

No. 19-631

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**In the Supreme Court of the United States**

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WILLIAM P. BARR, ATTORNEY GENERAL;  
FEDERAL COMMUNICATIONS COMMISSION,  
PETITIONERS

*v.*

AMERICAN ASSOCIATION OF POLITICAL  
CONSULTANTS, INC., ET AL.

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*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT*

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**JOINT APPENDIX**

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PETITION FOR A WRIT OF CERTIORARI FILED: NOV. 14, 2019  
CERTIORARI GRANTED: JAN. 10, 2020

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

Docket No. 18-1588

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; WASHINGTON STATE  
DEMOCRATIC CENTRAL COMMITTEE; TEA PARTY  
FORWARD PAC, PLAINTIFFS-APPELLANTS

*v.*

FEDERAL COMMUNICATIONS COMMISSION;  
WILLIAM P. BARR, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
5/24/18	<u>1</u>	Case docketed. Originating case number: 5:16-cv-00252-D. Case manager: AWalker. [18-1588] AW [Entered: 05/24/2018 09:33 AM]  * * * * *
7/3/18	<u>15</u>	BRIEF by Appellants American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC and Washington State Democratic Central Committee in electronic and

DATE	DOCKET NUMBER	PROCEEDINGS
7/3/18	<u>16</u>	<p>paper format. Type of Brief: OPENING. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 07/03/2018. [1000323219] [18-1588] William Raney [Entered: 07/03/2018 10:50 AM]</p> <p>Joint FULL ELECTRONIC APPENDIX and full paper appendix by Appellants American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC, Washington State Democratic Central Committee and Appellees FCC and Jefferson B. Sessions III. Method of Filing Paper Copies: courier. Date paper copies mailed dispatched or delivered to court: 07/03/2018. [1000323229] [18-1588] William Raney [Entered: 07/03/2018 10:55 AM]</p>
8/23/18	<u>21</u>	<p>* * * * *</p> <p>BRIEF by Appellees FCC and Jefferson B. Sessions III in electronic and paper format. Type of Brief: RESPONSE. Method of Filing Paper Copies: mail. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/23/2018.</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		[1000354318] [18-1588] Lindsey Powell [Entered: 08/23/2018 01:43 PM]
		* * * * *
9/13/18	<u>25</u>	BRIEF by Appellants American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC and Washington State Democratic Central Committee in electronic and paper format. Type of Brief: REPLY. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 09/14/2018. [1000367175] [18-1588] William Raney [Entered: 09/13/2018 05:10 PM]
		* * * * *
12/12/18	37	ORAL ARGUMENT heard before the Honorable Robert B. King, Barbara Milano Keenan and A. Marvin Quattlebaum, Jr. Attorneys arguing case: Mr. William Edward Raney, I for Appellants American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC and Washington State Democratic Central Committee and Linsey Powell for Appellees FCC

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
		and Matthew G. Whitaker. Courtroom Deputy: Cathy Poulsen. [1000419687] [18-1588] CP [Entered: 12/12/2018 01:19 PM]
		* * * * *
4/24/19	<u>39</u>	PUBLISHED AUTHORED OPINION filed. Originating case number: 5:16-cv-00252-D. [1000499370]. [18-1588] Annotation added reflecting Supreme Court history.— [Edited: 01/14/2020 by EB] AW [Entered: 04/24/2019 08:29 AM]
4/24/19	<u>40</u>	JUDGMENT ORDER filed. Decision: Vacated and remanded. Originating case number: 5:16-cv-00252-D. Entered on Docket Date: 04/24/2019. [1000499375] Copies to all parties and the district court/agency. [18-1588] AW [Entered: 04/24/2019 08:33 AM]
6/6/19	<u>41</u>	PETITION for rehearing en banc by American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC and Washington State Democratic Central Committee. [18-1588] William Raney [Entered: 06/06/2019 04:08 PM]

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
6/7/19	<u>42</u>	Mandate stayed pending ruling on petition for rehearing or rehearing en banc. [18-1588] AW [Entered: 06/07/2019 07:43 AM]
6/10/19	<u>43</u>	PETITION for rehearing en banc by William P. Barr. [18-1588] Lindsey Powell [Entered: 06/10/2019 03:48 PM]
6/21/19	<u>44</u>	COURT ORDER filed [1000534483] denying Motion for rehearing en banc [43], denying Motion for rehearing en banc [41] Copies to all parties. [18-1588] AW [Entered: 06/21/2019 07:58 AM]
7/1/19	<u>45</u>	Mandate issued. Referencing: [40] Judgement order, [39] published authored Opinion. Originating case number: 5:16-cv-00252-D. [18-1588] AW [Entered: 07/01/2019 07:37 AM]
		* * * * *
11/15/19	<u>48</u>	SUPREME COURT REMARK—petition for writ of certiorari filed. 11/14/2019. 19-631. [18-1588] EB [Entered: 11/18/2019 03:01 PM]
1/13/20	<u>49</u>	SUPREME COURT REMARK—petition for writ of certiorari granted. 01/13/2020 [18-1588] EB [Entered: 01/13/2020 04:53 PM]



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
(WESTERN DIVISION)

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Docket No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; WASHINGTON STATE  
DEMOCRATIC CENTRAL COMMITTEE, PLAINTIFFS

*v.*

FEDERAL COMMUNICATIONS COMMISSION;  
JEFFERSON SESSIONS, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANTS

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**DOCKET ENTRIES**

<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
5/12/16	<u>1</u>	COMPLAINT against Loretta Lynch (Filing fee \$400 receipt number 0417-3681161.), filed by Tea Party Forward PAC, American Association of Political Consultants, Inc., Public Policy Polling, LLC, Democratic Party of Oregon, Inc., Washington State Democratic Central Committee. (Attachments: # <u>1</u> Exhibit—Index of Exhibits/Attachments, # <u>2</u> Exhibit A—Declaration of Alana Joyce, # <u>3</u> Exhibit B—Declaration of Brad Martin, # <u>4</u> Exhibit C—Declaration of

DATE	DOCKET NUMBER	PROCEEDINGS
		Dean Debnam, # <u>5</u> Exhibit D— Declaration of Niger Innis, # <u>6</u> Ex- hibit E—Declaration of Karen Deal, # <u>7</u> Civil Cover Sheet, # <u>8</u> Pro- posed Summons) (George, Charles) (Entered: 05/12/2016)
		* * * * *
7/15/16	<u>15</u>	MOTION to Dismiss for Lack of Jurisdiction filed by Loretta Lynch. Attachments: # <u>1</u> Text of Pro- posed Order) (Heaps, Bailey) (En- tered: 07/15/2016)
7/15/16	<u>16</u>	Memorandum in Support regarding <u>15</u> MOTION to Dismiss for Lack of Jurisdiction filed by Loretta Lynch. (Attachments: # <u>1</u> Ex- hibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I) Heaps, Bailey) (Entered: 07/15/2016)
		* * * * *
8/5/16	<u>18</u>	AMENDED COMPLAINT against All Defendants, filed by Tea Party Forward PAC, American Association of Political Consultants, Inc., Public Policy Polling, LLC, Democratic Party of Oregon, Inc., Washington State Democratic Central Commit-

DATE	DOCKET NUMBER	PROCEEDINGS
		tee. (Attachments: # <u>1</u> Index Index of Exhibits/Attachments, # <u>2</u> Exhibit Exhibit A—Declaration of Alana Joyce in Support of Standing by American Association of Political Consultants, # <u>3</u> Exhibit Exhibit B Declaration of Brad Martin in Support of Standing by Democratic Party of Oregon, # <u>4</u> Exhibit Exhibit C—Declaration of Dean Debnam in Support of Standing by Public Policy Polling, # <u>5</u> Exhibit Exhibit D—Declaration of Niger Innis in Support of Standing by Tea Party Forward PAC, # <u>6</u> Exhibit Exhibit E—Declaration of Karen Deal in Support of Standing by Washington State Democratic Central Committee, # <u>7</u> Proposed Summons Proposed Summons FCC) (Raney, William) (Entered: 08/05/2016)
		* * * * *
9/2/16	<u>22</u>	MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' First Amended Complaint</i> filed by Federal Communications Commission, Loretta Lynch. (Attachments: # <u>1</u> Text of Proposed Order) (Heaps, Bailey) (Entered: 09/02/2016)

DATE	DOCKET NUMBER	PROCEEDINGS
9/2/16	<u>23</u>	Memorandum in Support regarding <u>22</u> MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' First Amended Complaint</i> filed by Federal Communications Commission, Loretta Lynch. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D) (Heaps, Bailey) (Entered: 09/02/2016)
9/23/16	<u>24</u>	RESPONSE in Opposition regarding <u>22</u> MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' First Amended Complaint</i> filed by American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC, Tea Party Forward PAC, Washington State Democratic Central Committee. (Raney, William) (Entered: 09/23/2016)
10/7/16	<u>25</u>	REPLY to Response to Motion regarding <u>22</u> MOTION to Dismiss for Lack of Jurisdiction <i>Plaintiffs' First Amended Complaint</i> filed by Federal Communications Commission, Loretta Lynch. (Heaps, Bailey) (Entered: 10/07/2016)

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<b>DATE</b>	<b>DOCKET NUMBER</b>	<b>PROCEEDINGS</b>
3/15/17	<u>26</u>	ORDER denying as moot <u>15</u> Motion to Dismiss for Lack of Jurisdiction; denying <u>22</u> Motion to Dismiss for Lack of Jurisdiction. Pursuant to Fed. R. Civ. P. 25(d), the court ORDERS that Jefferson Sessions in his official capacity as Attorney General of the United States, be substituted for Loretta Lynch in her official capacity as Attorney General of the United States. Signed by Chief Judge James C. Dever III on 3/15/2017. (Briggeman, N.) (Entered: 03/15/2017)  * * * * *
5/19/17	<u>30</u>	MOTION for Summary Judgment filed by American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC, Tea Party Forward PAC, Washington State Democratic Central Committee. (Raney, William) (Entered: 05/19/2017)
5/19/17	<u>31</u>	Memorandum in Support regarding <u>30</u> MOTION for Summary Judgment filed by American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC, Tea Party

DATE	DOCKET NUMBER	PROCEEDINGS
		Forward PAC, Washington State Democratic Central Committee. (Raney, William) (Entered: 05/19/2017)
		* * * * *
6/19/17	<u>33</u>	Memorandum in Opposition regarding <u>30</u> MOTION for Summary Judgment filed by Federal Communications Commission, Jefferson Sessions. (Brown, Aimee) (Entered: 06/19/2017)
6/19/17	<u>34</u>	Cross MOTION for Summary Judgment filed by Federal Communications Commission, Jefferson Sessions. (Brown, Aimee) (Entered: 06/19/2017)
6/19/17	<u>35</u>	Memorandum in Support regarding <u>34</u> Cross MOTION for Summary Judgment filed by Federal Communications Commission, Jefferson Sessions. (Brown, Aimee) (Entered: 06/19/2017)
7/5/17	<u>36</u>	RESPONSE in Opposition regarding <u>34</u> Cross MOTION for Summary Judgment <i>and Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment</i> filed by American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public

DATE	DOCKET NUMBER	PROCEEDINGS
7/11/17	<u>37</u>	Policy Polling, LLC, Tea Party Forward PAC, Washington State Democratic Central Committee. (Attachments: # <u>1</u> Exhibit A—Order from USDC Middle District of Florida, Tampa Division) (Raney, William) Modified on 7/6/2017—added exhibit description in docket text. (Briggeman, N.) (Entered: 07/05/2017)
7/11/17	<u>37</u>	MOTION to Withdraw <i>Tea Party Forward PAC as a Party</i> filed by Tea Party Forward PAC. (Attachments: # <u>1</u> Exhibit Proposed Order) (Raney, William) (Entered: 07/11/2017)
7/11/17	<u>38</u>	ORDER granting <u>37</u> Motion to Withdraw. The caption shall be modified to reflect the withdrawal of Tea Party Forward PAC as a party. Signed by Chief Judge James C. Dever III on 7/11/2017. (Briggeman, N.) (Entered: 07/12/2017)
7/20/17	<u>39</u>	REPLY to Response to Motion regarding <u>34</u> Cross MOTION for Summary Judgment filed by Federal Communications Commission, Jefferson Sessions. (Brown, Aimee) (Entered: 07/20/2017)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
3/26/18	<u>41</u>	ORDER denying <u>30</u> Motion for Summary Judgment; granting <u>34</u> Motion for Summary Judgment. Signed by Chief Judge James C. Dever III on 3/24/2018. (Briggeman, N.) (Entered: 03/26/2018)
3/26/18	<u>42</u>	JUDGMENT—IT IS ORDERED, ADJUDGED, AND DECREED that the Court entered an order on 7/11/2017 that withdrew the Plaintiff Tea Party Forward PAC as a Party. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the court GRANTS defendants’ motion for summary judgment [D.E. 34] and DENIES plaintiffs’ motion for summary judgment [D.E. 30]. Signed by Peter A. Moore, Jr., Clerk of Court on 3/26/2018. (Briggeman, N.) (Entered: 03/26/2018)
5/23/18	<u>43</u>	Notice of Appeal filed by American Association of Political Consultants, Inc., Democratic Party of Oregon, Inc., Public Policy Polling, LLC, Washington State Democratic Central Committee as to <u>41</u> Order on



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DATE	DOCKET NUMBER	PROCEEDINGS
		Motion for Summary Judgment, <u>42</u> Judgment,. Filing fee, receipt number 0417-4518563. (Raney, William) (Entered: 05/23/2018)
		* * * * *

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. \_\_\_\_\_

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC., DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANT

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[Filed: Apr. 28, 2016]

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**DECLARATION OF ALANA JOYCE IN SUPPORT  
OF STANDING BY AMERICAN ASSOCIATION  
OF POLITICAL CONSULTANTS**

---

COMES NOW Alana Joyce, being duly sworn, and states as follows:

1. My name is Alana Joyce. I am over the age of 18, am authorized to make this affidavit on behalf of American Association of Political Consultants, Inc. (“AAPC”), and am otherwise competent to make this affidavit.

2. I make this affidavit based on my own personal knowledge.

3. I have been the Executive Director of AAPC since 2011.

4. In my role as Executive Director, I oversee all AAPC general management, membership growth and retention, and annual conference functions including the recognition of excellence in political consulting practices.

5. AAPC is incorporated in the District of Columbia with its principal office in McLean, Virginia.

6. AAPC is organized as a tax-exempt nonprofit organization under § 501(c)(6) of the Internal Revenue Code.

7. AAPC is the largest bipartisan association of political and public affairs professionals in the world.

8. AAPC provides education for its members and advocates for the protection of political free speech.

9. AAPC members include individuals and businesses that handle all aspects of campaigning including political fundraisers, political organizers, persons who conduct and analyze political polls, i.e. political pollsters and opinion researchers, and persons who organize get out the vote (GOTV) efforts

10. AAPC members make calls to registered voters on their cell phones to solicit political donations.

11. AAPC members make calls to persons on their cell phones to discuss, persuade, inform and measure opinions on political and governmental issues.

