.S. Constitution is “[p]remised on mistrust of governmental power” and thus declares “Congress shall make no law . . . abridging the freedom of speech, or of the press . . .” U.S. Const. amend. I; *see also Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

22. Speech about public issues “[i]s at the heart of the First Amendment’s protection,” and therefore, speech concerning the salient issues is constitutionally enshrined because it is “the type of speech [that is] indispensable to decision making in a democracy.” *First National Bank v. Bellotti*, 435 U.S. 765, 776-77 (1978). *See also Eu v. San Francisco Cty. Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (“The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.”) (internal quotation omitted); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).
23. The Fourth Circuit Court of Appeals found unconstitutional similar content-based restrictions in South Carolina on automated telephone calls delivering political speech. There, the Court held that the “anti-robocall statute is content based because it makes content distinctions on its face” and failed under a strict scrutiny analysis as the government failed to demonstrate a compelling interest the statute was narrowly tailored to remedy. *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015).
24. Similarly, the Sixth Circuit Court of Appeals found that state laws restraining political speech—even when that speech conveyed potentially false information—were unconstitutional content-based restrictions on core protected speech, and upheld a permanent injunction against enforcement of those laws. *Susan B. Anthony List v.*

Driehaus, 2016 U.S. App. LEXIS 3186 (6th Cir. Feb. 24, 2016) (citing *United States v. Alvarez*, 132 S. Ct. 2537 (2012)).

25. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, prohibits Plaintiffs from engaging in political speech by permitting the Attorney General to apply content-based restrictions on political speech. This infringes Plaintiffs' free speech rights guaranteed under the First Amendment and by 42 U.S.C. § 1983.
26. The government has no governmental interest sufficient to justify the Defendant's action in applying the provisions of Ark. Code § 5-63-204 related to political speech by Plaintiffs.
27. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, are not least restrictive means to accomplish any permissible government interest sought to be served by the government.
28. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, are not narrowly tailored to serve any compelling government interest.

COUNT II: VIOLATION OF THE FIRST AMENDMENT

42 U.S.C. § 1983 Violation of Plaintiffs' Right to Freedom of Speech
Under the First and Fourteenth Amendments to the United States Constitution As Prior
Restraints

29. Plaintiffs incorporate by reference as if fully stated herein paragraphs 1-18.
30. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, impose impermissible prior restraints on constitutionally-protected speech.
31. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, are an unconstitutional prior restraint as it does not contain adequate standards or

guidelines to control the discretion of the decision-maker in deciding whether there has been a violation.

32. The arresting officer has unlimited discretion in deciding whether there has been a violation of the provisions of Ark. Code § 5-63-204 related to political speech.
33. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, are a viewpoint and content based restriction on speech.
34. The provisions of Ark. Code § 5-63-204 related to political speech, on its face and as applied, create an unconstitutional prior restraint on Plaintiffs' speech.

Damages

35. Plaintiffs have no adequate remedy at law to correct the continuing deprivation of their constitutional rights.
36. As a direct and proximate result of the Defendant's continuing violations of the Plaintiffs' rights, the Plaintiffs have in the past and will continue to suffer in the future, the loss of the ability to exercise their constitutional rights.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment in Plaintiffs' favor and against the Attorney General in the following manner:

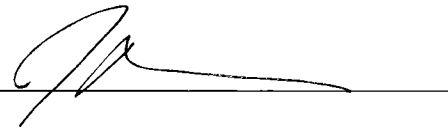
- A. That this Court issue a Preliminary Injunction, enjoining the Defendant, Defendant's officers, agents, employees and all other persons acting in active concert with them, from enforcing Ark. Code § 5-63-204 against the Plaintiffs, or from unlawfully obstructing the Plaintiffs from exercising constitutionally protected rights;
- B. That this Court render a Declaratory Judgment declaring the provisions of the Arkansas Code § 5-63-204 regarding political speech unconstitutional, on its face and as applied,

under the United States Constitution that violate the Plaintiffs' rights guaranteed under the First Amendment of the U.S. Constitution made applicable to the states through the Fourteenth Amendment;

- C. That this Court enter a judgment against the Defendants for the damages caused to the Plaintiffs for the loss of their constitutional rights;
- D. That this Court adjudge, decree and declare the rights and other legal relations of the parties, in order that such declaration shall have the force and effect of final judgment;
- E. That this Court retain jurisdiction of this matter for purpose of enforcing this Court's order;
- F. That this Court allow the Plaintiffs the reasonable attorneys' fees, costs, and expenses of this action in accordance with 42 U.S.C. § 1988 and any other applicable authority;
- G. That this Court grant such other and further relief as this Court deems equitable and just under the circumstances.

