IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

LEAGUE OF WOMEN VOTERS OF NEW HAMPSHIRE, *et al.*, Plaintiffs, v. STEVE KRAMER, *et al.*, Defendants.	Civil Action No. 1:24-cv-00073-SM-TSM

LINGO TELECOM LLC'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

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INTRODUCTION & BACKGROUND

Plaintiffs League of Women Voters of New Hampshire and League of Women Voters of the United States ("Organizational Plaintiffs") and three New Hampshire voters ("Individual Plaintiffs") seek an unprecedented and unwarranted preliminary injunction: a judicial order enjoining Lingo Telecom, LLC ("Lingo") from "distributing" certain calls based on their content due to events that occurred nearly nine months ago in the New Hampshire presidential primary. Magistrate Judge Saint-Marc was right to recommend that the motion for such relief be denied. Lingo is a telephone company that cannot lawfully review the contents of calls transiting its network. It was an innocent bystander in the robocall scheme that forms the basis of Plaintiffs' complaint. And Plaintiffs' months of delay, including waiting until the last possible day to file objections to the Magistrate Judge's Report and Recommendation (the "Report" or "R&R," ECF No. 99), undermines any assertion of a pressing need for injunctive relief against Lingo.

Steve Kramer, a political operative now under indictment, "commissioned" the robocalls (the "New Hampshire Robocalls") using a "deepfake" of President Biden's voice. ECF No. 71-1 ("Am. Mot.") at 7. Those calls were then "initiated" by Voice Broadcasting "using service and equipment provided by" Life Corporation ("Life Corp"). *Id.* at 9. Life Corp, in turn, routed "a portion" of those calls to Lingo before the New Hampshire presidential primary. *Id.* After Lingo learned of the New Hampshire Robocalls, it immediately terminated Life Corp as a customer. *See* ECF No. 87-30. Then, in August, it resolved an investigation into whether the company had violated the FCC's technical "STIR/SHAKEN" framework for authenticating caller ID by agreeing to supplement its already robust mitigation procedures—all without any findings of liability. *See* ECF No. 91-1. Meanwhile, despite dozens of intervening elections and weeks of early voting in the presidential primary, Plaintiffs have not provided a shred of evidence of any

similar robocall campaigns, much less any alleged misconduct by Lingo.

On this record, Magistrate Judge Saint-Marc's recommendation to deny a preliminary injunction against Lingo was correct and should be adopted by this Court. As the Magistrate Judge determined, Plaintiffs lack standing for prospective relief, failed to show that they would suffer irreparable harm absent preliminary injunctive relief, and requested an injunction that is impermissibly vague and overbroad. Plaintiffs' objections to the R&R, ECF No. 104 ("Objections"), do nothing to fix the fundamental flaws that doomed their request from the start: There is no evidence, or even plausible allegations, that Lingo knew of or participated in the New Hampshire Robocall scheme, no evidence that the scheme will recur, and no evidence that Plaintiffs have suffered or would suffer a cognizable or irreparable injury from such robocalls.

This Court should overrule the Objections and adopt the Report for the reasons stated therein—each of which is a separate and independent basis for denying preliminary injunctive relief—and for the additional, independent reasons stated in Lingo's Opposition to Plaintiffs' Amended Motion for Preliminary Injunction, ECF No. 81, which Lingo incorporates by reference.

First, Plaintiffs lack standing to seek injunctive relief because they have failed to show any reasonable likelihood of future harm from election-related robocalls, let alone that these harms would be traceable to Lingo or redressable by enjoining a single telephone company. Plaintiffs' principal theory of standing—and the only one capable of supporting the sweeping, nationwide injunction requested—is that the Organizational Plaintiffs diverted resources away from registering voters in response to "misinformation" in the New Hampshire Robocalls. But Plaintiffs offer no evidence or argument that the robocalls "directly" interfered with their voter registration activities by, for example, increasing the requirements to register voters or preventing voter outreach, and the Supreme Court in June rejected this kind of attenuated diversion-of-resources

theory of organizational standing. *FDA v. All. for Hippocratic Med.*, 144 S. Ct. 1540, 1564 (2024).

Second, Plaintiffs fall well short of demonstrating likely irreparable harm absent injunctive relief. There is *no* evidence of prospective harm in the record that would be traceable to Lingo, and the diversion of resources asserted by the Organizational Plaintiffs will apparently continue whether Lingo is enjoined or not. If any doubt remained, Plaintiffs' unexplained pattern of delay in seeking supposedly urgent relief for events that occurred nine months ago—and the complete lack of evidence that the alleged harm has recurred in any federal or state election since—undermines any argument that injunctive relief is necessary to prevent irreparable harm.

Third, Plaintiffs' requested injunction is impermissibly vague and overbroad. It would require Lingo—a telephone company—to violate federal and state laws protecting consumer privacy and mandating neutral service provision by monitoring the content of calls to determine whether they contain automated messages or illegal content, or were made for an unlawful purpose.

Finally, this Court may deny the motion for the additional reasons stated in Lingo's opposition, including that Plaintiffs failed to show standing as against Lingo with respect to traceability and redressability, failed to show a likelihood of success on the merits, and failed to show that the equities and the public interest favor granting the requested injunction.

STANDARD OF REVIEW

This Court reviews objected-to portions of the Magistrate Judge's report and recommendation *de novo*. 28 U.S.C. § 636(b)(1)(C). "A preliminary injunction is an extraordinary equitable remedy that is never awarded as of right." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1576 (2024) (quotation omitted). Plaintiffs must "make a clear showing" that they are likely to succeed on the merits, that they will be irreparably harmed absent relief, and that the equities and public interest favor granting the injunction. *Id.* They bear the burden of

demonstrating irreparable harm with "something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store." *Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004).