12. AAPC members make calls to registered voters on their cell phones to get out the vote (GOTV).

13. The interest of AAPC's members in soliciting political donations, discussing political and governmental issues, measuring political opinion and supporting GOTV efforts by cell phone is connected to AAPC's organizational purpose, which, in large part, is to defend political free speech and provide education and resources regarding same to its members.

14. AAPC, therefore has suffered an injury in fact and has organizational standing to bring suit on behalf of its members in the above-entitled action.

FURTHER AFFIANT SAYETH NOT.  
STATE OF VIRGINIA  
COUNTY OF FAIRFAX

Dated at Virginia, this 28 day of Apr., 2016.

/s/ ALANA M. JOYCE  
ALANA JOYCE

Sworn to, subscribed and acknowledged in my presence this 28th day of Apr., 2016, by Ashley DeWitt.

\_\_\_\_\_  
Notary Public

My Commission Expires: [6-30-17]

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. \_\_\_\_\_

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANT

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[Filed: May 4, 2016]

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**DECLARATION OF BRAD MARTIN IN SUPPORT  
OF STANDING BY DEMOCRATIC PARTY OF OREGON**

---

COMES NOW Brad Martin, being duly sworn, and states as follows:

1. My name is Brad Martin. I am over the age of 18, am authorized to make this affidavit on behalf of the Democratic Party of Oregon (“DPO”), and am otherwise competent to make this affidavit.
2. I make this affidavit based on my own personal knowledge.
3. I have been Executive Director of DPO since 2013.

4. In my role as Executive Director, I am responsible for managing DPO's internal operations, fundraising, running "get-out-the-vote" campaigns, and recruiting and electing Democrats among other duties.

5. DPO is located at 232 NE 9th Avenue, Portland, Oregon 97232.

6. DPO is organized as a tax-exempt nonprofit organization under § 527 of the Internal Revenue Code.

7. DPO works to promote the interests of the Democratic Party in the State of Oregon including coordinating, organizing and electing Democratic candidates, adopting a party platform, ensuring the party's issues are enacted into law, and representing DPO to the Democratic National Committee and to other states.

8. DPO makes calls to registered Democratic and progressive non-affiliated voters on their cell phones to discuss political and governmental issues, give voters critical information to help them with the voting process, encourage voters to return their ballots by deadlines and vote for Democratic candidates, and solicit political donations.

9. DPO, therefore, has a personal stake in the outcome of the action, has suffered an injury in fact, and has standing to bring suit in the above-entitled action.

[Signatures on the following page.]

FURTHER AFFIANT SAYETH NOT.  
STATE OF OREGON  
COUNTY OF MULTNOMAH

Dated at [Portland, Oregon], this [4th] day of [May],  
2016.

/s/ BRAD MARTIN  
BRAD MARTIN

Sworn to, subscribed and acknowledged in my presence  
this [4] day of [May], 2016, by [Bradley B. Martin].

/s/ BRYCE FONG SAETEURN  
BRYCE FONG SAETEURN  
Notary Public

My Commission Expires: [9/2/2019]



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. \_\_\_\_\_

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANT

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[Filed: Apr. 26, 2016]

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**DECLARATION OF DEAN DEBNAM IN SUPPORT  
OF STANDING BY PUBLIC POLICY POLLING**

---

COMES NOW Dean Debnam, being duly sworn, and states as follows:

1. My name is Dean Debnam. I am over the age of 18, am authorized to make this affidavit on behalf of Public Policy Polling, LLC (“PPP”), and am otherwise competent to make this affidavit.

2. I make this affidavit based on my own personal knowledge.

3. I have been President and CEO of PPP since 2001.



4. PPP is a limited liability company located at 2912 Highwoods Blvd., Suite 201, Raleigh, North Carolina 27604.

5. In my role as President and CEO, I oversee all PPP general management including polling and research for national political clients ranging from United States Senate campaigns to major progressive advocacy organizations.

6. PPP measures and tracks public opinion on candidates, campaigns, and other political issues with automated telephone surveys.

7. PPP makes calls to persons on their cell phones on behalf of politicians, political organizations, unions, consultants, and other organizations.

8. PPP, therefore, has a personal stake in the outcome of the action, has suffered are injury in fact, and has standing to bring suit in the above-entitled action.

FURTHER AFFIANT SAYETH NOT.  
STATE OF NORTH CAROLINA  
COUNTY OF WAKE

Dated at [Raleigh, North Carolina], this [26th] day of  
[Apr.], 2016.

/s/ DEAN DEBNAM  
DEAN DEBNAM

Sworn to, subscribed and acknowledged in my presence  
this [26th] day of [Apr.], 2016, by [Dean Debnam].

/s/ JULIA S. LACOLLE  
Notary Public JULIA S. LACOLLE

My Commission Expires: [5/20/2017]

[STAMP OMITTED]

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

---

Civil Action No. \_\_\_\_\_

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANT

---

[Filed: May 9, 2016]

---

**DECLARATION OF NIGER INNIS IN SUPPORT  
OF STANDING BY TEA PARTY FORWARD PAC**

---

COMES NOW Niger Innis, being duly sworn, and states as follows:

1. My name is Niger Innis. I am over the age of 18, am authorized to make this affidavit on behalf of the Tea Party Forward PAC (“TPF”), and am otherwise competent to make this affidavit.

2. I make this affidavit based on my own personal knowledge.

3. I have been the Chairman of TPF since 2015.

4. In my role as Chairman, I am responsible for the customary oversight of activities, approval of plans and program, and I am the acting spokesperson in media and other internal and external communications.

5. TPF is located at 211 N. Union St., Suite 100, Alexandria, Virginia 22314.

6. TPF is organized as a tax-exempt nonprofit organization under § 527 of the Internal Revenue Code.

7. TPF works to promote the interests of the Tea Party including reforming all political parties and government to advance the core principles of the Founding Fathers, recruiting Americans who share that same vision, and encouraging grassroots operations to vote and elect candidates who represent these ideals.

8. TPF makes calls to potential voters on their cell phones to solicit political donations and discuss political and governmental issues.

9. TPF, therefore, has a personal stake in the outcome of the action, has suffered an injury in fact, and has standing to bring suit in the above-entitled action.

[Signatures on the following page.]

FURTHER AFFIANT SAYETH NOT.  
STATE OF VIRGINIA  
COUNTY OF FAIRFAX

Dated at [North Las Vegas @ WF], this [9] day of  
May, 2016.

/s/ NIGER R. INNIS  
NIGER INNIS

Sworn to, subscribed and acknowledged in my presence  
this \_\_\_\_ day of \_\_\_\_\_, 2016, by  
\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

---

Civil Action No. \_\_\_\_\_

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANT

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[Filed: Apr. 25, 2016]

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**DECLARATION OF KAREN DEAL IN SUPPORT  
OF STANDING BY WASHINGTON STATE  
DEMOCRATIC CENTRAL COMMITTEE**

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COMES NOW Karen Deal, being duly sworn, and states as follows:

1. My name is Karen Deal. I am over the age of 18, am authorized to make this affidavit on behalf of the Washington State Democratic Central Committee (“WSDCC”), and am otherwise competent to make this affidavit.

2. I make this affidavit based on my own personal knowledge.

3. I have been the Executive Director of WSDCC since 2014.

4. In my role as Executive Director, my duties include, but are not limited to, directing our political program, staff management, and internal and external outreach.

5. WSDCC is located at 615 2nd Avenue Suite 580, Seattle, Washington 98104.

6. WSDCC is organized as a tax-exempt nonprofit organization under § 527 of the Internal Revenue Code.

7. WSDCC works to elect Democrats, uphold Democratic values, and support Democrats across the state. WSDCC members include elected officials, candidates for office, activists, and voters.

8. WSDCC makes calls to registered voters on their cell phones to discuss political and governmental issues and to solicit political donations.

9. WSDCC, therefore, has a personal stake in the outcome of the action, has suffered an injury in fact, and has standing to bring suit in the above-entitled action.

FURTHER AFFIANT SAYETH NOT.  
STATE OF WASHINGTON  
COUNTY OF KING

Dated at [2:45 PM], this [25] day of [Apr.], 2016.

/s/ KAREN DEAL  
KAREN DEAL

Sworn to, subscribed and acknowledged in my presence  
this [25th] day of [Apr.], 2016, by [Karen Deal].

/s/ ILLEGIBLE  
Notary Public

My Commission Expires: [08/13/2018]



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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Filed: Aug. 5, 2016

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**FIRST AMENDED COMPLAINT**

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COMES NOW American Association of Political Consultants, Inc. (“AAPC”), Democratic Party of Oregon, Inc. (“DPO”), Public Policy Polling, LLC (“PPP”), Tea Party Forward PAC (“TPF”), and Washington State Democratic Central Committee (“WSDCC”) (collectively “Plaintiffs”) by and through counsel, and allege the following:

**I. NATURE OF THE CASE**

1. This is a civil action wherein Plaintiffs pray for declaratory judgment as well as preliminary and permanent injunctions to restrain Defendants from acting

under color of law to deprive Plaintiffs of rights secured to them by the First Amendment to the United States Constitution.

2. Specifically, Plaintiffs allege that the ban on certain calls to cell phones in the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(b)(1)(A)(iii) (hereinafter the “cell phone call ban”), is an unconstitutional violation of their First Amendment rights because it is content-based and cannot withstand strict scrutiny.

3. Congress and the Federal Communications Commission (“FCC”) have shown that they intend to continue to create content-based exemptions to the cell phone call ban based both on the content of the speech involved and the identity of certain favored speakers. The TCPA itself provides the FCC the power to do this in the future. *See infra* ¶ 26. This history and the FCC and Congress’ demonstrated ability and intent to apply the cell phone call ban in a content-based way shows that the cell phone call ban is unconstitutional.

4. This lawsuit is a challenge to a federal statute, as it is content-based and regulates Plaintiffs’ fully-protected, political speech. This is not a challenge to FCC orders or regulations promulgated under that statute.

## II. JURISDICTION

5. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1331.

### III. VENUE

6. Venue lies with this Court pursuant to 28 U.S.C. § 1391(e)(1)(C) because a plaintiff resides in this district and this case does not involve real property.

### IV. AUTHORITY FOR RELIEF

7. Authority for declaratory relief sought by Plaintiffs is conferred upon this Court by 28 U.S.C. §§ 2201 and 2202, and by Fed. R. Civ. P. 57.

### V. PARTIES

8. Plaintiff AAPC is a bipartisan, nonprofit association of political professionals located in McLean, Virginia and organized under § 501(c)(6) of the Internal Revenue Code (“IRC”). AAPC provides education for its members and advocates for the protection of political free speech. AAPC members include political fundraisers, organizers, and persons who conduct and analyze political polls, i.e. political pollsters and opinion researchers. AAPC members make calls to persons on their cell phones to solicit political donations and to advise on political and governmental issues. AAPC members would make these calls to persons who did not provide prior express consent to them using an automatic telephone dialing system (“ATDS”), artificial or prerecorded voice but for the cell phone call ban and the credible threat and potential for prosecution by the federal government, states, or private persons or classes of persons<sup>1</sup>.

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<sup>1</sup> Indeed, our sitting President and a major political candidate in the current presidential race are or have been defendants in TCPA lawsuits seeking class action status. *See Shamblin v. Obama for Am.*, No. 8:13-cv-2428, 2015 U.S. Dist. Lexis 54849, \*18 (M.D. Fla.

9. Plaintiff DPO is located in Portland, Oregon and organized as a tax-exempt nonprofit organization under § 527 of the IRC. DPO works to promote the interests of the Democratic Party in the State of Oregon including coordinating, organizing and electing Democratic candidates. DPO makes calls to registered Democratic and progressive non-affiliated voters on their cell phones to advise on political and governmental issues, give voters critical information to help them with the voting process, encourage voters to return their ballots by deadlines and vote for Democratic candidates, and solicit political donations. DPO would make these calls to persons who did not provide prior express consent to it using an ATDS, artificial or prerecorded voice but for the cell phone call ban and the credible threat and potential for prosecution by the federal government, states, or private persons or classes of persons.

10. Plaintiff PPP is a limited liability for-profit company located in Raleigh, North Carolina. PPP measures and tracks public opinion on candidates, campaigns, and other political issues with automated telephone surveys. PPP makes calls to persons on their cell phones on behalf of politicians, political organizations, unions, consultants, and other organizations. PPP would make these calls to persons who did not provide prior express consent to it using an ATDS, artificial or prerecorded voice but for the cell phone call ban and the credible threat and potential for prosecution by the federal government, states, or private persons or classes of persons.

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Apr. 27, 2015). *See also Thorne v. Donald J. Trump for President, Inc.*, No. 1:16-cv-4603 (N.D. Ill. Apr. 25, 2016).

11. Plaintiff TPF is located in Alexandria, Virginia and organized as a tax-exempt nonprofit organization under § 527 of the IRC. TPF works to promote the interests of the Tea Party by reforming political parties and government to advance the core principles of the Founding Fathers, recruiting Americans who share that same vision, and encouraging grassroots operations to vote and elect candidates who represent these ideals. TPF makes calls to potential voters on their cell phones to solicit political donations and advise on political and governmental issues. TPF would make these calls to persons who did not provide prior express consent to it using an ATDS, artificial or prerecorded voice but for the cell phone call ban and the credible threat and potential for prosecution by the federal government, states, or private persons or classes of persons.

12. Plaintiff WSDCC is the Democratic Party in the State of Washington and is located in Seattle, Washington. WSDCC is organized under § 527 of the IRC. WSDCC works to elect Democrats, uphold Democratic values, and support Democrats across the state. WSDCC members include elected officials, candidates for office, activists, and voters. WSDCC makes calls to registered voters on their cell phones to advise on political and governmental issues and to solicit political donations. WSDCC would make these calls to persons who did not provide prior express consent to it using an ATDS, artificial or prerecorded voice but for the cell phone call ban and the credible threat and potential for prosecution by the federal government, states, or private persons or classes of persons.

13. Defendant Loretta Lynch (“Attorney General”) heads the United States Department of Justice (“DOJ”) which is the agency in the United States government responsible for enforcement of federal law. In her official capacity as Attorney General of the United States, she enforces the law complained of in this action. Plaintiffs sue her in her official capacity.

14. Defendant FCC is a part of the executive branch of the United States government responsible for promulgation of regulations under the TCPA and enforcement of its terms. 47 U.S.C. § 227(b)(2); 47 U.S.C. § 503(b).

## VI. STANDING

15. Plaintiff AAPC has Article III standing as an organization to bring suit on behalf of its members. *See* revised Declaration of Alana Joyce in Support of Standing, attached hereto as Exhibit A; *see also Friends of the Earth v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 181 (2000); *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

16. Plaintiff DPO has Article III standing to bring suit as it has a personal stake in the outcome of the action. *See* revised Declaration of Brad Martin in Support of Standing, attached hereto as Exhibit B; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

17. Plaintiff PPP has Article III standing to bring suit as it has a personal stake in the outcome of the action. *See* revised Declaration of Dean Debnam in Support of Standing, attached hereto as Exhibit C; *see also Lujan*, 504 U.S. at 560.