Dated: May 3, 2016

Respectfully Submitted,




Jason Torchinsky (VA 47481)
HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Fax: 540-341-8809

CERTIFICATE OF SERVICE

I, Jason Torchinsky, hereby certify that on this 3rd day of May, 2016, I mailed a copy of the foregoing via certified mail to the following:

Attorney General Leslie Rutledge, State of Arkansas,
323 Center Street
Suite 200
Little Rock, Arkansas 72201

Dated: May 3, 2016



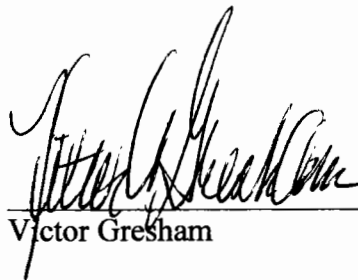
Jason Torchinsky (VA 47481)
HOLTZMAN VOGEL JOSEFIAK
TORCHINSKY PLLC
45 North Hill Drive, Suite 100
Warrenton, Virginia 20186
Phone: 540-341-8808
Fax: 540-341-8809

VERIFICATION

I, Victor Gresham, declare as follows.

1. I am a Plaintiff in the present case, a citizen of the United States of America, and a resident of the Commonwealth of Virginia. I am Managing Member of Conquest Communications Group, LLC.
2. I have reviewed the foregoing *Verified Complaint for Injunctive and Declaratory Relief*.
3. I have personal knowledge of myself, my activities, and my intentions, including those set out in the foregoing *Verified Complaint for Injunctive and Declaratory Relief*, and if called on to testify I would competently testify to the matters stated herein.
4. I have personal knowledge of the business activities of Conquest Communications Group, LLC, as well as its intentions, including those set out in the foregoing *Verified Complaint for Injunctive and Declaratory Relief*, and if called on to testify I would competently testify to the matters stated herein.
5. I verify under penalty of perjury that the factual statements in this *Complaint* concerning myself, my activities, and my intentions are true and correct, as are the factual statements concerning Conquest Communications Group, LLC. 28 U.S.C. § 1746.

Executed on May 2, 2016.



Victor Gresham

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

JS 44 (Rev. 11/15)

CIVIL COVER SHEET 416cv241

MAY 04 2016

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Federal Rules of Civil Procedure as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM)

JAMES W. McCORMACK, CLERK
By: _____
DEP. CLERK

I. (a) PLAINTIFFS
Gresham, Victor
Conquest Communications Group, LLC

(b) County of Residence of First Listed Plaintiff Fluvanna, Virginia
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Holtzman Vogel Josefiak Torchinsky PLLC; 45 North Hill Drive,
Suite 100; Warrenton, Virginia, 20186; (540) 341-8808
Jason Torchinsky

DEFENDANTS
Arkansas Attorney General
Rutledge, Leslie

County of Residence of First Listed Defendant Pulaski, Arkansas
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

1 U.S. Government Plaintiff

3 Federal Question (U.S. Government Not a Party)

2 U.S. Government Defendant

4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input checked="" type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from Another District (specify)

6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity)
42 U.S.C. § 1983

Brief description of cause:
Violation of Plaintiffs' Right to Freedom of Speech Based on Ark. Code § 5-63-204

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

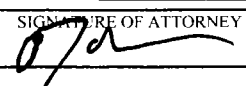
DEMAND \$ _____

CHECK YES only if demanded in complaint
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions)

JUDGE _____ DOCKET NUMBER _____

DATE: 05/03/2016

SIGNATURE OF ATTORNEY OF RECORD: 

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG JUDGE _____