ARGUMENT

I. PLAINTIFFS LACK STANDING FOR INJUNCTIVE RELIEF.

The Magistrate Judge correctly determined that Plaintiffs' request for extraordinary relief failed at the threshold for lack of Article III standing. R&R 7–11. "At the preliminary injunction stage," Plaintiffs "must make a clear showing that [they are] likely to establish each element of standing" for "each claim that they press against each defendant, and for each form of relief that they seek." *Murthy v. Missouri*, 144 S. Ct. 1972, 1986, 1988 (2024) (quotations omitted). Because Plaintiffs "request forward-looking relief, they must face a real and immediate threat of repeated injury" traceable to Lingo. *Id.* at 1986 (quotation omitted). Plaintiffs failed to make this showing.

A. The Magistrate Judge Correctly Determined The Organizational Plaintiffs Failed To Demonstrate Injury Or Immediate Threat Of Future Injury.

Plaintiffs' principal theory of standing is that the New Hampshire Robocalls caused the Organizational Plaintiffs to divert resources from their "core business" of voter registration to prepare and disseminate notices that the robocalls were fake. Objections 5–7; Am. Mot. 12–13. As the Magistrate Judge explained, that diversion-of-resources theory cannot establish standing for injunctive relief for at least two reasons. First, the New Hampshire Robocalls did not "*directly*" harm the League's "core business activities" by interfering with its ability to register voters. *All. for Hippocratic Med.*, 144 S. Ct. at 1564 (emphasis added). Second, the League presented no evidence at all that the robocalls will recur or harm them in the future, and "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief."

Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992) (quotations omitted).

Plaintiffs rightly conceded at the hearing that their diversion-of-resources theory with respect to the Organizational Plaintiffs is the *only* theory of standing and irreparable harm that could support their requested nationwide injunction. *See* ECF No. 103 ("Hr'g Tr.") 28:15–16 ("We're asking for a preliminary injunction to prevent future harm to the League."); *see also* 97:25, 99:11–15. The Individual Plaintiffs are all New Hampshire residents, and there is no evidence suggesting that they could suffer future harm from conduct affecting third parties or occurring in another state. As a result, this Court could adopt the Magistrate Judge's Report and deny the preliminary injunction based on the Organizational Plaintiffs' lack of standing alone.

1. The Organizational Plaintiffs Do Not Assert Cognizable Article III Injury.

An organization "cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *All. for Hippocratic Med.*, 144 S. Ct. at 1563–64. Rather, the challenged action must have "*directly* affected and interfered with [the organization's] core business activities." *Id.* (emphasis added). Here, the Magistrate Judge correctly determined that the Organizational Plaintiffs failed to show the New Hampshire Robocalls "interfered with its core mission" of registering voters. R&R 11.

In *Alliance for Hippocratic Medicine*, the Supreme Court held that the diversion of resources by an advocacy organization is not enough to show standing because that "would mean that all the organizations in America would have standing to challenge almost every" action they dislike, "provided they spend a single dollar opposing those policies." 144 S. Ct. at 1564. Rather, the Court pointed to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), to hold that organizations most show "direct[]" interference with "core business activities." 144 S. Ct. at 1564. The plaintiff in *Havens* was a "housing counseling service" that had standing because the

defendants gave its "*employees* false information about apartment availability" and thereby violated the *plaintiff's* right to truthful information, impairing its "ability to provide counseling and referral services." *Id.* (emphasis added) (citation omitted). By contrast, the medical associations in *Alliance for Hippocratic Medicine* lacked standing because the FDA's relaxation of regulations on mifepristone had no direct impact on the associations' ability to advocate for their preferred policy outcomes. *Id.* In short, "*Havens* was an unusual case, and th[e] Court has been careful not to extend the *Havens* holding beyond its context." *Id.*

Here, nothing about the New Hampshire Robocalls *directly* interfered with the Organizational Plaintiffs' "core business" of registering voters. The robocalls did not convey false information to the League that prevented them from registering voters, *Havens*, 455 U.S. at 379, or raise any additional barriers to collecting and submitting voter registrations. Instead, the Organizational Plaintiffs assert that they diverted resources to oppose the message conveyed in the robocalls. *See* Am. Mot. 12–13; Declaration of Elizabeth Tentarelli, ECF No. 71-29 ("Tentarelli Decl.") ¶¶ 10–13; Declaration of Celina Stewart, ECF No. 71-30 ("Stewart Decl.") ¶¶ 10–14. These efforts to combat "disinformation" have been ongoing "[s]ince 2020," Stewart Decl. ¶ 7, and Organizational Plaintiffs have always engaged in "rapid-response" activities, Tentarelli Decl. ¶ 8 (discussing "rumor" in "mid-October 2023" that "required several hours of volunteer time that was not otherwise planned for"). That is exactly the type of expenditure on advocacy unrelated to "core business" activities that is insufficient for standing under *Alliance for Hippocratic Medicine*.

Plaintiffs' Objections fundamentally misunderstand *Havens* and *Alliance for Hippocratic Medicine*. The Organizational Plaintiffs assert they have standing because they have "taken actions to directly counteract Defendants' misinformation." Objections 8. But the relevant question is whether *Defendants'* actions directly interfered with the Organizational Plaintiffs' core

business activities, not whether the Organizational Plaintiffs took action to advocate against the Defendants' alleged misconduct. Plaintiffs have never argued that the New Hampshire Robocalls restricted voter registration activities, and that critical gap defeats their theory of standing. Indeed, Plaintiffs' theory would give the League standing to sue based on any election-related misinformation the League decides to divert resources to counteract. That is not the law.