18. Plaintiff TPF has Article III standing to bring suit as it has a personal stake in the outcome of the action. *See* revised Declaration of Niger Innis in Support of Standing, attached hereto as Exhibit D; *see also Lujan*, 504 U.S. at 560.

19. Plaintiff WSDCC has Article III standing to bring suit as it has a personal stake in the outcome of the action. *See* revised Declaration of Karen Deal in Support of Standing, attached hereto as Exhibit E; *see also Lujan*, 504 U.S. at 560.

## VII. STATEMENT OF FACTS

20. Congress passed the TCPA in 1991 as Pub. L. No. 102-243, 105 Stat. 2394 (codified at 47 U.S.C. § 227) to protect telephone subscribers' privacy rights in connection with commercial telephone solicitations.

21. Congress instructed the FCC to account for the "free speech protections embodied in the First Amendment of the Constitution" when considering the impact of any restrictions on noncommercial communications. TCPA, Pub. L. 102-243, § 2(13).

22. The TCPA states:

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

. . .

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii) (the “cell phone call ban”).

23. The TCPA regulations define “emergency purposes” as “calls made necessary in any situation affecting the health and safety of consumers.” *Id.* at (f)(4) (hereinafter the “emergency exemption”).

24. The TCPA defines “automatic telephone dialing system” (“ATDS”) as “equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers.” 47 U.S.C. § 227(a)(1).

25. The FCC, the states, through their attorneys general or otherwise, and private persons, including classes of persons, can sue for actual or statutory damages for violations of the cell phone call ban for \$500 or more per telephone call. *Id.* at (b)(3), (g); 47 U.S.C. § 503.

26. The TCPA provides that the FCC “shall prescribe regulations to implement the requirements of this subsection. . . .” 47 U.S.C. § 227(b)(2).

27. In the 1992 Order regarding the implementation of the TCPA, the FCC stated the purpose of its regulations under this subsection:



This R&O amends part 64 of the Commission's rules by adding § 64.1200 to restrict the use of automatic telephone dialing systems and artificial or prerecorded voice messages for telemarketing purposes or for transmitting unsolicited telephone facsimile advertisements. The rules require that persons or entities making telephone solicitations establish procedures to protect residential subscribers from unwanted solicitations, and set forth exemptions to certain prohibitions under this part. . . . The rules are intended to impose reasonable restrictions on autodialed or prerecorded voice telephone calls consistent with considerations regarding public health and safety and commercial speech and trade, and to allow consumers to avoid unwanted telephone solicitations without unduly limiting legitimate telemarketing practices.

57 Fed. Reg. 48333 (Oct. 23, 1992).

28. Since 1992, the FCC and Congress have passed at least six exemptions to the cell phone call ban which apply based on the identity of the caller and/or the content of the exempted calls.

29. In 2012, the FCC exempted from the cell phone call ban "autodialed or prerecorded message calls by a wireless carrier to its customer when the customer is not charged." 77 Fed. Reg. 34233, 34235 (June 11, 2012) (hereinafter referred to as the "wireless exemption").

30. In 2014, the FCC exempted from the cell phone call ban prerecorded and ATDS calls for "package delivery notifications to consumers' wireless phones either by voice or text . . . so long as those calls are not charged to the consumer recipient, including not

being counted against the consumer's plan limits on minutes or texts, and comply with the conditions. . . .” *In the Matter of Cargo Airline Association Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3432, 3439 (Mar. 27, 2014) (hereinafter referred to as the “package delivery exemption”).

31. In 2014, the FCC exempted from the cell phone call ban prerecorded and ATDS “non-telemarketing voice calls or text messages to wireless numbers . . . [that] rely on a representation from an intermediary that they have obtained the requisite consent from the consumer.” *In the Matter of GroupMe, Inc./Skype Communications S.A.R.L.*, 29 FCC Rcd 3442, 3444 (Mar. 27, 2014) (hereinafter referred to as the “intermediary consent exemption”).

32. In 2015, the FCC exempted from the cell phone call ban prerecorded and ATDS “non-telemarketing, healthcare calls that are not charged to the called party” and “for which there is exigency and that have a healthcare treatment purpose. . . .” *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 et al.*, 30 FCC Rcd 7961, 8930-31 (July 10, 2015) (hereinafter referred to as the “HIPAA exemption”).

33. In 2015, the FCC exempted from the cell phone call ban prerecorded and ATDS calls regarding “(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.’” *Id.* at 8023 (hereinafter referred to as the “bank and financial exemption”).

34. In 2015, Congress exempted from the cell phone call ban prerecorded and ATDS calls “made solely to collect a debt owed to or guaranteed by the United States”. TCPA, Pub. L. No. 114-74, § 301(a) 129 Stat. 588 (2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)) (hereinafter referred to as the “debt collection exemption”).

35. In 2016, the FCC exempted from the cell phone call ban prerecorded and ATDS calls from federal government officials conducting official business. *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 et al.*, CG Docket No. 02-278, July 5, 2016 at ¶ 12 (hereinafter referred to as the “official federal government business exemption<sup>2</sup>”).

### COUNT I

#### (The Cell Phone Call Ban is a Content-based Restriction on Speech)

36. Plaintiffs incorporate by reference the allegations in paragraphs one through 35.

37. The First Amendment reflects a “profound national commitment” to the principle that “debate on public issues should be uninhibited, robust, and wide-open,” and has “consistently commented on the central importance of protecting speech on public issues.” *Boos v. Barry*, 485 U.S. 312, 318 (1998).

38. “[P]olitical speech is at the very core of the First Amendment.” *Carey v. Fed. Elec. Comm’n.*, 791 F. Supp. 2d 121, 133-34 (D.D.C. 2011) (citing *Buck-*

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<sup>2</sup> The FCC issued the full text of its Declaratory Ruling, available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2016/db0706/FCC-16-72A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0706/FCC-16-72A1.pdf).

*ley v. Valeo*, 424 U.S. 1, 39 (1976)). “The First Amendment affords the broadest protection to such political expression in order ‘to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by people.’” *McIntyre v. Ohio Elec. Comm’n.*, 514 U.S. 334, 346 (1995).

39. The First Amendment to the United States Constitution prohibits discrimination as to the content of speech or the identity of the speaker. *Reed v. Town of Gilbert*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218, 2227 (2015) (“Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”).

40. The debt collection exemption created by Congress and the FCC’s exemptions are based on the content of the speech, which includes the identity of the speaker. *U.S. v. Playboy Entm’t Group*, 529 U.S. 803, 812 (2000). Content-based restrictions of protected speech are subject to strict scrutiny. *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015) (“As a content-based regulation of speech, the anti-robocall statute is subject to strict scrutiny . . . [u]nder this standard, the government must prove ‘that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.’”); *Riley v. Nat’l Fed. of the Blind*, 487 U.S. 781, 800 (1988) (“These more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored.”).

41. The Defendants therefore bear the burden of demonstrating that the cell phone call ban is narrowly tailored to further a compelling interest which it is en-

titled to protect using the least restrictive means available. *Secr'y of the State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 959-61 (1984); *Vill. of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620, 636-37 (1980). The cell phone call ban does not satisfy strict scrutiny.

42. The TCPA restricts Plaintiffs' fully-protected, political speech whereas the FCC permits prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the wireless exemption. *See* 77 Fed. Reg. at 34235. By favoring commercial speech over Plaintiffs' political speech, the cell phone call ban violates the constitutional rights of these political organizations. *See Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980).

43. The TCPA restricts Plaintiffs' fully-protected, political speech whereas the FCC permits prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the package delivery exemption. *See* 29 FCC Rcd at 3435. By favoring commercial speech over the noncommercial political speech of Plaintiffs, the cell phone call ban violates the constitutional rights of these political organizations. *See Metromedia*, 453 U.S. at 513.

44. The TCPA restricts Plaintiffs' fully-protected, political speech whereas the FCC permits prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the intermediary consent exemption. *See* 29 FCC Rcd at 3444. By favoring this speech over the noncommercial political speech of Plaintiffs, the cell

phone call ban violates the constitutional rights of these political organizations. *See Metromedia*, 453 U.S. at 513.

45. The TCPA restricts Plaintiffs' fully-protected, political speech whereas the FCC permits prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the HIPAA exemption. *See* 30 FCC Rcd at 8031. By favoring this speech over the noncommercial political speech of Plaintiffs, the cell phone call ban violates the constitutional rights of these political organizations. *See Metromedia*, 453 U.S. at 513.

46. The TCPA restricts Plaintiffs' fully-protected, political speech whereas the FCC permits prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the bank and financial exemption. *See* 30 FCC Rcd at 8024-28. By favoring commercial speech over the noncommercial political speech of Plaintiffs, the cell phone call ban violates the constitutional rights of these political organizations. *See Metromedia*, 453 U.S. at 513.

47. The TCPA restricts Plaintiffs' fully-protected, political speech whereas the TCPA permits prerecorded and ATDS commercial calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the debt collection exemption. 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii). By favoring commercial speech over the noncommercial political speech of Plaintiffs, the cell phone call ban violates the constitutional rights of these political organizations. *See Metromedia*, 453 U.S. at 513.

48. The TCPA restricts Plaintiffs' fully-protected, political speech whereas the FCC permits prerecorded and ATDS commercial calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the official federal government business exemption. *In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 et al.*, CG Docket No. 02-278, July 5, 2016 at ¶ 12. By favoring federal government speech over the non-commercial political speech of Plaintiffs, the cell phone call ban violates the constitutional rights of these political organizations. *See Metromedia*, 453 U.S. at 513.

49. The official federal government business exemption causes the cell phone call ban to be unconstitutional for two reasons, first, because it is based on the content of the speech involved, and second, because it is based on the identity of the speaker. *Playboy*, 529 U.S. at 812.

50. The cell phone call ban is therefore an unconstitutional content-based restriction on Plaintiffs' fully-protected, political speech in violation of the First Amendment. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

## COUNT II

### (The Cell Phone Call Ban is Underinclusive)

51. Plaintiffs incorporate by reference the allegations in paragraphs one through 50.

52. A law is underinclusive and thus not narrowly tailored “when it discriminates against some speakers but not others without a legitimate ‘neutral justification’

for doing so.” *Nat’l Fed’n of the Blind v. F.T.C.*, 420 F.3d 331, 345 (4th Cir. 2005) (“Even when the government has a compelling interest for restricting speech, it may not seek to further that interest by creating arbitrary distinctions among speakers that bear no ‘reasonable fit’ to the interest at hand.”).

53. An underinclusive statute “raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 802 (2011) (holding that a California statute that prohibited the sale or rental of “violent video games” to minors violated the First Amendment because it was underinclusive and did not preclude minors from having access to violent information in other forms).

54. The cell phone call ban is underinclusive because it exempts commercial prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the wireless exemption. *See* 77 Fed. Reg. at 34235.

55. The cell phone call ban is underinclusive because it exempts prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the package delivery exemption. *See* 29 FCC Rcd at 3435.

56. The cell phone call ban is underinclusive because it exempts prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the intermediary consent exemption. *See* 29 FCC Rcd at 3444.



57. The cell phone call ban is underinclusive because it exempts prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the HIPAA exemption. *See* 30 FCC Rcd at 8031.

58. The cell phone call ban is underinclusive because it exempts prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the bank and financial exemption. *Id.* at 8024-28.

59. The cell phone call ban is underinclusive because it exempts commercial prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the debt collection exemption. *See* 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

60. The cell phone call ban is underinclusive because it exempts commercial prerecorded and ATDS calls or text messages to cell phones (or any service for which the called party is charged) if made pursuant to the official federal government business exemption. *See In re Rules and Regulations Implementing the Tel. Consumer Prot. Act of 1991 et al.*, CG Docket No. 02-278, July 5, 2016 at ¶ 12.

61. There is no relation between any legitimate government purpose behind the cell phone call ban and the speech banned, regulated, or allowed by it.

62. Plaintiffs' speech is no more harmful than the speech allowed by the content-based exemptions to the cell phone call ban.

63. The cell phone call ban is an impermissible means of advancing any legitimate interest of Defendants. The cell phone call ban is therefore unconstitutional.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray for the following relief and judgment from this Court:

1. A preliminary injunction enjoining the enforcement of the cell phone call ban by Defendants, its agents and employees against these Plaintiffs, and others similarly situated;

2. A permanent injunction enjoining the enforcement of the cell phone call ban by Defendants, its agents and employees against these Plaintiffs, and others similarly situated;

3. A declaratory judgment pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 that the cell phone call ban on its face is unconstitutional as it violates the First Amendment to the United States Constitution;

4. An award of nominal damages in the amount of \$1.00 as a result of Defendants' violation of Plaintiffs' constitutional rights;

5. An order requiring that Defendants pay all costs, interest, and attorneys' fees as may be incurred with this civil action as allowed by law; and

6. An order providing such other and further relief as the Court deems just and proper and for the purpose of redressing Plaintiffs' grievances.

Dated: Aug. 5, 2016.

Respectfully Submitted,

/s/ CHARLES GEORGE  
CHARLES GEORGE, NC #21003  
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**ATTORNEYS FOR PLAINTIFFS**

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
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AS ATTORNEY GENERAL OF THE UNITED STATES, AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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[Filed: Aug. 3, 2016]

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**DECLARATION OF ALANA JOYCE IN SUPPORT  
OF STANDING BY AMERICAN ASSOCIATION  
OF POLITICAL CONSULTANTS**

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COMES NOW Alana Joyce, being duly sworn, and states as follows:

1. My name is Alana Joyce. I am over the age of 18, am authorized to make this affidavit on behalf of American Association of Political Consultants, Inc. (“AAPC”), and am otherwise competent to make this affidavit.

2. I make this affidavit based on my own personal knowledge.

3. I have been the Executive Director of AAPC since 2011.

4. In my role as Executive Director, I oversee all AAPC general management, membership growth and retention, industry advocacy, and annual conference functions including the recognition of excellence in political consulting practices.

5. AAPC is incorporated in the District of Columbia with its principal office in McLean, Virginia.

6. AAPC is organized as a tax-exempt nonprofit organization under § 501(c)6 of the Internal Revenue Code.

7. AAPC is the largest bipartisan association of political and public affairs professionals in the world.

8. AAPC provides education for its members and advocates for the protection of political free speech.

9. AAPC members include individuals and businesses that handle all aspects of campaigning including political fundraisers, political organizers, persons who conduct and analyze political polls, i.e. political pollsters and opinion researchers, and persons who organize get out the vote (GOTV) efforts

10. But for the Telephone Consumer Protection Act (“TCPA”), AAPC members would make calls to registered voters’ cell phones using an automatic telephone dialing system (“ATDS”) or prerecorded voice as these technologies allow a more cost-efficient way to communicate with registered voters than live voice or “manually dialed” telephone calls. Our members’ contacts to voters and constituents would be much more cost-effective if we could use prerecorded voice or ATDS calling equipment without threat of TCPA litigation. In addition, as

many consumers increasingly choose to have cell phone only access (in lieu of landlines), our members are increasingly reliant on outreach by cell phone for information gathering, e.g. polling, solicitation of donations, “get out the vote” or for other political purposes.

11. In the past, AAPC members have considered making calls to cell phones with a predictive dialer, i.e. equipment which has the capacity to dial numbers without human intervention for each call, or prerecorded voice calls for get out the vote, polling, or solicitation of donations. AAPC members have not used prerecorded voice, predictive dialers, or other ATDS equipment to make calls to cell phones for which we do not have express consent for fear of prosecution and/or private actions under the TCPA for massive damages which would exceed their ability to pay.

12. While some of AAPC members’ calls to cell phones are made to persons who have provided prior express consent (and have not revoked that consent), they would also like to make prerecorded voice, predictively dialed, and other ATDS calls to persons’ cell phones who had a relationship with them in the past but whose number has changed, persons who do not have a relationship with them but might support their causes, and to persons who do not have a relationship with them for information gathering, e.g. polling, solicitation of donations, “get out the vote” or for other political purposes.

13. The interest of AAPC members in making calls to registered voters' cell phones using a prerecorded voice, predictive dialers, or other ATDS equipment is connected to AAPC's organizational purpose, which, in large part, is to defend political free speech and provide education and resources regarding same to its members.

14. AAPC, therefore has suffered an injury in fact and has organizational standing to bring suit on behalf of its members in the above-entitled action.

[Signatures on the following page.]

FURTHER AFFIANT SAYETH NOT.  
STATE OF VIRGINIA  
COUNTY OF FAIRFAX

Dated at \_\_\_\_\_, this [3rd] day of [Aug.], 2016.

/s/ ALANA M. JOYCE  
ALANA JOYCE

Sworn to, subscribed and acknowledged in my presence  
this [3rd] day of [Aug.], 2016, by [Alana Joyce].

/s/ CARYN L. STILWELL  
CARYN L. STILWELL  
Notary Public

My Commission Expires: [Jan. 5, 2019]





UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES, AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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[Filed: Aug. 4, 2016]

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**DECLARATION OF BRAD MARTIN IN SUPPORT  
OF STANDING BY DEMOCRATIC PARTY OF OREGON**

---

COMES NOW Brad Martin, being duly sworn, and states as follows:

1. My name is Brad Martin. I am over the age of 18, am authorized to make this affidavit on behalf of the Democratic Party of Oregon (“DPO”), and am otherwise competent to make this affidavit.
2. I make this affidavit based on my own personal knowledge.
3. I have been Executive Director of DPO since 2013.

4. In my role as Executive Director, I am responsible for managing DPO's internal operations, fund-raising, running "get-out-the-vote" campaigns, and recruiting and electing Democrats among other duties.

5. DPO is located at 232 NE 9th Avenue, Portland, Oregon 97232.

6. DPO is organized as a tax-exempt nonprofit organization under § 527 of the Internal Revenue Code.

7. DPO works to promote the interests of the Democratic Party in the State of Oregon including coordinating, organizing and electing Democratic candidates, adopting a party platform, ensuring the party's issues are enacted into law, and representing DPO to the Democratic National Committee and to other states.

8. But for the Telephone Consumer Protection Act ("TCPA"), DPO would make calls to registered voters' cell phones using an automatic telephone dialing system ("ATDS") or prerecorded voice as these technologies allow a more cost-efficient way to communicate with registered voters than live voice or "manually dialed" telephone calls.

9. In the past, DPO has considered making calls to cell phones with a predictive dialer, i.e. equipment which has the capacity to dial numbers without human intervention for each call, or prerecorded voice calls for get out the vote, polling, or solicitation of donations. We have not used prerecorded voice, predictive dialers, or other ATDS equipment to make calls to cell phones for which we do not have express consent for fear of prosecution and/or private actions under TCPA for massive damages which would exceed our ability to pay.

10. While some of our calls to cell phones are made to persons who have provided prior express consent (and have not revoked that consent), we would also like to make prerecorded voice, predictively dialed, and other ATDS calls to persons' cell phones who had a relationship with us in the past but whose number has changed, persons who do not have a relationship with us but might support our causes, and to persons who do not have a relationship with us for information gathering, e.g. polling, solicitation of donations, "get out the vote" or for other political purposes.

11. DPO, therefore, has a personal stake in the outcome of the action, has suffered an injury in fact, and has standing to bring suit in the above-entitled action.

[Signatures on the following page.]

FURTHER AFFIANT SAYETH NOT.  
STATE OF OREGON  
COUNTY OF MULTNOMAH

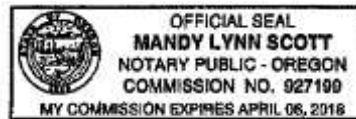
Dated at [Bank of America], this [4] day of [Aug.], 2016.

/s/ BRAD MARTIN  
BRAD MARTIN

Sworn to, subscribed and acknowledged in my presence  
this [4] day of [Aug.], 2016, by [Bradly B. Martin].

/s/ MANDY LYNN SCOTT  
MANDY LYNN SCOTT  
Notary Public

My Commission Expires: [Apr. 6, 2018]



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES, AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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[Filed: Aug. 4, 2016]

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**DECLARATION OF DEAN DEBNAM IN SUPPORT  
OF STANDING BY PUBLIC POLICY POLLING**

---

COMES NOW Dean Debnam, being duly sworn, and states as follows:

1. My name is Dean Debnam. I am over the age of 18, am authorized to make this affidavit on behalf of Public Policy Polling, LLC (“PPP”), and am otherwise competent to make this affidavit.
2. I make this affidavit based on my own personal knowledge.
3. I have been President and CEO of PPP since 2001.

4. PPP is a limited liability company located at 2912 Highwoods Blvd., Suite 201, Raleigh, North Carolina 27604.

5. In my role as President and CEO, I oversee all PPP general management, including polling and research for national political clients ranging from United States Senate campaigns to major progressive advocacy organizations.

6. PPP measures and tracks public opinion on candidates, campaigns, and other political issues with automated telephone surveys.

7. But for the Telephone Consumer Protection Act (“TCPA”), PPP would make calls to registered voters’ cell phones using an automatic telephone dialing system (“ATDS”) or prerecorded voice as these technologies allow a more cost-efficient way to communicate with registered voters than live voices or “manually dialed” telephone calls.

8. In the past, PPP has considered making calls to cell phones with a predictive dialer, i.e. equipment which has the capacity to dial numbers without human intervention for each call, or prerecorded voice calls for public opinion polling. We have not used prerecorded voice, predictive dialers, or other ATDS equipment to make calls to cell phones for which we do not have express consent for fear of prosecution and/or private actions under the TCPA for massive damages which would exceed our ability to pay.

9. While some of our calls to cell phones are made to persons who have provided prior express consent (and have not revoked that consent), we would also like to make prerecorded voice, predictively dialed, and other

ATDS calls to persons' cell phones who had a relationship with us in the past but whose number has changed, persons who do not have a relationship with us but might be able to provide responses to opinion polls or for other political purposes.

10. PPP, therefore, has a personal stake in the outcome of the action, has suffered an injury in fact, and has standing to bring suit in the above-entitled action.

[Signatures on the following page.]

FURTHER AFFIANT SAYETH NOT.  
STATE OF NORTH CAROLINA  
COUNTY OF WAKE

Dated at [Raleigh NC], this [4th] day of [Aug.], 2016.

/s/ DEAN DEBNAM  
DEAN DEBNAM

Sworn to, subscribed and acknowledged in my presence  
this \_\_\_ day of \_\_\_\_\_, 2016, by \_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES, AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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[Filed: Aug. 5, 2016]

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**DECLARATION OF NIGER INNIS IN SUPPORT  
OF STANDING BY TEA PARTY FORWARD PAC**

---

COMES NOW Niger Innis, being duly sworn, and states as follows:

1. My name is Niger Innis. I am over the age of 18, am authorized to make this affidavit on behalf of the Tea Party Forward PAC (“TPF”), and am otherwise competent to make this affidavit.
2. I make this affidavit based on my own personal knowledge.
3. I have been the Chairman of TPF since 2015.

4. In my role as Chairman, I am responsible for the customary oversight of activities, approval of plans and program, and I am the acting spokesperson in media and other internal and external communications.

5. TPF is located at 211 N. Union St., Suite 100, Alexandria, Virginia 22314.

6. TPF is organized as a tax-exempt nonprofit organization under § 527 of the Internal Revenue Code.

7. TPF works to promote the interests of the Tea Party including reforming all political parties and government to advance the core principles of the Founding Fathers, recruiting Americans who share that same vision, and encouraging grassroots operations to vote and elect candidates who represent these ideals.

8. But for the Telephone Consumer Protection Act (“TCPA”), TPF would make calls to registered voters’ cell phones using an automatic telephone dialing system (“ATDS”) or prerecorded voice as these technologies allow a more cost-efficient way to communicate with registered voters than live voice or “manually dialed” telephone calls.

9. In the past, TPF has considered making calls to cell phones with a predictive dialer, i.e. equipment which has the capacity to dial numbers without human intervention for each call, or prerecorded voice calls to obtain support, educate voters, or solicit donations. We have not used prerecorded voice, predictive dialers, or other ATDS equipment to make calls to cell phones for which we do not have express consent for fear of prosecution and/or private actions under the TCPA for massive damages which would exceed our ability to pay.

10. While some of our calls to cell phones are made to persons who have provided prior express consent (and have not revoked that consent), we would also like to make prerecorded voice, predictively dialed, and other ATDS calls to persons' cell phones who had a relationship with us in the past but whose number has changed, persons who do not have a relationship with us but might support our causes, and to persons who do not have a relationship with us for solicitation of donations, education or for other political purposes.

11. TPF, therefore, has a personal stake in the outcome of the action, has suffered an injury in fact, and has standing to bring suit in the above-entitled action.

[Signatures on the following page.]

FURTHER AFFIANT SAYETH NOT.  
STATE OF VIRGINIA  
COUNTY OF FAIRFAX

Dated at Alexandria, VA, this 5th day of Aug.,  
2016.

/s/ NIGER INNIS  
NIGER INNIS

Sworn to, subscribed and acknowledged in my presence  
this \_\_\_\_ day of \_\_\_\_\_, 2016, by  
\_\_\_\_\_.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES, AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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[Filed: Aug. 2, 2016]

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**DECLARATION OF KAREN DEAL IN SUPPORT  
OF STANDING BY WASHINGTON STATE  
DEMOCRATIC CENTRAL COMMITTEE**

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COMES NOW Karen Deal, being duly sworn, and states as follows:

1. My name is Karen Deal. I am over the age of 18, am authorized to make this affidavit on behalf of Washington State Democratic Central Committee (“WSDCC”), and am otherwise competent to make this affidavit.
2. I make this affidavit based on my own personal knowledge.
3. I have been the Executive Director of WSDCC since 2014.

4. In my role as Executive Director, my duties include, but are not limited to, directing our political program, staff management, and internal and external outreach.

5. WSDCC is located at 615 2nd Avenue Suite 580, Seattle, Washington 98104.

6. WSDCC is organized as a tax-exempt nonprofit organization under § 527 of the Internal Revenue Code.

7. WSDCC works to elect Democrats, uphold Democratic values, and support Democrats across the state. WSDCC members include elected officials, candidates for office, activists, and voters.

8. But for the Telephone Consumer Protection Act (“TCPA”), WSDCC would make calls to registered voters’ cell phones using an automatic telephone dialing system (“ATDS”) or prerecorded voice as these technologies allow a more cost-efficient way to communicate with registered voters than live voice or “manually dialed” telephone calls.

9. In the past, WSDCC has considered making calls to cell phones with a predictive dialer, i.e. equipment which has the capacity to dial numbers without human intervention for each call, or prerecorded voice calls for get out the vote, polling, or solicitation of donations. We have not used prerecorded voice calls, predictive dialers, or other ATDS equipment to make calls to cell phones for which we do not have express consent for fear of prosecution and/or private actions under the TCPA for massive damages which would exceed our ability to pay.

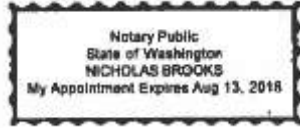
10. While some of our calls to cell phones are made to persons who have provided prior express consent (and have not revoked that consent), we would also like to make prerecorded voice, predictively dialed, and other ATDS calls to persons' cell phones who had a relationship with us in the past but whose number has changed, persons who do not have a relationship with us but might support our causes, and to persons who do not have a relationship with us for information gathering, e.g. polling, solicitation of donations, "get out the vote" or for other political purposes.

11. WSDCC, therefore, has a personal stake in the outcome of the action, has suffered an injury in fact, and has standing to bring suit in the above-entitled action.

[Signatures on the following page.]

FURTHER AFFIANT SAYETH NOT.  
STATE OF WASHINGTON  
COUNTY OF KING

Dated at [12:10 PM], this [2] day of [Aug.], 2016.



/s/ KAREN DEAL  
KAREN DEAL

Sworn to, subscribed and acknowledged in my presence  
this [2nd] day of [Aug.], 2016, by [Karen Deal].

/s/ NICHOLAS BROOKS  
NICHOLAS BROOKS  
Notary Public

My Commission Expires: [08/13/2018]



UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

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Civil Action No. 5:16-cv-00252 (JCD)

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

LORETTA LYNCH, IN HER OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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Filed: Sept. 23, 2016

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**PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION  
TO DISMISS FIRST AMENDED COMPLAINT**

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\* \* \* \* \*

**I. SUMMARY OF THE CASE**

On May 12, 2016, Plaintiffs filed this lawsuit against Defendant Loretta Lynch, in her official capacity as Attorney General of the United States, for declaratory judgment as well as preliminary and permanent injunctions to restrain Defendant from acting under color of law to deprive Plaintiffs of rights secured to them by the First Amendment to the U.S. Constitution. *See* Doc. 1, ¶¶ 1-2. Specifically, Plaintiffs allege that the

cell phone call ban is an unconstitutional violation of their First Amendment rights because it is content based and cannot withstand strict scrutiny. *Id.*

On July 15, 2016, Defendant Lynch filed her Motion to Dismiss Plaintiffs' Complaint for lack of subject-matter jurisdiction. *See* Doc. 15 and 16. Plaintiffs subsequently filed their First Amended Complaint on August 5, 2016, and added the FCC as a Defendant. *See* Doc. 18. In the First Amended Complaint, Plaintiffs alleged that 47 U.S.C. § 227(b)(1)(A)(iii) (hereinafter the "cell phone call ban") of the Telephone Consumer Protection Act ("TCPA") violates the First Amendment because it is a content-based restriction of Plaintiffs' fully-protected political speech and cannot withstand strict scrutiny. Doc. 18, ¶ 2. This case is a challenge to the cell phone call ban, only, based on the litany of content-based exemptions to it created by Congress and the FCC. Plaintiffs are not challenging the entirety of the TCPA, nor are they challenging those exemptions. *Id.* at ¶ 4. Plaintiffs have further alleged that the fact that Congress and the FCC continue to create content-based exemptions to the cell phone call ban supports Plaintiffs' argument that it is unconstitutional. The history of the FCC and Congress' ability and intent to continue to create content-based exemptions to the cell phone call ban demonstrates that it is unconstitutional. *Id.* at ¶ 3.