After *Alliance for Hippocratic Medicine*, multiple courts have found no standing where, as here, the defendant's challenged conduct had only a speculative, indirect impact on the plaintiff's activities. *See Lawson v. Hargett*, 2024 WL 3867526, at *17–18 (M.D. Tenn. Aug. 19, 2024) (no standing for vagueness challenge to voting laws that allegedly made it more difficult to advise the public "how to participate in the democratic process"); *Citizens Project v. City of Colorado Springs*, 2024 WL 3345229, at *5–6 (D. Colo. July 9, 2024) (no standing to challenge timing of elections because timing did not disrupt existing educational and outreach services). Rather, cases applying *Alliance for Hippocratic Medicine* in the voting-rights context have found organizational standing *only* where the challenged action directly imposed requirements or restrictions on the plaintiff's activities. For example, in *Get Loud Arkansas v. Thurston*, 2024 WL 4142754, at *14 (W.D. Ark. Sept. 9, 2024), the organizational plaintiff had standing to challenge a "Wet Signature Rule" that effectively barred online voter registration and thereby restricted how the plaintiff could register voters. And the court in *League of Women Voters of Ohio v. LaRose*, 2024 WL 3495332, at *5 n.3 (N.D. Ohio July 22, 2024), suggested that the League had standing to challenge a state law "forbid[ding] [League] members from assisting disabled voters" and subjecting its members "to felony criminal charges" for violations.

Plaintiffs apparently could not identify a single case finding an advocacy organization had standing to challenge actions taken by a defendant with respect to third parties. *Cf. Tenn.*

Conference of NAACP v. Lee, 105 F.4th 888, 907 (6th Cir. 2024) (concluding that district court "likely erred" in holding plaintiff had standing). Nor can Plaintiffs manufacture standing by generalizing their mission "to encourag[ing] informed and active participation in democracy." Objections 6. This broad statement of mission is inconsistent with Plaintiffs' representations that their "core business" is "registering eligible voters." *Id.* at 6; *see also id.* at 8 ("enfranchisement of all eligible voters"), (the "League is in the business of registering voters" (quotation omitted)); Am. Mot. 12, 25. And it is inconsistent with *Alliance for Hippocratic Medicine*, in which the Supreme Court emphasized that "core business activities"—such as providing housing services or selling products as a retailer—and not statements of mission are the focus of the inquiry. 144 S. Ct. at 1564. Regardless, the Organizational Plaintiffs would lack standing even if abstract advocacy for voters were their core mission—resources already allocated for core business activities are not an injury. *See*, *e.g.*, *L. Aid Chi. v. Hunter Props., Inc.*, 2024 WL 4346615, at *10 (N.D. Ill. Sept. 30, 2024) (no standing for "divert[ing] resources from its other activities in order to fight evictions" because that was the organization's principal mission).

2. The Organizational Plaintiffs Do Not Assert An Imminent Future Injury.

As the Magistrate Judge explained, the Organizational Plaintiffs also failed to show any non-speculative likelihood that similar robocalls will recur and inflict future harm. R&R 11. Past responses to the New Hampshire Robocalls are not enough to show standing for injunctive relief even if those actions stated an injury: "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Lujan*, 504 U.S. at 564 (quotations omitted); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Roe v. Healey*, 78 F.4th 11, 21 (1st Cir. 2023).

Plaintiffs have never presented any evidence suggesting that the New Hampshire Robocalls

will recur and have instead relied exclusively on *allegations* pertaining to *past* conduct. Plaintiffs assert in their Objections that "the NH Robocalls were not an isolated incident but part of a pattern of illegal robocalls which Defendants" have been unable or unwilling to stop. Objections 9. But this supposed "pattern" consists of *investigations* of alleged robocalls—that had nothing to do with *elections* in any event. *See*, *e.g.*, ECF No. 71-13 (FTC letter regarding robocalls about retail products that were "apparently" routed through Lingo's predecessor). None of this pertains to events since the New Hampshire Robocalls or even supports speculation that Lingo's network would be used in the future to transit election-related illegal robocalls that directly impair the Organizational Plaintiffs' core business activities. Despite ample opportunities to do so—and the many intervening elections in the nine months since January 2024—Plaintiffs have *never* provided evidence that such robocalls have reoccurred or will occur in the future. This wholesale failure to produce evidence suggesting a likelihood of future harm is fatal to standing by itself. *See Tenn. Conf. of NAACP*, 105 F.4th at 904 ("[O]rganizations cannot establish their standing by diverting resources to eliminate a risk of harm to third parties that is not imminent.").

Moreover, the record affirmatively confirms that election-related illegal robocalls attributable in any way to Lingo are *unlikely* to recur. The Magistrate Judge correctly explained that circumstances have "materially changed" since January 2024. R&R 8. Lingo terminated Life Corp as a customer nine months ago. ECF No. 87-30. And, without any finding of liability, Lingo resolved an FCC investigation of its compliance with the STIR/SHAKEN framework by agreeing to pay a $1 million penalty and undertake additional steps to promote compliance with the agency's rules for authenticating the reliability of Caller ID representations by customers. ECF No. 91-1.

In addition, Kramer has been indicted for orchestrating the New Hampshire Robocalls, R&R 8, and the FCC recently finalized a Forfeiture Order imposing on him a $6,000,000 penalty.

See Spencer Decl., Ex. A. The Forfeiture Order confirms that Kramer, not Lingo, "caused" the New Hampshire Robocalls. *Id.* ¶¶ 24–25 & n.74. Specifically, "*Kramer* knowingly caused the calls at issue by directing—in detail—Voice Broadcasting to transmit spoofed calls." *Id.* ¶ 24 (emphasis added). And "Voice Broadcasting transmitted 9,581 calls through Life pursuant to *Kramer's instructions*." *Id.* (emphasis added). Notably, the FCC did not mention Lingo *at all* in its causation analysis.[1]

Plaintiffs ignore Lingo's Consent Decree with the FCC and respond to these other developments by repeating their refrain that Lingo has not fully complied with the STIR/SHAKEN framework in the past and citing the same batch of non-final documents from regulatory agencies. Objections 14. But, contrary to Plaintiffs' assertion, these statements *are* "mere allegations," *id.*—even the Consent Decree reached no determinations of wrongdoing, ECF No. 91-1, and the remaining documents are cease-and-desist letters stating allegations and "apparent" events, Objections 14 (citing ECF No. 71-12, 71-13). Pointing yet again to *past* allegations does nothing to address the impact of intervening developments—only additional evidence of recurring misconduct could fill that gap. But Plaintiffs failed to present such evidence to the Magistrate Judge and opted not to include additional evidence in support of their Objections to this Court.