Defendants' Motion to Dismiss First Amended Complaint (Doc. 22) and Memorandum in Support of Defendants' Motion to Dismiss (Doc. 23) were filed on August 26, 2016. In their Memorandum, Defendants argue that 1) the district court lacks jurisdiction to consider Plaintiffs' suit because it is actually a challenge to FCC orders

creating the content-based exemptions; and 2) Plaintiffs lack standing because the remedy for a challenge to regulatory exemptions, i.e. striking those exemptions, would not redress their alleged injury. *See* Doc. 22. As shown herein, Plaintiffs contend that both of these arguments mischaracterize Plaintiffs' case and neither has merit. *See infra* and Doc. 18.

## II. STATEMENT OF FACTS

Plaintiffs are various political organizations and a bipartisan, nonprofit association of political professionals that make calls to registered voters on their cell phones to discuss political and governmental issues and to solicit political donations, and would make these calls to persons who did not provide prior express consent to them using an automatic telephone dialing system ("ATDS"), artificial or prerecorded voice but for the cell phone call ban and the potential for prosecution by the federal government, states, or private persons or classes of persons. Doc. 18, ¶¶ 8-12. As set forth above, Plaintiffs in their First Amended Complaint allege that the cell phone call ban of the TCPA violates the First Amendment because it is a content-based restriction of Plaintiffs' fully-protected political speech and cannot withstand strict scrutiny. *Id.* at ¶ 2. They challenge the cell phone call ban, only, based on the litany of content-based exemptions to it created by Congress and the FCC, and are not challenging the entirety of the TCPA, nor are they challenging those exemptions. *Id.* at ¶ 4. Plaintiffs have also alleged that the history and continuous creation by Congress and the FCC of content-based exemptions to the cell phone call ban supports Plaintiffs' argument that it is unconstitutional. *Id.* at ¶ 3.

Since 1992, the FCC and Congress have passed numerous exemptions to the cell phone call ban which apply based on the identity of the caller and/or the content of the exempted calls. *Id.* at ¶¶ 28-35. The wireless exemption, package delivery exemption, intermediary consent exemption, HIPAA exemption, bank and financial exemption, debt collection exemption and official federal government business exemption as referenced in the First Amended Complaint each favor commercial speech over the noncommercial political speech of Plaintiffs, and thus violate the constitutional rights of these political organizations. *See id.* at ¶¶ 28-50. As a result, and for the reasons more particularly alleged in the First Amended Complaint, Plaintiffs have alleged that the cell phone call ban is an impermissible content-based restriction on free speech and is underinclusive. *Id.* at ¶¶ 36-63. Plaintiffs seek, among other things, a preliminary and permanent injunction enjoining the enforcement of the cell phone call ban by Defendants, its agents and employees against these Plaintiffs, and others similarly situated, and a declaratory judgment pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 that the cell phone call ban on its face is unconstitutional as it violates the First Amendment to the U.S. Constitution. *Id.* at Prayer ¶¶ 1-3.

Defendants have filed a motion to dismiss and supporting memorandum arguing that 1) the district court lacks jurisdiction to consider Plaintiffs' suit because it is actually a challenge to FCC orders creating the content-based exemptions; and 2) Plaintiffs lack standing because the remedy for a challenge to regulatory exemptions, i.e. striking those exemptions, would not redress their alleged injury. *See* Doc. 22. As shown herein, Plaintiffs contend that both of these arguments mis-

characterize Plaintiffs' case and neither has merit. *See infra* and Doc. 18.

### III. ARGUMENT

#### A. The cell phone call ban violates the First Amendment.

The cell phone call ban is contrary to the protections afforded to political speech by the First Amendment. “[S]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’” *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Consequently, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

Nor would striking the regulatory and statutory exemptions properly redress Plaintiffs' injury as the FCC and Congress are empowered to create new exemptions. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (the Supreme Court struck down ordinance that prohibited residences from erecting certain signs but exempted commercial entities, churches, and nonprofit organizations as a content-based restriction on speech

that violated the First Amendment). The Court noted that “[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government’s rationale for restricting speech in the first place.” *Id.* at 52. *See also Carey v. Brown*, 447 U.S. 455, 459-71 (1980) (the Supreme Court struck down state law that forbade certain kinds of picketing but exempted labor picketing as it discriminated between lawful and unlawful conduct based upon the content of the communication. Notably, the Court struck the statute, not the exemption to the statute, as unconstitutional).

Permitting more speech, rather than less, is preferable as part of the marketplace of ideas where freedom of expression encourages the competition of ideas. *See Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, O., dissenting) (“the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”); *U.S. v. Rumely*, 345 U.S. 41, 56 (1953) (“Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.”); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

**B. Plaintiffs challenge the cell phone call ban, a provision of the TCPA.**

Defendants’ Memorandum rests on the argument that the district court lacks jurisdiction, characterizing Plaintiffs’ challenge not as a challenge to a provision of the TCPA, but to the regulatory exemptions created by

FCC orders.<sup>2</sup> That characterization is false: Plaintiffs' lawsuit challenges a provision of the TCPA:

the ban on certain calls to cell phones in the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii) (hereinafter the "cell phone call ban"), is an unconstitutional violation of their First Amendment rights because it is content-based and cannot withstand strict scrutiny.

Doc. 18, ¶ 2.

Plaintiffs reiterate throughout their First Amended Complaint that "[t]his lawsuit is a challenge to a federal statute" and it is "not a challenge to FCC orders or regulations promulgated under that statute." *Id.* at ¶ 4. Based on an apparent recognition of this fact, alternatively, Defendants contend that "[a]lthough Plaintiffs' primary purpose in citing to FCC orders in their Complaint may be to argue that the TCPA writ large is unconstitutional, the fact that those orders form the basis for their constitutional argument is sufficient to invoke the jurisdiction of the court of appeals." Doc. 23, p. 5. Defendants do not cite any law for this proposition, nor could they. Moreover, Plaintiffs are not challenging the TCPA as a whole, but the cell phone call ban. *See* Doc. 18, ¶ 2. Nevertheless, elsewhere in their Memorandum, Defendants contend that "Plaintiffs make no argument that the statute itself is otherwise unconstitutional" so the "'practical effect' of a ruling in Plain-

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<sup>2</sup> *See* Doc. 23, p. 4, n.2. To be clear, Plaintiffs do not dispute that the court of appeals has exclusive jurisdiction to determine the validity of all final orders of the FCC. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1), but deny that they are challenging any FCC orders, and thus deny that this suit invokes the Hobbs Act.

tiffs' favor would be to invalidate the FCC orders alone" and the district court would therefore lack jurisdiction. Doc. 23, p. 6. This statement contradicts not only Plaintiffs' First Amended Complaint, but Defendants' argument cited above and its further admission in their Memorandum that "[Plaintiffs] are left with their argument that the statute is unconstitutional because the 2015 amendment, exempting calls made to collect debts owed to or guaranteed by the Federal Government, renders it content-based." *Id.* at p. 7.

Plaintiffs have, in fact, argued that the cell phone call ban is an unconstitutional restriction, applicable or not based on the identity of the speaker and the content of the speech. The cell phone call ban restricts Plaintiffs' fully-protected political speech while it otherwise permits certain types of commercial speech. *See* Doc. 18, ¶¶ 36-50.

Plaintiffs also argue that the cell phone call ban is unconstitutional as an underinclusive statute because it discriminates against some speakers [Plaintiffs] but not others without a legitimate 'neutral justification' for doing so." *Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 345 (4th Cir. 2005) ("Even when the government has a compelling interest for restricting speech, it may not seek to further that interest by creating arbitrary distinctions among speakers that bear no 'reasonable fit' to the interest at hand."). *Id.*



The FCC believes it has the power to make content-based exemptions to the cell phone call ban.<sup>3</sup> Congress also believes it has the same ability and if a statutory content-based exemption was struck down, Congress could simply pass a new law recreating it. The fact that Congress and the FCC continue to create content-based exemptions to the cell phone call ban, including the 2015 amendment to the TCPA that exempts calls “made solely to collect a debt owed to or guaranteed by the United States”<sup>4</sup>, leads to the conclusion that the cell phone call ban is unconstitutional.

Defendants’ reliance on *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) is inapposite. The plaintiff in *Mais* filed a claim in federal district court against a medical provider and its debt collection agent for making prerecorded or ATDS calls to his cell phone without prior express consent in violation of the TCPA. *Id.* at 1113. The defendant argued that the calls fell within a statutory exception for “prior express consent,” as interpreted in a 2008 declaratory ruling from the FCC. *Id.* Because the plaintiff’s claim fell “squarely within the scope of the FCC order, which covers medical debts” and the district court held that the “FCC’s interpretation was inconsistent with the language of the TCPA, the *Mais* court appropriately held that the district court had no authority to consider the validity of the 2008 FCC ruling. *Id.*

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<sup>3</sup> The TCPA has given the FCC the authority to “prescribe regulations to implement the requirements of this subsection. . . .” 47 U.S.C. § 227(b)(2).

<sup>4</sup> TCPA, Pub. L. No. 114-74, § 301(a) 129 Stat. 588 (2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)) (hereinafter referred to as the “debt collection exemption”).

In this case, there is no request by Plaintiffs to have this Court consider any of the FCC rulings referenced in Plaintiffs' First Amended Complaint, and a review of those rulings makes clear that they are completely unrelated to the calls at issue in this case, and Plaintiffs would have no standing before the FCC to challenge any of those rulings. *See* Doc. 18, ¶¶ 29-34. The *Mais* court did discuss the "practical effect" that a case would have on an FCC ruling, 768 F.3d at 1120, and thus Defendants here expressly argue that the "'practical effect' of a ruling in Plaintiffs' favor would be to invalidate the FCC orders alone, as Plaintiffs make no argument that the statute itself is unconstitutional." Doc. 23, p. 6. As Plaintiffs are arguing that a provision of the TCPA itself—the cell phone call ban—is unconstitutional, Defendants' argument necessarily fails. Without directly stating it, Defendants want the Court to find that the Hobbs Act, 28 U.S.C. § 2342, is applicable in any challenge of a statute, if the statute has been interpreted by the FCC at some point, because the constitutional challenge would necessarily make rulings interpreting the statute of no force and effect. Neither the *Mais* case nor any other case cited by Defendants support this position, and it is undisputed that this Court has jurisdiction generally to assess the constitutionality of a statute or a provision thereof. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

The decision and rationale of *U.S. v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 460 (8th Cir. 2000), a case cited by Defendants, demonstrates why Defendants' reliance on the Hobbs Act is erroneous. In that case, the government brought an in rem

forfeiture action to seize radio equipment used by the plaintiff, an individual “microbroadcaster” who operated a radio station without a FCC license. In defending against the claim, the plaintiff asserted affirmative defenses including that FCC regulations barring new licenses to microbroadcasters violated the First Amendment and the Communications Act of 1934. *Id.* As noted specifically by the Court, the plaintiff “did not challenge the constitutionality of the Communications Act itself.” *Id.* As Defendants do here, the government relied on the Hobbs Act and the Federal Communications Act, 47 U.S.C. § 402(a), but unlike that plaintiff, Plaintiffs here are in fact challenging the constitutionality of a provision of the statute, and are not challenging any order or ruling of the FCC. The *Any & All Radio Station Transmission Equip.* court summarized the statutory scheme of the above two statutes, stating:

The statute provides: “Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission . . . shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.” 47 U.S.C. § 402(a). The cross-referenced statute states: “The court of appeals . . . has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.” 28 U.S.C. § 2342.

207 F.3d at 463. In analyzing the statutory scheme, however, the Court noted:

The statutory scheme makes sense (1) to ensure review based on an administrative record made before the agency charged with implementation of the

statute; (2) to ensure uniformity of decision making because of uniform fact finding made by the agency; (3) to bring to bear the agency's expertise in engineering and other technical questions. If Fried had no way of obtaining judicial review of the regulations his case might be different. See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994). But he could have obtained review by applying for a license and asking for a waiver of the regulations; rejection of his request would have permitted appeal to the circuit.

*Id.* In this case, however, there is nothing for Plaintiffs to put before the FCC in the way of an administrative record, there is no fact finding for an agency to make as the relief sought here has nothing to do with decisions made by the agency, and the FCC has no expertise and there are no technical questions for the FCC to consider, and thus the factors supporting the statutory scheme do not exist. More directly, the purpose of this proceeding is not "to enjoin, set aside, annul or suspend any order of the Commission" and thus jurisdiction does not lie in the court of appeals. See 47 U.S.C. § 402(a); 28 U.S.C. § 2342. Moreover, unlike the option that the Court said was available to the plaintiff in *Any & All Radio Station Transmission Equip.*, Plaintiffs do not have the option of addressing the exemptions with the FCC as referenced in the First Amended Complaint.

*Fitzhenry v. Indep. Order of Foresters*, No. 2:14-CV-3690, 2015 U.S. Dist. LEXIS 76750, \*6-7 (D.S.C. June 15, 2015), relied upon by Defendants, also supports Plaintiffs' argument that referencing an FCC order does not invoke the jurisdiction of the court of appeals

under the Hobbs Act. In *Fitzhenry*, the plaintiff argued that “the FCC has been clear that if a tax exempt nonprofit is engaging in commercial pre-recorded telemarketing, it can be held liable.” *Id.* at \*6. While the defendant contested that interpretation, the district court noted that:

Fitzhenry does not argue that the court should invalidate the nonprofit exemption. Such an argument would raise serious issues under the Hobbs Act, which grants the courts of appeals the “exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of . . . all final orders of the [FCC]”. 28 U.S.C. § 2342(1); 47 U.S.C. § 402.

*Id.* at n.3. Similar to the reasoning in *Fitzhenry*, if Plaintiffs had argued to invalidate final orders of the FCC, the jurisdiction of the court of appeals would be invoked. Plaintiffs, however, have not brought this proceeding to invalidate any FCC final order.

The other cases Defendants cite in support of their argument are also distinguishable. See *Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461-62 (11th Cir. 2012) (finding that the district court correctly concluded it did not have jurisdiction where in order to grant the relief sought it would have to contradict two previously issued FCC orders); *Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1193-94 (9th Cir. 2008) (court found that the district court did not have jurisdiction after defendants challenged that the FCC did not comply with its statutory obligation under the Endangered Species Act, despite the attempt to frame the case as a ‘failure to act,’ where the court found that seven FCC approvals of licenses for towers were being directly challenged); *Murphy v. DCI Biologicals Orlando, LLC*, 797 F.3d

1302, 1307 (11th Cir. 2015) (finding that the district court rightly refused to consider the TCPA case where the plaintiff directly challenged the FCC order); *Morse v. Allied Interstate, LLC*, 65 F. Supp. 3d 407 (M.D. Pa. 2014) (holding that where the defendant was asking the court to disregard the interpretation of two FCC orders, its defense was subject to the Hobbs Act); *Compare IMHOFF Inv., L.L.C. v. Alfocino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) (noting that where the FCC's reasoning in a letter brief was questioned, there was no direct challenge to the legitimacy of FCC definitions, and thus the Hobbs Act was not applied); *Physicians Healthsource, Inc. v. Stryker Sales Corp.*, No. 1:12-CV-0729, 2015 U.S. Dist. LEXIS 178592, \*4-5 (W.D. Mich. Feb. 26, 2015) (refusing to apply the Hobbs Act and distinguishing between “facial” and “as applied” challenges of a final FCC order, and noting that the outcome of the case did “not depend on any final determination made by the FCC.”).