B. The Magistrate Judge Correctly Determined The Individual Plaintiffs Failed To Demonstrate Injury Or Immediate Threat Of Future Injury.

The Individual Plaintiffs lack standing because none of them were injured by the New Hampshire Robocalls and none of them have presented any evidence that the robocalls will reach

[1] The FCC mentioned Lingo only three times in the entire Forfeiture Order: first, as "the originating provider for a number of the[] calls," Spencer Decl., Ex. A ¶ 8, next in reciting investigative history, *id.* ¶ 17, and then in a footnote about the Lingo Consent Decree related to the STIR/SHAKEN framework promulgated under the TRACED Act, not the Telephone Consumer Protection Act ("TCPA"), *id.* ¶ 18 n.65.

them and inflict harm in the future. Each asserts that he or she previously received one of the New Hampshire Robocalls, was not misled, and voted. *See* Declaration of James Fieseher, ECF No. 71-18 ("Fieseher Decl.") ¶¶ 5, 8; Declaration of Patricia Gingrich, ECF No. 71-19 ("Gingrich Decl.") ¶¶ 6–8; Declaration of Nancy Marashio, ECF No. 71-20 ("Marashio Decl.") ¶¶ 6–7, 10. As the Magistrate Judge explained, the Individual Plaintiffs have "demonstrated [their] ability to discern the falsity of the previous message" and will be "awar[e] of the possibility of false messaging robocalls in the future," thus forestalling any future harm. R&R 9.

Plaintiffs object that the Individual Plaintiffs have standing for injunctive relief because the Voting Rights Act ("VRA") prohibits coercing, intimidating, or threating voters and *attempting* to do so. Objections 15–16. "For standing purposes," however, "an important difference exists between (i) a plaintiff's statutory cause of action" and "(ii) a plaintiff's suffering concrete harm because of the defendant's violation of federal law." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 426–27 (2021). "Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court." *Id.* Because the Individual Plaintiffs voted in the New Hampshire primary, it is unclear what other "concrete harm" the robocalls could have inflicted. Plaintiffs assert that these voters have an "interest in free and fair elections, where they are not subject to voter intimidation and confusion," Objections 16, but the record demonstrates that these voters were *not* intimidated or confused by the robocalls and proceeded to vote. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 237 (4th Cir. 2014) (finding no harm where voters misinformed about voting requirements were ultimately able to vote in the election). An "interest[] in ensuring legal compliance with" a state's "election" laws "that might *someday* affect them"—untethered from an injury—is "a generalized grievance" that cannot satisfy Article III. *Castro v. Scanlan*, 86 F.4th 947, 960 (1st Cir. 2023).

Even if the Individual Plaintiffs had alleged a cognizable injury, none has shown that he or she is likely to be harmed again by such attempts in the future. There is no evidence that similar incidents have occurred since the New Hampshire Robocalls, including in state elections in which these individuals were eligible to vote. Plaintiffs also have never given reason to believe *these individuals* would be targeted again or explained how they could be deceived into giving up their right to vote given their status as "experienced voters," Objections 1, and proven ability to disregard fake messages. Any "[c]onclusory assertion" that the Individual Plaintiffs *could* receive robocalls in the future or *could* be deceived would not "suffice" to show standing, *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 47 (1st Cir. 2020), because "merely invoking the possibility of these events [would] not [be] enough," *Roe*, 78 F.4th at 21.

C. Additionally, Plaintiffs Have Not Shown Future Injuries Traceable To Lingo Or Redressable By Their Requested Relief.

The Magistrate Judge rightly concluded that Plaintiffs lack standing for injunctive relief because they have not shown an imminent future injury-in-fact. This Court may also deny the motion on standing grounds for the additional reasons that any injuries are not traceable *to Lingo* or redressable by the requested injunction. *See Murthy*, 144 S. Ct. at 1993; *Naser Jewelers, Inc. v. City of Concord*, 2007 WL 1847307, at *1–2 (D.N.H. June 25, 2007) (adopting recommendation to deny preliminary injunction on alternative grounds). Lingo played an unwitting and passive part in the New Hampshire Robocalls. Lingo did not create them—Kramer did. And Lingo did not initiate them—Kramer did that as well with assistance from Voice Broadcasting and Life Corp. Plaintiffs' case against Lingo is limited to the allegation that Lingo gave the robocalls incorrect attestations under the STIR/SHAKEN framework for Caller ID authentication and thus supposedly "increas[ed] the likelihood that the [New Hampshire] Robocalls would reach their intended target."

Am. Mot. 19. Accordingly, Plaintiffs have not shown that the harms they assert are traceable to Lingo or that recurrence would be prevented if Lingo were enjoined.

There is no evidence that Lingo is more likely than other telephone companies to carry illegal robocalls going forward—providers are prohibited under the Wiretap Act from reviewing the content of the calls that transit their networks, including whether the voice on the phone is human or AI-generated and live or pre-recorded. *See* 18 U.S.C. § 2511(1)(a) (prohibiting the interception of call content absent exceptional circumstances). Lingo thus "faces much the same risk of future [illegal traffic] as virtually every" provider. *Webb v. Injured Workers Pharmacy, LLC*, 72 F.4th 365, 378 (1st Cir. 2023). Nor is there reason to believe Lingo is more likely than others to provide improper Caller ID attestations under the STIR/SHAKEN framework. As noted, Lingo terminated Life Corp as a customer for misusing Lingo's networks, ECF No. 87-30, and has taken steps to further increase the reliability of its STIR/SHAKEN attestations, including the enforceable commitments made in its Consent Decree with the FCC, *see* ECF No. 91-1. In short, "nothing in the record" supports Plaintiffs' "speculation" about any risk of future harm originating from Lingo. *All. for Hippocratic Med.*, 144 S. Ct. at 1561; *see also Roe*, 78 F.4th at 21.

For similar reasons, any risk of future harm would not be meaningfully reduced by enjoining Lingo. *See Murthy*, 144 S. Ct. at 1993; *McBreairty v. Miller*, 93 F.4th 513, 518 (1st Cir. 2024). The requested injunction barring Lingo from "producing, generating, or distributing AI-generated robocalls," "distributing" spoofed calls, and "distributing" communications "made for an unlawful purpose," ECF No. 71-31 at 1–2, "would not remedy the alleged injury," *Haaland v. Brackeen*, 599 U.S. 255, 292–93 (2023), because Lingo does not "produc[e]" or "generat[e]" robocalls and cannot, without violating countless laws protecting consumer privacy and imposing common-carrier requirements, cease "distributing" calls that have an "unlawful purpose."

II. PLAINTIFFS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM ATTRIBUTABLE TO LINGO ABSENT A PRELIMINARY INJUNCTION.

To obtain a preliminary injunction, the plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction" before a decision on the merits can be reached. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The Magistrate Judge correctly found that the likelihood of *any* future harm here is "questionable" at best because the Individual Plaintiffs were not harmed in the past and because the Organizational Plaintiffs failed to show harm from diversion of resources that could not be remedied, if necessary, with monetary damages. R&R 12. Plaintiffs object to the Magistrate Judge's conclusion on irreparable harm but argue only that the diversion of resources by the Organizational Plaintiffs *in the past* is irreparable—they still have no evidence or argument that harms will occur again.[2]

First, Plaintiffs point only to "irreparable harm related to harm" they allegedly have "already suffered, rather than to harm [they] would suffer if the preliminary injunction were not granted." *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 80–81 (1st Cir. 2009). Their sole argument for irreparable harm—the diversion of resources in response to the New Hampshire Robocalls—is tied to *past* harms and *past* events, not likely future harm. Plaintiffs candidly admit that the League has "suffered, and will continue to suffer, by being forced to divert resources away from [their] mission" in order "to combat the harm caused"—past tense—"by the Defendants." Am. Mot. 25; *see* Objections 17 (the League "has already spent—and will continue to spend" resources combatting "misinformation"). Plaintiffs have never asserted that they would cease these efforts if Lingo were enjoined—and an injunction against Lingo would not un-spread

[2] Plaintiffs failed to object to the Magistrate Judge's finding that the Individual Plaintiffs would not be irreparably harmed absent an injunction, thereby waiving the issue. Objections 16–18 (addressing only the Organizational Plaintiffs); *see* 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72.

Kramer's misinformation or prevent unlawful traffic from transiting other networks.

Given the intervening nine months since the New Hampshire Robocalls, it is particularly notable that there is *still* no record evidence that Plaintiffs' asserted fears of other election-related robocalls inflicting further harms have come to pass. Many federal and state elections have been held since January 2024, including primary elections for state offices in New Hampshire on September 10, 2024, R&R 8, and early voting for the November 2024 general election is well underway across the country, Taylor Robinson, *Early Voting Is Beginning in These States. Here's What to Know*, N.Y. Times (Oct. 7, 2024). Plaintiffs bear the burden on irreparable harm. But despite dire warnings that robocalls would inflict further harms absent relief by "early September," Hr'g Tr. 97:19, they have never identified a single incident backing up their concerns.

Second, Plaintiffs have not shown irreparable harm *as against Lingo*—a difficult task given the fundamental mismatch between their allegations against Lingo, which are limited to providing inaccurate attestations, Am. Mot. 9–10, and their only theory of irreparable harm, voter intimidation, *id.* at 23–25. Even if accurate attestations might have affected how voters received the spoofed calls—which Plaintiffs do not establish—Plaintiffs do not assert spoofing as a standalone basis of irreparable harm. Nor could they: Plaintiffs are seeking monetary damages, Am. Compl. 35, and cannot claim that spoofing is an irreparable harm while, at the same time, asserting they are entitled to a legal remedy for the same conduct, *see Lyons*, 461 U.S. at 111. Moreover, Plaintiffs' own submissions establish that the perceived threat from voter intimidation arose exclusively from the deepfake of President Biden's voice, not from spoofing. *See* Gingrich Decl. ¶ 10 ("[I]f someone who received the call thought it was President Biden, the robocall might cause some voters not to vote."); Marashio Decl. ¶ 10 ("I am concerned that a less experienced voter may not have known that the voice was a fake."); Fieseher Decl. ¶¶ 6, 9; Tentarelli Decl. ¶ 9

(voters "were receiving prerecorded telephone calls . . . purporting to come from President Joe Biden and realistically simulating his voice by computer"); Stewart Decl. ¶¶ 7, 10.

Before this Court, Plaintiffs object to the Magistrate Judge's finding that any residual harms from the Organizational Plaintiffs' diversion of resources could be addressed through money damages. Objections 17 (citing *National Coal. on Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457 (S.D.N.Y. 2020)). But Plaintiffs misunderstand both the Report and *Wohl*. In *Wohl*, the court found irreparable harm where an organization diverted resources away from work on the Census and the Census had completed before the injunction could issue—thus, the organization had completely lost the opportunity to work on the Census. 498 F. Supp. 3d at 474. That logic has no application here. The New Hampshire Robocalls occurred in January 2024, and there is no reason to believe the Organizational Plaintiffs have been unable to perform voter registration work in the nine months since because of the robocalls.