Despite Defendants' mischaracterizations to the contrary, Plaintiffs are not trying to elude the jurisdiction of the court of appeals by artful pleading and are not challenging the FCC rulings that obviously do not apply to them. Rather, as clearly stated in the First Amended Complaint, Plaintiffs are challenging the constitutionality of the cell phone call ban. This Court has jurisdiction to preside over this case as Plaintiffs are challenging the constitutionality of a provision of the TCPA itself. *See* 28 U.S.C. § 1331.

**C. Plaintiffs satisfy the standing requirements as finding the cell phone call ban unconstitutional as a violation of Plaintiffs' First Amendment rights would redress their injury.**

In their Memorandum, Defendants appropriately set forth the standing standard for plaintiffs, including organizational plaintiffs, as enunciated by the U.S. Supreme Court, as well as by the Fourth Circuit in *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 753 (4th Cir. 2013) and *White Tail Park v. Stroube*, 413 F.3d 451, 458 (4th Cir. 2005)<sup>5</sup>. See Doc. 23, pp. 6-7. Defendants do not argue, nor could they, that Plaintiffs have not suffered an actual or threatened injury by their inability to make ATDS, or artificial or prerecorded voice calls as a result of the cell phone call ban as Plaintiffs have averred that they “would make these calls to persons who did not provide prior express consent to it using an ATDS, artificial or prerecorded voice but for the cell phone call ban and the potential for prosecution by the federal government, states, or private persons or clas-

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<sup>5</sup> See also *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 100 (4th Cir. 2011) (“Where, as here, the plaintiff is an organization bringing suit on behalf of its members, it must satisfy three requirements to secure organizational standing: (1) that its members would have standing to sue as individuals; (2) that the interests it seeks to protect are germane to the organization’s purpose; and (3) that the suit does not require the participation of individual members. *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977). Individual members of the organization must be able to show that (1) they suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir.2006)”).

ses of persons.” See Doc. 18, ¶¶ 8-12 and Declarations at Doc. 18-2 to 18-6; see also *Doe*, 713 F.3d at 753. Similarly, there can be no issue that Plaintiffs’ injury is traceable to the cell phone call ban. See *id.* Rather, Defendants allege Plaintiffs lack standing because they cannot show that any injury they have suffered would be redressed by a judgment in their favor. Doc. 23, p. 7; see also *Doe*, *supra* at 753. This argument once again relies on the false assumption that Plaintiffs are challenging the regulatory exemptions to the cell phone call ban and not the cell phone call ban itself.

Under Article III of the U.S. Constitution, “[a]n injury is redressable if it is ‘likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.’” *Id.* at 755 (quoting *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). “No explicit guarantee of redress to a plaintiff is required to demonstrate a plaintiff’s standing.” *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 91, 100 (4th Cir. 2011). In assessing standing, the *Equity in Athletics, Inc.*, the court noted:

This court assumes the merits of a dispute will be resolved in favor of the party invoking our jurisdiction in assessing standing and, at the pleading stage, “presumes that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990); see also *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff’d by* *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (“The Supreme Court has made clear that when considering whether a plaintiff has Article III



standing, a federal court must assume *arguendo* the merits of his or her legal claim.”).

*Id.* at 99. Therefore, the arguments put forth by Defendants in their Memorandum that the Court will ultimately rule in their favor because the TCPA has been upheld previously, or based on Defendants’ erroneous contention that Plaintiffs are attacking the FCC orders or debt collection exemption, are irrelevant and do not overcome the assumption that the merits of the dispute will be resolved in the favor of Plaintiffs. Moreover, as will be shown on a hearing on the merits, the cell phone call ban as applied is unconstitutional as the First Amendment prohibits discrimination as to the content of speech or the identity of the speaker. *Reed v. Town of Gilbert*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2218, 2227 (2015) (“Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”).

The cell phone call ban places a significant burden on Plaintiffs as they are required to obtain prior express consent to make ATDS, or artificial or prerecorded voice calls to cell phones, while the cell phone call ban permits other speakers, including commercial debt collectors, to disseminate commercial speech without regard to the cell phone call ban. The cell phone call ban severely hinders Plaintiffs’ attempts to reach citizens and engage them in political discourse. Finding the cell phone call ban unconstitutional will allow Plaintiffs to more easily engage with constituents, which parallels the First Amendment’s “profound national commitment” to the principle that “debate on public issues should be uninhibited, robust, and wide-open,” and has “consistently commented on the central importance of protecting

speech on public issues.” *Boos v. Barry*, 485 U.S. 312, 318 (1998). Therefore, Plaintiffs satisfy the Article III standing requirement as determining that the cell phone call ban is unconstitutional would redress their injury.

#### IV. CONCLUSION

The district court has jurisdiction in this case as Plaintiffs are challenging the constitutionality of cell phone call ban, a provision of the TCPA, and are not seeking by this proceeding to enjoin, set aside, annul, or suspend any order of the FCC.

Plaintiffs also satisfy Article III’s standing requirement as they have sufficiently alleged that they have (1) suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by redress their injury. For the foregoing reasons, this Court should deny Defendants’ Motion to Dismiss First Amended Complaint.

\* \* \* \* \*

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

JEFFERSON SESSIONS, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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Filed: May 19, 2017

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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION  
FOR SUMMARY JUDGMENT**

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\* \* \* \* \*

**II. SUMMARY OF THE CASE**

Plaintiffs American Association of Political Consultants, Inc. (“AAPC”), Democratic Party of Oregon, Inc. (“DPO”), Public Policy Polling, LLC (“PPP”), Tea Party Forward PAC (“TPF”), and Washington State Democratic Central Committee (“WSDCC”) (collectively “Plaintiffs”) filed this lawsuit against Defendant Loretta

Lynch,<sup>2</sup> in her official capacity as Attorney General of the United States, for declaratory judgment and preliminary and permanent injunctions to restrain Defendant from acting under color of law to deprive Plaintiffs of rights secured to them by the First Amendment to the U.S. Constitution. Dkt. No. 1, ¶¶ 1-2.

In response, Defendant Lynch filed a motion to dismiss Plaintiffs' complaint for lack of subject-matter jurisdiction. *See* Dkt. Nos. 15 and 16. Plaintiffs then filed their first amended complaint and added the FCC as a defendant. *See* Dkt. No. 18. Defendants subsequently filed a motion to dismiss Plaintiffs' first amended complaint for lack of subject-matter jurisdiction. *See* Dkt. Nos. 22 and 23.

On March 15, 2017, this Court ruled that it has subject-matter jurisdiction over this claim, and Plaintiffs have standing to bring this constitutional challenge. *See* Dkt. No. 26.

Plaintiffs allege the cell phone call ban violates the First Amendment because it is a content-based restriction of Plaintiffs' fully-protected political speech and cannot withstand strict scrutiny. Dkt. No. 18, ¶ 2. This case is a challenge to only the cell phone call ban, based on the litany of content-based exemptions to it created by Congress and the FCC.

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<sup>2</sup> On February 19, 2017, Jefferson Sessions assumed the position of Attorney General of the United States. A public officer's "successor is automatically substituted as a party." Fed. R. Civ. P. 25(d).

Plaintiffs do not challenge the entirety of the TCPA,<sup>3</sup> nor are they challenging those exemptions. *Id.* at ¶ 4. The history of the FCC and Congress’ creation of, and ability and intent to continue to create content-based exemptions to the cell phone call ban demonstrates that it is unconstitutional. *Id.* at ¶ 3.

Based upon a joint discovery plan and scheduling order (Dkt. No. 21), the Parties have agreed that it is appropriate for the Court to resolve this constitutional facial challenge on cross-motions for summary judgment. Plaintiffs now respectfully move this Court to grant it summary judgment for the following reasons.

\* \* \* \* \*

## V. LANGUAGE OF THE TCPA’S CELL BAN

\* \* \* \* \*

The FCC and Congress have passed at least seven exemptions to the cell phone call ban which apply based on the content of the calls and the identities of the callers.

In 1992, the FCC exempted from the cell phone call ban prerecorded and ATDS calls by a wireless carrier to its customer when the customer is not charged. *Id.* (*reaff’d* by 77 Fed. Reg. 34233, 34235 (June 11, 2012) (the “wireless carrier exemption”)).

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<sup>3</sup> While other courts have addressed the constitutionality of the TCPA, these cases challenged the entirety of the statute or did not consider the content-based exemptions challenged in this case. *See, e.g., Gomez v. Campbell-Ewald Co.*, 768 F.3d 871, 876 (9th Cir. 2014); *Moser v. Fed. Comm’n Comm’n*, 46 F.3d 970, 973 (9th Cir. 1995); *Wreyford v. Citizens for Transp. Mobility, Inc.*, 957 F. Supp. 2d 1378, 1380 (N.D. Ga. 2013).

In 2014, the FCC exempted from the cell phone call ban prerecorded and ATDS calls for “package delivery notifications to consumers’ wireless phones either by voice or text . . . so long as those calls are not charged to the consumer recipient, including not being counted against the consumer’s plan limits on minutes or texts, and comply with the conditions. . . .” *In the Matter of Cargo Airline Ass’n Petition for Expedited Declaratory Ruling*, 29 FCC Rcd 3432, 3439 (Mar. 27, 2014) (the “package delivery exemption”).

In 2014, the FCC exempted from the cell phone call ban prerecorded and ATDS “non-telemarketing voice calls or text messages to wireless numbers . . . [that] rely on a representation from an intermediary that they have obtained the requisite consent from the consumer.” *In the Matter of GroupMe, Inc./Skype Communications S.A.R.L.*, 29 FCC Rcd 3442, 3444 (Mar. 27, 2014) (the “intermediary consent exemption”).

In 2015, the FCC exempted from the cell phone call ban prerecorded and ATDS “non-telemarketing, health-care calls that are not charged to the called party” and “for which there is exigency and that have a healthcare treatment purpose. . . .” *In re Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd 7961, 8030-31 (July 10, 2015) (the “HIPAA exemption”).

In 2015, the FCC exempted from the cell phone call ban prerecorded and ATDS calls regarding “(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.’” *In re Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 30 FCC Rcd 7961, 8023 (July 10, 2015) (the “bank and financial exemption”).

In 2015, Congress exempted from the cell phone call ban prerecorded and ATDS calls “made solely to collect a debt owed to or guaranteed by the United States”. Pub. L. No. 114-74 § 301(a), 129 Stat. 588 (amending 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)) (the “debt collection exemption”).

In 2016, the FCC exempted from the cell phone call ban prerecorded and ATDS calls from federal government officials conducting official business. *In re Rules and Regs. Implementing the Tel. Consumer Prot. Act of 1991*, 31 FCC Rcd 7394, 7400 (July 5, 2016) (the “official federal government business exemption”).

The history of the FCC and Congress’ creation of, and ability and intent to continue to create, content-based exemptions to the cell phone call ban demonstrates that it is unconstitutional.

## VI. ARGUMENT

\* \* \* \* \*

### B. Defendants cannot satisfy strict scrutiny to justify the cell phone call ban.

\* \* \* \* \*

#### 1. The cell phone call ban is content based on its face.

\* \* \* \* \*

**a. The cell phone call ban exempts certain types of calls based on the content of the calls.**

As explained in *supra* Part V, the FCC and Congress have passed exemptions to the cell phone call ban which apply based on the content of the speech. Based upon these exemptions, calls which include the following speech are more worthy than Plaintiffs' political speech:

- package delivery notifications in the package delivery exemption, *see* 29 FCC Rcd at 3439;
- healthcare-related calls in the HIPAA exemption, *see* 30 FCC Rcd at 8030-31;
- fraud, security and money transfer notifications in the bank and financial exemption, *see id.* at 8023;
- debts owed to or guaranteed by the United States in the debt collection exemption, *see* 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii); and
- official federal government business in the official federal government business exemption, *see* 31 FCC Rcd at 7400.

Because the cell phone call ban applies to Plaintiffs' political speech but exempts these types of calls, it is a content-based restriction on speech and subject to strict scrutiny.



**b. The cell phone call ban exempts certain types of calls based on the identities of the callers.**

Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000).

The FCC and Congress have passed exemptions to the cell phone call ban which apply based on the identities of the callers. Based upon these exemptions, calls made by the following speakers are more worthy than Plaintiffs' political speech:

- calls made by wireless carriers in the wireless carrier exemption, *see* 77 Fed. Reg. at 34235;
- calls made by intermediaries in the intermediary consent exemption, *see* 29 FCC Rcd at 3444; and
- calls made by federal government officials in the official federal government business exemption, *see* 31 FCC Rcd at 7400.

Because the cell phone call ban applies to Plaintiffs' political speech but exempts calls from the above types of speakers, it is a content-based restriction on the identities of the callers and subject to strict scrutiny.

\* \* \* \* \*

**E. Plaintiffs are entitled to reasonable attorneys' fees if they prevail.**

To the extent required by law, Plaintiffs provide notice that they intend to move for an award of reasonable

attorneys' fees and costs if they are the prevailing party in this matter. *See* 28 U.S.C. § 2412.

The term “prevailing party” means that a plaintiff must achieve a “material alteration of the legal relationship of the parties” and there must be “judicial *impri-matur* on the change.” *Daimler Trust v. Prestine Annapolis, LLC*, 2016 U.S. Dist. LEXIS 75014, at \*20-21 (D. Md. June 7, 2016) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 604-05 (2001)); *see also* *Grissom v. The Mills Corp.*, 549 F.3d 313, 318 (4th Cir. 2008).

Should the Court determine the cell phone call ban is unconstitutional, it should therefore find Plaintiffs to be the prevailing party and award them reasonable attorneys' fees.

## VII. CONCLUSION

The outcome of this motion rests on the fact that the cell phone call ban is contrary to the protections afforded to political speech by the First Amendment to the U.S. Constitution. *Dun & Bradstreet*, 472 U.S. at 758-59. The FCC and Congress have created exemptions to the cell phone call ban based on the content of the calls and the identities of the callers.

The cell phone call ban violates the First Amendment as a content-based restriction on speech that discriminates against some speakers but not others without a legitimate, neutral justification for doing so. *See Cahaly*, 769 F.3d 399.

Courts must apply strict scrutiny to content-based restrictions of speech. *Citizens United*, 558 U.S. at 339. But the government has failed to prove that the

cell phone call ban is narrowly tailored to further a compelling governmental interest and is the least restrictive means available to achieve its purported interest. *Holt*, 135 S. Ct. at 863.

The cell phone call ban cannot survive strict scrutiny and is therefore unconstitutional. *See Reed*, 135 S. Ct. 2218. As there is no genuine dispute of material fact, Plaintiffs are entitled to judgment as a matter of law.