Third, Plaintiffs' own delay "detracts from [their] claim of irreparable harm." *Charlesbank*, 370 F.3d at 163. Plaintiffs waited two months after the New Hampshire Robocalls to file suit on March 14, 2024, *see* ECF No. 1, and then another month and a half to file their original motion for a preliminary injunction on April 26, *see* ECF No. 47. When the original motion was nearly ripe for decision, Plaintiffs restarted the clock by filing an amended motion on June 7—nearly five months after the New Hampshire Robocalls. *See* ECF No. 71.[3] At no point have Plaintiffs sought to expedite the proceedings by moving for accelerated briefing or voluntarily filing briefs earlier than required—including their Objections, which Plaintiffs filed exactly 14

[3] Plaintiffs said they needed to amend to address "new information" and to add a new party. ECF No. 63 ¶ 9. But Plaintiffs could have addressed new information on reply and filed a separate motion against the new party. Their decision to reset briefing for all Defendants—adding more than a month of delay—was a deliberate choice that belies any sense of urgency.

days after the Magistrate Judge recommended denying the motion. That "delay in seeking relief in federal court after learning" of the alleged misconduct confirms the absence of any irreparable harm. *SMA Life Assur. Co. v. Sanchez-Pica*, 960 F.2d 274, 278 (1st Cir. 1992); *see also Open Top Sightseeing USA v. Mr. Sightseeing, LLC*, 48 F. Supp. 3d 87, 90 (D.D.C. 2014).

At the hearing before the Magistrate Judge back in July, Plaintiffs conceded that there were "some elections happening in place to place in the summer," Hr'g Tr. 97:16–17—an understatement, given that Plaintiffs allowed nearly the entire primary election season to pass between the New Hampshire Robocalls and the preliminary injunction hearing. Yet Plaintiffs insisted that "the harm that the League is asking for the injunction to protect against" could still come "in early September," when "early voting starts." *Id.* at 97:17–23. Yet, even then, Plaintiffs waited the full 14 days allotted under the rules to file their Objections and still did not seek expedited briefing, allowing nearly a full month of the early voting period to elapse before their Objections would be ripe for a ruling from this Court. That inexplicable delay confirms that Plaintiffs are not likely to suffer irreparable harm absent preliminary injunctive relief.

III. THE MAGISTRATE JUDGE CORRECTLY DETERMINED THAT PLAINTIFFS' REQUESTED PRELIMINARY INJUNCTION IS VAGUE AND OVERBROAD.

Relief should also be denied because Plaintiffs' requested preliminary injunction is hopelessly vague and overbroad. Plaintiffs ask this Court to preliminarily enjoin Lingo from: (i) "distributing AI-generated robocalls impersonating any person, without that person's express, prior written consent"; (ii) "distributing spoofed telephone calls, text messages, or any other form of spoofed communication, without the express, prior consent of the individual or entity upon whose half the communication is being sent"; and (iii) "distributing telephone calls, text messages, or other mass communications that do not fully comply with all applicable state and federal laws

or that are made for an unlawful purpose." ECF No. 71-31 at 1–2. That language violates Local Rule 65.1 and Federal Rule of Civil Procedure 65(d)(1)(C) because it does not "describe in reasonable detail . . . the act or acts restrained or required." *See*, *e.g.*, *Francisco Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 15 (1st Cir. 2009) ("An order that fails to comply with the prerequisites of Rule 65(d) should be set aside on appeal.").

The Magistrate Judge rightly determined that Plaintiffs' requested relief was vague and overbroad. The "proposed injunction does not include definitions of the terms used," including "unclear or ambiguous" terms such as "'AI-generated,' 'spoofed,' 'applicable state and federal laws,' and 'unlawful purpose.'" R&R 13–14. The second provision does not explain whose consent would be required for spoofed communications. *Id.* at 14. And the third did not specify which laws and requirements were included in the sweeping "obey the law" provision. *Id.* For each of these reasons, the Magistrate Judge correctly concluded that the proposed injunction did not comply with Rule 65(d)(1).

The proposed injunction is improper for additional reasons. Neither Lingo nor any other voice provider can magically stop customers from making calls that include illegal content, short of unprecedented (and unlawful) monitoring and censorship. And besides failing to define what it means to have an illegal "purpose" for making a call, Plaintiffs do not explain how Lingo could possibly discern its customers' purposes. The exact same conversation could be made for lawful or unlawful purposes—for example, a call asking for money could be criminal fraud or a grandson talking with indulgent grandparents—and Lingo would have no way of knowing the difference. The same flaw applies to Plaintiffs' proposed "express, written consent" language, as Lingo generally has no way of knowing whether one caller placing a robocall or spoofed call has obtained such consent from the recipient. Plaintiffs also cite no authority to enjoin Lingo from distributing

any spoofed communication. Spoofing is often entirely legal and holds "'legitimate importance'" for many callers. *Walsh v. TelTech Sys., Inc.*, 821 F.3d 155, 163 (1st Cir. 2016). At most, Plaintiffs could request an injunction to prevent *illegal* spoofing, but that would pose the same problem: Neither Lingo nor any other phone company can tell with certainty whether a spoofed call is made for an illegal purpose, much less in time to avoid "distributing" the call.

Plaintiffs' Objections to the Magistrate Judge's reasoning are baseless. Plaintiffs suggest that Lingo must simply "put measures in place to ensure its internal controls are not deficient to prevent an illegal robocall scheme such as the [New Hampshire] Robocalls from recurring." Objection 20. But that is not the injunction that Plaintiffs proposed; rather than "measures" and "internal controls," Plaintiffs' proposed injunction would require Lingo to determine which robocalls are being made for unlawful purposes and to monitor the content of calls illegally to determine if they are AI-generated robocalls. Plaintiffs' reframing also ignores the robust compliance plan Lingo entered into with the FCC, which already requires Lingo to engage in additional measures to verify information. Plaintiffs' demand for consent for spoofed communications, Objections 20–21, ignores the legal uses of spoofing for privacy purposes. Plaintiffs offer no support for their assertion that the "circumstances of this case" make an "obey-the-law" injunction appropriate. *Id.* at 21. And their claim that there are no "conflicting legal obligations," *id.*, is particularly unfounded—as Plaintiffs have brought novel election-law claims against a telephone company and ignored Lingo's arguments about the Wiretap Act.

IV. ALTERNATIVELY, THIS COURT SHOULD DENY THE MOTION FOR PRELIMINARY INJUNCTION ON GROUNDS THE MAGISTRATE JUDGE DID NOT REACH.

The Magistrate Judge properly recommended denying the preliminary injunction for lack of standing, failure to show irreparable harm, and the impermissible vagueness and scope of the

requested injunction. This Court may also deny the injunction for the additional reasons, set out in Lingo's opposition and summarized here, that Plaintiffs failed to show other required elements.

A. Plaintiffs' VRA Claim Is Unlikely To Succeed Against Lingo.

Plaintiffs' federal election-law claims are unlikely to succeed against Lingo because they are unlikely to show that Lingo intimidated, threatened, or coerced anyone in violation of section 11(b) of the VRA. 52 U.S.C. § 10307(b). Kramer "commissioned" the "deepfake" message, provided the script, and "solicited" Voice Broadcasting to procure a batch of robocalls. Am. Mot. 7–8. Voice Broadcasting "initiated" the calls, and Life Corp "routed" the calls through various telecommunications providers. *Id.* at 9. Lingo was merely one of the voice providers through which the calls were carried. It did not create the calls, initiate them, or review their content. Plaintiffs fail to show that *Lingo* can be held liable for Kramer and Life Corp's calls. This reality is reflected in the fact that Plaintiffs barely mentioned Lingo in their VRA arguments, alleging only that Lingo incorrectly gave a portion of the New Hampshire Robocalls "A-level" attestations under the STIR/SHAKEN framework and thus "falsely authenticated that Life Corp had the legal authorization to use Kathy Sullivan's personal cell phone number." Am. Mot. 9–10; *see id.* at 22. But any technical violation of the STIR/SHAKEN framework did not intimidate voters.

Even if the New Hampshire Robocalls' content could be imputed to Lingo, that content did not intimidate, threaten, or coerce voters in violation of the VRA. Plaintiffs' "fear[ ] that less-experienced voters would not have been able to discern [the calls'] inauthenticity," and "could have led to the suppression of these voters," does not even meet their own standard for Section 11(b) liability: That "a reasonable recipient, familiar with the context of the communication, would view [it] as a threat of injury to deter individuals from exercising their right to vote." Am. Mot. 3, 16 (quoting *Nat'l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 113

(S.D.N.Y. 2023)). Plaintiffs' own evidence confirms as much: Each of the Individual Plaintiffs "knew" that the calls were not authentic and "knew" that he or she could vote in both the primary and general election. Gingrich Decl. ¶ 8; *see also* Fieseher Decl. ¶¶ 5, 8; Marashio Decl.¶¶ 7, 10.

In addition, Plaintiffs are unlikely to prevail on their VRA claim against Lingo for another, more fundamental reason: There is "no private right of action under Section 11(b) of the VRA." *Andrews v. D'Souza*, 696 F. Supp. 3d 1332, 1351 (N.D. Ga. 2023); *Schilling v. Washburne*, 592 F. Supp. 3d 492, 497–99 (W.D. Va. 2022); *see also* ECF No. 79-1 ("Second MTD") at 14–16.

B. Plaintiffs' State-Law Claims Are Unlikely To Succeed Against Lingo.

Plaintiffs' claims fare no better under state election law. *See* Second MTD 11–12. To succeed on a claim under NH RSA 664:14-b, I, Plaintiffs must prove that Lingo "knowingly misrepresent[ed] the origin of a telephone call." Plaintiffs argue that "Defendants" (collectively) spoofed caller ID information and impersonated President Biden. Am. Mot. 21–22. But Lingo had nothing to do with either alleged misrepresentation. Spoofing occurs where "*the caller* falsifies caller ID information that appears on a recipient's phone," *Call Authentication Trust Anchor*, Report and Order and Further Notice of Proposed Rulemaking, 35 FCC Rcd 3241, 3242 ¶ 1 (2020) (emphasis added), and Lingo was not the caller. Plaintiffs admit that "*Kramer* instructed Voice Broadcasting to use" the wrong phone number "that would appear on the Caller ID display," Am. Mot. 9 (emphasis added), and do not suggest Lingo knew about the spoofing. And Plaintiffs allege that *Kramer* commissioned the deepfake, *id.* at 7, and do not allege that Lingo knew it existed, much less shaped its content.

For the same reason, Plaintiffs are not likely to succeed on their claim under NH RSA 664:14-a, II. For that claim, Plaintiffs must prove that Lingo "deliver[ed] or knowingly cause[d] to be delivered a prerecorded political message" that did not disclose the entities responsible for

the call. But again, Plaintiffs do not argue that Lingo had any role in shaping the content of the prerecorded message in the New Hampshire Robocalls. Lingo would not have been able to screen for—or add—any of the disclosures that Plaintiffs allege are missing.

Plaintiffs are also unlikely to succeed on their state-law claims because they were not "injured" as required to bring a private action. *See* NH RSA 664:14-a, IV(b); NH RSA 664:14-b, II(b); *see also* Second MTD 16–18. Plaintiffs have failed to allege an injury stemming from a violation of NH RSA 664:14-a, II or NH RSA 664:14-b, I, and so do not claim to have suffered any "legal injury against which the law was designed to protect." *O'Brien v. New Hampshire Democratic Party*, 166 N.H. 138, 142 (2014) (quotation omitted). The statutes at issue here are designed to protect against voter confusion. *See id.* at 145 (assessing voter confusion to analyze statutory standing). But all of the Individual Plaintiffs knew "the call was illegitimate," Am. Mot. 3, and the Organizational Plaintiffs make no allegation that they were confused. Because Plaintiffs were not confused, they were not "injured" for purposes of either state statute.

And even if Plaintiffs alleged a cognizable statutory injury, they fail to establish that it comes "from the alleged" violations. *O'Brien*, 166 N.H. at 145. The crux of Plaintiffs' case is that the New Hampshire Robocalls deceived voters by telling them "that exercising their right to vote in the New Hampshire Primary" would render them "unable to vote in the General Election." Am. Mot. 17. Thus, any injury necessarily "flowed from the political content of the message, rather than from the alleged absence of the required disclosure." *O'Brien*, 166 N.H. at 145. Even if the message disclosed Kramer as "the fiscal agent" or displayed a different phone number, that "additional information would not have clarified" that voters could participate in the general election if they voted in the primary. *Id.* Thus, because Plaintiffs do "not allege an injury flowing from the alleged statutory violation," they lack statutory standing. *Id.* at 146.