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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

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Civil Action No. 5:16-cv-00252-D

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS,  
INC.; DEMOCRATIC PARTY OF OREGON, INC.;  
PUBLIC POLICY POLLING, LLC; TEA PARTY FORWARD  
PAC; AND WASHINGTON STATE DEMOCRATIC CENTRAL  
COMMITTEE, PLAINTIFFS

*v.*

JEFFERSON SESSIONS, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES AND  
FEDERAL COMMUNICATIONS COMMISSION,  
A FEDERAL AGENCY, DEFENDANTS

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Filed: July 5, 2017

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**PLAINTIFFS' RESPONSE AND REPLY TO**  
**DEFENDANTS' MEMORANDUM IN OPPOSITION**  
**TO PLAINTIFFS' MOTION FOR SUMMARY**  
**JUDGMENT AND IN SUPPORT OF DEFENDANTS'**  
**CROSS-MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

Please consider once more two telephone calls. The first is from the Democratic Party urging residents of a given district to vote in the upcoming election. A volunteer makes the call using an automatic telephone dialing system ("ATDS") to a voter, but the volunteer doesn't know that the number called is a cell phone. The second is from a debt collector to a debtor concerning a de-

faulted government-backed mortgage. This call is also placed using an ATDS, and the only number available is a cell phone number.

The first call is banned by the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227(b)(1)(A)(iii) (the “cell phone call ban”). The second call is not.<sup>1</sup> The exempt debt collection call has a significant effect on the privacy of the recipient, but it seems likely that the first call would be more welcomed by the recipient. The TCPA cell phone call ban is therefore a content-based restriction of speech, subject to strict scrutiny under the First Amendment. It cannot withstand strict scrutiny and is therefore unconstitutional.

## II. ARGUMENT

When Congress passed the TCPA, it gave the Federal Communications Commission (“FCC”) power to create exemptions to its restrictions, including to the TCPA cell phone call ban. Since 1992, the FCC has created seven exemptions to the TCPA cell phone call ban.

Congress also has the power to create exemptions to the cell phone call ban. It has done so, for example by including an exemption for any entity placing calls solely collecting debt owed to or guaranteed by the federal government.

By creating this exemption based on the content of the speech, Congress has caused the TCPA cell phone call ban to be a content-based restriction of speech.

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<sup>1</sup> See discussion of *Brickman v. Facebook, Inc.*, 2017 U.S. Dist. LEXIS 11849 (N.D. Cal. Jan. 27, 2017) (“*Brickman*”) and the cell phone call ban debt collection exemption, *infra* at B1.

The FCC, in including exemptions based on the content of speech and the identity of speakers, has also caused the cell phone call ban to be a content-based restriction of speech.

Further, because Congress and the FCC have the power to create future content-based exemptions, the TCPA cell phone call ban cannot be cured of its unconstitutionality by striking those exemptions. Congress and the FCC would still have the power, which they have used and likely intend to use in the future, to create content-based exemptions. Under this Circuit's ruling in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015) ("*Cahaly*"), the cell phone call ban cannot withstand strict scrutiny and is therefore unconstitutional.

**A. Defendants cannot distinguish *Reed*, as it is undisputed that the exemptions apply based on the content of speech.**

\* \* \* \* \*

**2. The FCC has exercised its power to create content-based exemptions.**

Defendants attempt to argue that the FCC's content-based exemptions "are not actually exemptions at all." Defs.' Brief at 14. But whether by FCC order, interpretation, or otherwise, some speakers' calls are exempt based on the speakers' identity or the content of the calls, and some are not. The provisions of the First Amendment are not so easily evaded. Governmental restraint on speech need not fall into familiar or traditional patterns to be subject to constitutional limitations. *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256 (1974) (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 244-45 (1936)).

The FCC has created exemptions that favor certain speakers over others, including:

- calls made by wireless carriers in the wireless carrier exemption, *see* 77 Fed. Reg. at 34235;
- calls made by intermediaries in the intermediary consent exemption, *see* 29 FCC Rcd at 3444; and
- calls made by federal government officials in the official federal government business exemption, *see* 31 FCC Rcd at 7400.

Ptfs.’ Brief in Support of Motion for Summ. J., Dkt. 31 (May 19, 2017) (“Ptfs.’ Brief”) at 18.

The FCC has also created exemptions that favor certain messages with certain content over others, including:

- package delivery notifications in the package delivery exemption, *see* 29 FCC Rcd at 3439;
- healthcare-related calls in the HIPAA exemption, *see* 30 FCC Rcd at 8030-31;
- fraud, security and money transfer notifications in the bank and financial exemption, *see id.* at 8023; and
- official federal government business in the official federal government business exemption, *see* 31 FCC Rcd at 7400.

Ptfs.’ Brief at 17.

There is no reason to believe the FCC will refrain from creating future content-based exemptions, by order, interpretation, or otherwise.

**3. Congress believes it has the power to create content-based exemptions.**

Congress, similarly, believes it has the power to create content-based exemptions favoring certain speakers or messages.

Despite claims of Defendants, the debt collection exemption is not limited to calls to debtors of government or government backed debts. Pub. L. No. 114-74, 129 Stat. 584 (Nov. 2, 2015) at § 301(a), *Brickman* at \*26.

Congress knew how to limit the TCPA’s application in some respects to calls to certain people. For example, the “established business relationship” is part of an exemption to the national “do-not-call” list. It is specifically limited to a relationship between a caller and a specific residential subscriber.

The term “established business relationship”, for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[].

47 U.S.C. § 227(a)(2).



The FCC's regulation then specifies that an established business relationship means:

a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party . . .

47 C.F.R. § 64.1200(f)(5) (emphasis added).

The debt collection exemption contains no such limitation to calls to a specific person (e.g. the debtor) and could apply to any call to any person, so long as the call is made solely to collect a government or government backed debt, e.g. employment verification, asset location, etc. There are likely tens of thousands of companies that issue government backed debt, including small business loans, student loans, mortgages, etc. These companies' collection calls are allowed, while other debt collectors' calls are banned, as are the fully-protected political calls placed by Plaintiffs.

**4. Severing the existing exemptions does not cure this problem.**

Severance of the content-based exemptions as Defendants' argue is not a suitable cure for the cell phone call ban's unconstitutionality. *See* Defs.' Brief at 17-20. Severance does not solve the problem of the FCC and

Congress's existing and actualized ability to create future content-based exemptions.

Congress's ability to amend the TCPA is ongoing. Congress has amended the TCPA six times since it was passed in 1991, Pub. L. No. 102-243 (Dec. 20, 1991), most recently creating the debt collection exemption to the cell phone call ban as part of the Bipartisan Budget Act of 2015 Pub. L. No. 114-74 (Nov. 2, 2015). As explained, Congress has given the FCC power to create future exemptions. *See* 47 U.S.C. § 227(b)(2).

Severance of the existing content-based exemptions would not cure the cell phone call ban's unconstitutionality and contradicts long-standing First Amendment jurisprudence that more speech, rather than less speech, is the goal of this constitutional protection. *See Whitney v. Cal.*, 274 U.S. 357 (1927). "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Id.* at 377.

The proper remedy is to allow more speech and speakers by striking the cell phone call ban and allowing the FCC or Congress to use other narrowly tailored, or content-neutral, means to protect residential privacy.

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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AMERICAN ASSOCIATION OF POLITICAL  
CONSULTANTS, INC.; DEMOCRATIC PARTY OF OREGON,  
INC.; PUBLIC POLICY POLLING, LLC; WASHINGTON  
STATE DEMOCRATIC CENTRAL COMMITTEE,  
PLAINTIFFS-APPELLANTS,

AND

TEA PARTY FORWARD PAC, PLAINTIFF

*v.*

FEDERAL COMMUNICATIONS COMMISSION;  
JEFFERSON B. SESSIONS III, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANTS-APPELLEES

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION*

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**APPELLANTS' OPENING BRIEF**

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\* \* \* \* \*

**STATEMENT OF THE ISSUE**

Whether the ban on certain calls to cell phones in the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii), imposes an impermissible content-based restriction on protected speech and, therefore, violates the First Amendment of the United States Constitution.

**STATEMENT OF THE CASE**

\* \* \* \* \*

10. **Proceeding Below.** \* \* \*

\* \* \* \* \*

19. This case is an appeal to the cell phone call ban, only, based on the litany of content-based exemptions to it created by the FCC and Congress. JA 012-13; 147-48. The Political Organizations do not challenge the entirety of the TCPA, nor are they challenging the exemptions under the Hobbs Act, 28 U.S.C. § 2341 *et seq.* or otherwise. *Id.*

\* \* \* \* \*

**ARGUMENT**

The Political Organizations challenge the constitutionality of the cell phone call ban as it imposes an impermissible content-based restriction on protected speech and, therefore, violates the First Amendment to the Constitution. The Political Organizations are not challenging the entirety of the TCPA, or the FCC orders

or regulations promulgated under the TCPA.<sup>3</sup> JA 141; 280. This lawsuit is a challenge to a federal statute, as it is content-based and regulates the Political Organizations fully-protected, political speech. The cell phone call ban is therefore unconstitutional. *Cahaly*, 796 F.3d at 402.

**I. The cell phone call ban violates the First Amendment because it is a content-based restriction of speech and cannot withstand strict scrutiny.**

The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Consequently, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

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<sup>3</sup> In denying Attorney General Sessions and the FCC’s motion to dismiss for lack of subject matter jurisdiction, the district court correctly held that the Political Organizations “do not seek to enjoin, set aside, annul or suspend any order of the FCC. Rather, plaintiffs challenge the autodialing ban in 47 U.S.C. § 227(b)(1)(a)(iii) . . . they do not seek to show that the FCC’s orders delineating or interpreting exceptions to the autodialing ban are void or invalid.” JA 267-68. Nor does this Court need to determine that those exemptions are unconstitutional to find the cell phone ban unconstitutional. Merely acknowledging the existence of the multiple exemptions in these FCC orders does not make the present proceeding one to enjoin, set aside annul, or suspend those orders within the meaning of 47 U.S.C. § 402(a). *Id.* That is, this is not a Hobbs Act challenge.

**A. The calls prohibited by the cell phone ban are fully protected by the First Amendment.**

Political speech is protected at the very core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). The Constitution affords the broadest protection to political expression “to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by people.” *McIntyre v. Ohio Elec. Comm’n.*, 514 U.S. 334, 346 (1995) (internal quotation marks omitted). Political discourse is of the highest value to society, and any limitation placed upon it comes with a heavy presumption of constitutional invalidity. *Brown v. Hartlage*, 456 U.S. 45, 52-53 (1982).

The Political Organizations engage in political speech via autodialed and prerecorded telephone calls to encourage citizens to vote, advise them on political and governmental issues, solicit political donations, and track public opinion on candidates, campaigns, and other political issues. JA 281-82. The cell phone call ban prohibits these calls without prior express consent. 47 U.S.C. § 227(b)(1)(A)(iii). But it exempts other autodialed and prerecorded commercial calls, including calls made by the United States or its agents to collect a debt owed to or guaranteed by the United States. 47 U.S.C. § 227(b)(1)(A)(iii); JA 284-86. This is quintessential commercial speech as these calls are made by for-profit entities to collect on mortgages, student loans, back taxes, and other debts owed to the federal government or commercial lenders of federally-guaranteed debts. The cell phone call ban therefore favors commercial speech over the political speech of the Political Organizations and violates the Constitution. *See Metro-media, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1980).

**B. The cell phone call ban is content-based because it restricts speech based on its subject matter and its substantive message.**

Adopting the reasoning of *Reed v. Town of Gilbert*, this Court ruled that “the crucial first step in the content-neutrality analysis’ is to ‘determin[e] whether the law is content neutral on its face.’” *Cahaly*, 796 F.3d at 405 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015)). A statute is content based on its face if it “draws distinctions based on the message a speaker conveys” or is facially content neutral but cannot be “justified without reference to the content of the regulated speech,” *Reed*, 135 S. Ct. at 2227 (internal quotation marks omitted).

The district court correctly held that the cell phone call ban’s debt collection exemption is a content-based speech restriction because, on its face, it distinguishes calls based on the content of the message. JA 429 (citing *Cahaly*, 796 F.3d at 405). The cell phone call ban facially discriminates based on a call’s content because it imposes liability for autodialed and prerecorded calls placed without the recipient’s prior express consent unless the calls are “made solely to collect a debt owed to or guaranteed by the United States.” 47 U.S.C. § 227(b)(1)(A)(iii). Put differently, “a private debt collection agency may call the same consumer twice in a row, once to collect a private, government-guaranteed loan and once to collect a similar private loan not guaranteed by the government, but, absent prior express consent, may place only the first call using an autodialer or prerecorded voice.” *Gallion v. Charter Communs., Inc.*, 287 F. Supp. 3d 920, 926 (C.D. Cal. 2018) (internal quotation marks omitted).

The district court also properly rejected Attorney General Sessions and the FCC’s argument that the debt collection exemption is content-neutral based on the relationship of the parties. JA 430. The plain language of the debt collection exemption makes no mention to the relationship of the parties. *Id.* at 927; *see Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1045 (N.D. Cal. 2017). In addition, the debt collection exemption permits “a third party that has no preexisting relationship with the debtor” to use an autodialed or pre-recorded voice to collect a debt owed to or guaranteed by the United States. *Gallion*, 287 F. Supp. 3d at 927; 47 U.S.C. § 227(b)(1)(A)(iii). As a result, the debt collection exemption is “based on the subject matter of the call regardless of the caller’s relationship to the recipient.” JA 430 (citing *Greenley v. Laborers’ Int’l Union of N. Am.*, 271 F. Supp. 3d 1128, 1148 (D. Minn. 2017); *see Gallion*, 287 F. Supp. 3d at 927; *Brickman*, 230 F. Supp. 3d at 1045).

“A law that is content based on its face is subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Reed*, 135 S. Ct. at 2228 (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993)). An innocuous justification cannot transform a facially content-based law into one that is content neutral. *Reed*, 135 S. Ct. at 2228. But there is no innocuous justification for the exemptions to the cell phone call ban as they show a clear intent by the FCC and Congress to favor some speech and speakers over others. It cannot be argued with a straight face, for example, that a “get out the vote” call has a more detrimental effect on residential privacy than a debt collection call from a for-profit debt



collector regarding a defaulted federally-guaranteed mortgage.

Even if the cell phone call ban was content neutral on its face, it cannot be “justified without reference to the content of the regulated speech.” *Id.* The district court correctly noted that “[i]n order for a court to determine whether a potential defendant violated the TCPA’s government-debt exception, the court must review the communicative content of the call.” JA 429. Accordingly, the cell phone call ban is content-based because a court must review the call’s content to determine what restrictions apply.

Similarly, a court must review the content of other autodialed and prerecorded calls (not just debt collection calls) to determine if they fit within the other exemptions promulgated by the FCC. If the calls contain information related to package deliveries, healthcare-related calls exempted by HIPAA, security and money transfers, or calls related to other official government business, they are permitted under the cell phone call ban with fewer restrictions than calls that contain fully-protected political speech made by the Political Organizations.