C. Plaintiffs Are Unlikely To Show That Lingo Proximately Caused Any Injury From The Alleged Election-Law Violations.

Plaintiffs' election-law claims also fail for the independent reason that they are unlikely to show that Lingo proximately caused any election-law-related injury. *See* Second MTD 13–14; *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014) (courts "generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute"). The First Circuit rejected an even less attenuated theory of proximate cause in *Walsh*, 821 F.3d 155. There, a third party used the defendant's SpoofCard to disguise her phone number and harass the plaintiff. *Id.* at 157–58. But the defendant did not cause any injury because there were "illegitimate and legitimate uses" of SpoofCard. *Id.* at 163–64. Here, the only plausible allegation against Lingo is that it failed to *detect* spoofing and thus issued improper STIR/SHAKEN attestations. That alleged conduct is far too remote to create liability for any misdeeds of its customers. *See id.*

D. Plaintiffs Are Unlikely To Overcome Lingo's Statutory Immunity Against Their Election-Law Claims.

Plaintiffs' election-law claims are also unlikely to succeed against Lingo because they are barred by Section 230 of the Communications Decency Act. *See* 47 U.S.C. § 230(c)(1); Second MTD 18–21. Under Section 230, "a defendant is shielded from liability" where "(1) the defendant is a provider or user of an interactive computer service; (2) the claim is based on information provided by another information content provider; and (3) the claim would treat the defendant as the publisher or speaker of that information." *Monsarrat v. Newman*, 28 F.4th 314, 318 (1st Cir. 2022) (cleaned up). "[I]mmunity under [S]ection 230 'should be broadly construed.'" *Id.* (quoting *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007), and citing *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 18 (1st Cir. 2016)).

Lingo satisfies all three elements. *First*, Lingo's voice over Internet Protocol ("VoIP") service is an "interactive computer service." 47 U.S.C. § 230(f)(2). Because the calls were given STIR/SHAKEN attestations, Am. Mot. 9–10, they were necessarily "carried over Internet Protocol (IP) networks." FCC, *Combating Spoofed Robocalls with Caller ID Authentication*, https://tinyurl.com/yc6kecav (last visited Oct. 17, 2024) ("the STIR/SHAKEN framework is only operational on IP networks"). *Second*, Plaintiffs' VRA and state-law claims are "based on information provided by another information content provider." *Monsarrat*, 28 F.4th at 318 (quotation omitted). Kramer satisfies the "broad definition" of information content provider, *Lycos*, 478 F.3d at 419, because he "commissioned" the "New Hampshire Robocalls," Am. Mot. 7–8. *Third*, Plaintiffs' VRA and state-law claims would treat Lingo "as the publisher or speaker of" the robocalls. *Monsarrat*, 28 F.4th at 318 (quotation omitted). Plaintiffs' VRA claim alleges the calls' contents were intimidating; their NH RSA 664:14-a claim alleges the calls "did not disclose" required information; and their NH RSA 664:14-b claim alleges that the calls "convey[ed] the message using a deepfake audio recording of President Biden." Am. Mot. 19–22. Thus, "there would be no harm to [the Plaintiffs] but for the content of the" calls. *Backpage.com*, 817 F.3d at 19–20. Plainly then, "any liability against [Lingo] must be premised on imputing to it the" calls' content—"that is, on treating it as the publisher [or speaker] of that information"—precisely what Section 230 does not allow. *Lycos*, 478 F.3d at 422.

E. Plaintiffs' TCPA Claim Is Unlikely To Succeed Against Lingo.

Plaintiffs are unlikely to succeed in their claim that Lingo violated the TCPA because they cannot show that Lingo "initiated" the New Hampshire Robocalls within the meaning of 47 U.S.C. § 227(b)(1)(B). *See* Second MTD 21–25. Consistent with the plain meaning of that term, the FCC and the courts have long held that communications intermediaries generally do not "initiate" calls

because they "do[ ] not control the recipients, timing, or content" of the calls. *Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7982 ¶ 33 (2015). Because Plaintiffs have not alleged—much less shown—that Lingo controlled the recipients, timing, or content of the calls, they are unlikely to succeed on their TCPA claim against Lingo. To the contrary, Plaintiffs themselves admit that "*Voice Broadcasting*, using service and equipment provided by Life Corp, *initiated*" the New Hampshire Robocalls. Am. Mot. 9 (emphases added). And the FCC's Forfeiture Order against Kramer confirms that Kramer, not Lingo, "initiated" the calls within the meaning of the TCPA. *See* Spencer Decl., Ex. A.

F. The Equities And The Public Interest Strongly Disfavor A Preliminary Injunction Against Lingo.

Plaintiffs fail to grapple with the sweeping consequences of their requested injunction for Lingo, its customers, and the public. Ordering Lingo to cease "distributing AI-generated robocalls," "spoofed" communications, and any communications "that do not fully comply with all applicable state and federal laws or that are made for an unlawful purpose," ECF No. 71-31 at 1–2, would force Lingo to monitor and censor calls in violation of federal law. And in pursuit of the important public interest in the "'right to vote,'" Am. Mot. 26, the injunction would eviscerate the public interests in privacy, free expression, and access to communications services. The Court should deny the injunction against Lingo on equitable and public-interest grounds. Because the final two factors heavily and unanimously counsel against an injunction, denial is warranted on this basis as well. *See Winter*, 555 U.S. at 26–33 (vacating preliminary injunction on sole ground that equities and public interest disfavored injunctive relief).

CONCLUSION

Lingo respectfully requests that this Court overrule the Objections, adopt the Magistrate Judge's report, and deny the motion for a preliminary injunction.

October 17, 2024

Respectfully submitted,

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