In addition, a law can still be content based if the text is content neutral but the restriction was “adopted by the government ‘because of disagreement with the message [the speech] conveys.’” *Cahaly*, 796 F.3d at 405 (citing *Reed*, 135 S. Ct. at 2228). It is clear the FCC and Congress enacted the cell phone call ban because they disagreed with the messages conveyed by non-favored speakers using autodialed and prerecorded calls. *Cahaly*, 796 F.3d at 405; *Reed*, 135 S. Ct. at 2227.

Finally, the cell phone call ban is content-based because it exempts calls based on the identity of the callers, e.g. for-profit debt collector agents of the federal government. Laws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles. *United States v. Playboy Entm't Group*, 529 U.S. 803, 812 (2000). Yet the exemptions carved out by the FCC and Congress permit autodialed and prerecorded calls based on identified speakers including wireless carriers, intermediaries, and for-profit debt collector agents of the federal government. The speech of these parties is favored over the fully-protected political speech of the Political Organizations, and thus the cell phone call ban is a content-based restriction on speech and subject to strict scrutiny.

**C. The FCC's content-based restriction of certain calls to cell phones cannot withstand strict scrutiny.**

Courts must apply strict scrutiny to determine the constitutionality of content-based restrictions of speech. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). This requires “the government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’” *Id.* (citing *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2000)); *Cahaly*, 796 F.3d at 405. Strict scrutiny requires that the government use the “least restrictive means” available among effective alternatives to accomplish its legitimate goal. *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). If there are plausible less restrictive alternatives available, then the statute cannot withstand strict scrutiny. *Cahaly*, 796 F.3d at 405. Further, the

ameliorative actions of the FCC and Congress cannot cure the unconstitutionality of the cell phone call ban.

**1. The cell phone call ban does not further a compelling governmental interest.**

The protection of residential privacy is undoubtedly a compelling governmental interest. *Carey v. Brown*, 447 U.S. 455, 471 (1980). But the cell phone call ban does not further this compelling governmental interest.

The exemptions carved out of the cell phone call ban demonstrate that protection of residential privacy was not the FCC or Congress' purpose when they created multiple exemptions to the cell phone call ban. *See* 105 Stat. 2394. There must have been some other purpose, as debt collection calls can have no less deleterious effect on privacy than calls made by the Political Organizations. Commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors are permitted to make autodialed or prerecorded calls with fewer restrictions than imposed on calls made by the Political Organizations engaging in political speech.

These commercial entities are precisely the sources of calls from whom the Court states the "unwilling listener" might want to be protected. JA 431 (citing *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988); *Gallion*, 287 F. Supp. 3d at 928). There is no explanation for why calls from such commercial entities, the government or its for-profit debt collectors are any less intrusive or less unwelcome than calls made by the Political Organizations that deliver constitutionally protected political messages.

The cell phone call ban has become a way for the FCC and Congress to favor certain speakers and content rather than protect telephone subscribers' residential privacy. The intrusion into residential privacy is not lessened merely by the fact that autodialed or prerecorded calls to collect debt are made on behalf of the United States as opposed to on behalf of a private actor. The cell phone call ban fails to further a compelling governmental interest as demonstrated by the exemptions.

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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AMERICAN ASSOCIATION OF POLITICAL  
CONSULTANTS, INC.; DEMOCRATIC PARTY OF OREGON,  
INC.; PUBLIC POLICY POLLING, LLC; WASHINGTON  
STATE DEMOCRATIC CENTRAL COMMITTEE,  
PLAINTIFFS-APPELLANTS,

AND

TEA PARTY FORWARD PAC, PLAINTIFF

*v.*

FEDERAL COMMUNICATIONS COMMISSION;  
JEFFERSON B. SESSIONS III, IN HIS OFFICIAL CAPACITY  
AS ATTORNEY GENERAL OF THE UNITED STATES,  
DEFENDANTS-APPELLEES

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION*

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**APPELLANTS' REPLY BRIEF**

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**INTRODUCTION**

The cell phone call ban is a content-based speech restriction because, on its face, it applies to calls based on the content of the message. JA 429. It facially discriminates between calls and speakers based on content because it bans some calls, like those from Appellants (the “Political Organizations”), and allows others, i.e. calls made solely to collect a debt owed to or guaranteed by the United States. This Court must therefore apply strict scrutiny to the cell phone call ban to determine its constitutionality.

Attorney General Jefferson B. Sessions III and the Federal Communications Commission have failed to show that the cell phone call ban furthers a compelling interest and is narrowly tailored to achieve that interest. Instead, they argue that (1) the cell phone call ban’s debt collection exemption is a content-neutral restriction based on the relationship between the government and the debtor; (2) even if the cell phone call ban is content-based, it withstands strict scrutiny; and (3) if the cell phone call ban is unconstitutional, the proper remedy would be to strike down the exception and uphold the remainder of the statute. *See* Appellees’ Br. 6-9. Each of these arguments fails.

**ARGUMENT**

- A. It is indisputable that the cell phone call ban is content-based because it restricts speech based on its subject matter and its substantive message.**

Nearly half of Attorney General Sessions and the FCC’s brief argues that the cell phone call ban’s debt collection exemption is not based on the content of the

call, but the government’s relationship with the debtor. Appellees’ Br. 9-16.

The debt collection exemption permits “a third party that has no preexisting relationship with the debtor” to use an autodialed or prerecorded voice to collect a debt owed to or guaranteed by the United States. *Gallion v. Charter Communs., Inc.*, 287 F. Supp. 3d 920, 927 (C.D. Cal. 2018); 47 U.S.C. § 227(b)(1)(A)(iii). While Attorney General Sessions and the FCC contend that it is relationship based because it arises from a relationship between the called party and the Government, (Appellees’ Br. 11), the debt collector making the call often has no relationship with the call recipient. As a result, the debt collection exemption is “based on the subject matter of the call regardless of the caller’s relationship to the recipient.” JA 430 (citing *Greenley v. Laborers’ Int’l Union of N. Am.*, 271 F. Supp. 3d 1128, 1148 (D. Minn. 2017); see *Gallion*, 287 F. Supp. 3d at 927; *Brickman v. Facebook, Inc.*, 230 F. Supp. 3d 1036, 1045 (N.D. Cal. 2017)).

The district court correctly held that the cell phone call ban’s debt collection exemption is a content-based speech restriction because, on its face, it distinguishes calls based on the content of the message. JA 429 (citing *Cahaly v. Larosa*, 796 F.3d 399, 405 (4th Cir. 2015)). The cell phone call ban facially discriminates based on a call’s content because it imposes liability for autodialed and prerecorded calls placed without the recipient’s prior express consent unless the calls are “made solely to collect a debt owed to or guaranteed by the United States.” 47 U.S.C. § 227(b)(1)(A)(iii). Put differently, “a private debt collection agency may call the same consumer twice in a row, once to collect a private, government-guaranteed

loan and once to collect a similar private loan not guaranteed by the government, but, absent prior express consent, may place only the first call using an autodialer or prerecorded voice.” *Gallion*, 287 F. Supp. 3d at 926 (internal quotation marks omitted).

In addition, the cell phone call ban violates the First Amendment based on the litany of content-based regulatory exemptions to it created by the FCC and Congress. Appellants’ Br. 2-4, 7; JA 012-13, 146-48.<sup>1</sup> Since 1992, the FCC and Congress have created at least six regulatory exemptions to the cell phone call ban which apply based on the identity of the caller and/or the content of the exempted calls. Appellants’ Br. 2-4; JA 012-13, 146-48.

The cell phone call ban exempts certain types of calls based on the identities of the callers including calls made by wireless carriers in the wireless exemption, calls made by intermediaries in the intermediary consent exemption, and calls made by federal government officials in the official federal government business exemption. Appellants’ Br. 3-4; JA 012-13, 147-48, 291. It also exempts certain types of calls based on the content of the calls including package delivery notifications in the package delivery exemption, healthcare-

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<sup>1</sup> Contrary to the assertion in Attorney General Sessions and the FCC’s brief, the Political Organizations have not abandoned the argument that the cell phone call ban violates the First Amendment based on the numerous content-based exemptions to it created by the FCC and Congress. *See* Appellees’ Br. 16. The Political Organizations specifically discussed the FCC’s regulatory exemptions to the TCPA in their opening brief (Appellants’ Br. 2-4, 7, FN 3), and argued that the creation of, and the ability and intent to continue to create content-based exemptions to the cell phone call ban made it unconstitutional. Appellants’ Br. 26.



related calls in the HIPAA exemption, and official federal government business in the official federal government business exemption. Appellants’ Br. 3-4; JA 012-13; 147-48, 290.

The speech of these parties is favored over the fully-protected political speech of the Political Organizations, and thus the cell phone call ban is a content-based restriction on speech and subject to strict scrutiny. While this Court does not need to determine that those exemptions are unconstitutional to find the cell phone ban unconstitutional, the creation of, and ability and intent to continue to create, content-based exemptions to the cell phone call ban demonstrates that it is unconstitutional.

Because the cell phone call ban is a content-based speech restriction, this Court must apply strict scrutiny to its analysis.

**B. As a content-based restriction on speech, the cell phone call ban fails to satisfy strict scrutiny.**

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In addition, the cell phone call ban is not narrowly tailored to further a compelling governmental interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015). “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* at 2226; *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992).

While narrow tailoring does not require perfect tailoring, *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1671 (2015), the restriction cannot be underinclusive or over-

inclusive in the speech that it restricts. *Cahaly*, 796 F.3d at 405. Contrary to the district court’s finding, the cell phone call ban is both, and Attorney General Sessions and the FCC have not met their burden of proof to show that it is narrowly tailored to serve a compelling interest.

Similar to the statute at issue in *Cahaly*, the cell phone call ban is underinclusive because it permits calls from certain exempted commercial entities including wireless carriers, package delivery and healthcare companies, third-party-intermediaries, financial institutions, and government debt collectors. JA 294; *see Cahaly*, 796 F.3d at 406. These calls have the same—if not worse—effect on telephone subscribers’ residential privacy than calls made by the Political Organizations that deliver constitutionally protected political messages.

Far from a narrow exception that furthers a compelling interest, the debt collection exemption permits calls made by thousands of for-profit entities collecting mortgages, student loans, back taxes, and other debts owed to the federal government or federally-guaranteed debts. Attorney General Sessions and the FCC even acknowledged the extent of delinquent debt owed to the United States in 2015: \$162.1 billion. Appellees’ Br. 18.

Furthermore, restrictions on speech cannot be “overinclusive by unnecessarily circumscribing protected expression.” *Cahaly*, 796 F.3d at 405 (internal quotation marks omitted). But the cell phone call ban does just that. It is overinclusive because it prohibits autodialed or prerecorded calls consumers desire, expect, or benefit from, including calls made by the Political Organizations that contain fully-protected speech such as “get out the vote” calls, survey and other important informational calls, and voter registration drives. JA 021-34;

157-76. As this Court noted, “[c]omplaint statistics show that unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations.” *Cahaly*, 796 F.3d at 406. The cell phone call ban fails to acknowledge this by exempting for-profit entities to collect on mortgages, student loans, back taxes, and other debts owed to the federal government or federally-guaranteed debts without the prior express consent of the recipient. 47 U.S.C. § 227(b)(1)(A)(iii).

Finally, there are less restrictive means available to achieve the FCC and Congress’ purported interest in residential privacy. *Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015). “If a less restrictive alternative would serve the Government’s purpose, the legislature must use that alternative.” *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812 (2000); *Cahaly*, 796 F.3d at 405.

Despite the similarities between the South Carolina statute and the cell phone call ban—both prohibit political calls without consent, but exempt certain commercial calls—the district court rejected this Court’s reasoning that less restrictive alternatives to the cell phone call ban exist, despite no greater showing by the Government here than what was shown in *Cahaly*. JA 435-36.

It held that behavioral restrictions such as time of day limitations, mandatory disclosure of the caller’s identity, disconnection requirements, and “do-not-call” lists are not more effective, less restrictive alternatives that preserve the privacy interests of residential telephone subscribers as applied to the TCPA. *Id.*

The district court incorrectly reasoned that the time of day restriction would “designate a time for intrusive phone calls.” JA 436 (citing *Brickman*, 230 F. Supp. 3d at 1048; *Gallion*, 287 F. Supp. 3d at 924; *Greenley*, 271 F. Supp. 3d at 1151; *Mejia v. Time Warner Cable, Inc.*, No. 15-cv-6445 (JPO), 2017 U.S. Dist. LEXIS 120445, at \*49 (S.D.N.Y. Aug. 1, 2017); *Holt v. Facebook, Inc.*, 240 F. Supp. 3d 1021, 1034 (N.D. Cal. 2017)). And the “[m]andatory disclosure of a caller’s identity and disconnection requirements . . . would not prevent the privacy intrusion from the phone call in the first place.” *Id.* (citing *Brickman*, 230 F. Supp. 3d at 1048-49; see *Gallion*, 287 F. Supp. 3d at 924; *Greenley*, 271 F. Supp. 3d at 1151; *Mejia*, 2017 U.S. Dist. LEXIS 120445, at \*49; *Holt*, 240 F. Supp. 3d at 1034). In addition, “do-not-call” lists place the burden on consumers to opt-out of intrusive calls. *Id.* (citing *Brickman*, 230 F. Supp. 3d at 1049; *Gallion*, 287 F. Supp. 3d at 924; *Greenley*, 271 F. Supp. 3d at 1151; *Mejia*, 2017 U.S. Dist. LEXIS 120445, at \*49; *Holt*, 240 F. Supp. 3d at 1034).

Despite finding that less restrictive alternatives to the cell phone call ban do not exist, the district court then justified that the debt collection exemption is narrowly tailored *because* of those same sort of behavioral restrictions adopted by the FCC for those calls. JA 432-33. The district court relied on the reasoning of *Gallion* to distinguish the “unlimited proliferation” of certain signs in *Reed* with the supposedly narrowly-tailored debt collection exemption. *Id.*; *Gallion*, 287 F. Supp. 3d at 930. *Gallion* held that the debt collection exemption is “cabined by the TCPA’s express grant of authority to the FCC to ‘restrict or limit the number and duration of calls made . . . to collect a debt owed to or guaranteed by the United States.’” *Id.* (citing 47 U.S.C. § 227(b)(2)(H)).

In addition, *Gallion* noted that the debt collection exemption may be further limited by a rule proposed by the FCC limiting the number of federal debt collection calls to three within a 30-day period and limiting call lengths to 60 seconds or less. *Gallion*, 287 F. Supp. 3d at 930 (citing *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, Report and Order*, 31 FCC Rcd. 9074, ¶¶ 32-49 (Aug. 11, 2016)). Interestingly, in that same order, the FCC contemplates permitting “federal agencies . . . [to] request a waiver seeking a different limit on the number of autodialed, prerecorded-voice, and artificial-voice calls that may be made without consent of the called party.” *Id.* at 9090. This is another example of the government using the cell phone call ban as a way to benefit politically-favored constituencies, including itself and for-profit debt collector agents of the federal government.

Either the behavioral restrictions are effective in reducing the intrusive nature of autodialed or prerecorded calls into telephone subscribers’ residential privacy or not. Logically, these type of restrictions cannot be effective to ameliorate the intrusiveness of debt collection exemption but ineffective as applied to the bad effect of political calls.

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