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-73-SM-TSM

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Defendants Voice Broadcasting ("Voice"), Life Corporation ("Life"), and Lingo Telecom, LLC ("Lingo") (collectively, "Defendants") do not dispute underlying facts in this case, namely, that each of the Defendants played a critical role in generating, distributing, or falsifying the New Hampshire Robocalls ("NH Robocalls"). Instead, they rely on strained and spurious legal arguments in a futile effort to downplay their involvement and evade culpability for their actions (and inaction). As demonstrated below, and contrary to Defendants' assertions, Plaintiffs League of Women Voters of New Hampshire and League of Women Voters of the United States (collectively, the "League"), and Nancy Marashio, James Fieseher, and Patricia Gingrich (collectively, the "Individual Plaintiffs") have standing to assert their claims and are likely to succeed on the merits. Furthermore, Plaintiffs have demonstrated a risk of irreparable harm absent an injunction, and that the balance of the equities and the public interest necessitates such relief.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO ASSERT THEIR CLAIMS

Plaintiffs have shown that an injury is likely to occur if a preliminary injunction is not granted. To establish standing, "a plaintiff must meet a familiar three-part test" showing "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *Wiener v. MIB Group, Inc.*, 86 F.4th 76, 84 (1st Cir. 2023) (citations omitted). At the preliminary injunction stage, the plaintiff need only show that they are "likely" to establish standing, given that discovery has not been taken. *Murthy v. Missouri*, No. 23-411, 2024 WL 3165801, at *8 (U.S. June 26, 2024) (citations omitted).

a. Plaintiffs have shown they are likely to establish an injury-in-fact.

"To satisfy [] standing, the injury in fact 'must be concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *Reddy v. Foster*, 845 F.3d 493, 500 (1st Cir. 2017) (internal quotation marks omitted) (quoting *SBA List v. Driehaus*, 573 U.S. at 149, 158 (2014)).

i. Plaintiffs have shown their injury is likely actual and imminent.

A future injury is imminent "if the threatened injury is certainly impending, or if there is a substantial risk that the harm will occur." *Id.* (internal quotation marks omitted) (quoting *Driehaus*, 573 U.S. at 158). Additionally, when requesting prospective relief, "past exposure to harm will not, in and of itself, confer standing upon a litigant to obtain equitable relief '[a]bsent a sufficient likelihood that he will again be wronged in a similar way.'" *Am. Postal Workers Union v. Frank*, 968 F.2d 1373, 1376 (1st Cir. 1992) (quoting *L.A. v. Lyons*, 461 U.S. 95, 111 (1983)).

The loss of a vote is an actual, imminent, and severe injury. In this case, Plaintiffs have shown that there is substantial risk and sufficient likelihood that they will be similarly wronged again by the Defendants. The manipulation and intimidation alleged due to the Defendants' own actions interfered with the exercise of people's right to vote in the New Hampshire Primary.

Defendant Lingo alleges that Plaintiffs have not provided any proof that the injury is likely to reoccur, but that is incorrect. *See* Lingo Telecom LLC's Mem. in Opp'n to Pls.' Am. Mot. for Prelim. Inj. ("Lingo Opp.") at 4-5, ECF No. 81. Plaintiffs have shown that the NH Robocalls were not an isolated incident but part of a pattern of illegal robocalls which Defendants, particularly Lingo, have been unable (or deliberately refuse) to catch and stop despite increasing pressure from government agencies to comply with the law. *See, e.g.*, Multistate Litig. Task Force Letter, ECF No. 71-12 ; FTC Letter, ECF No. 71-13. Further, Plaintiffs have shown that Lingo has knowingly not complied with the STIR/SHAKEN framework, having falsely authenticated Life's illegal calls by marking over ten thousand with an "A" attestation, the highest level. *See* Lingo Notice of

Apparent Liab., ECF No. 71-11 ¶¶ 7, 14 n.59. These examples demonstrate Lingo's refusal to comply with statutory and regulatory standards, in turn showing that, with or without Kramer and Life purchasing its services, Lingo can be expected to send illegal robocalls to intimidate, manipulate, and confuse voters. These are not mere allegations, but conclusions from expert agencies that Lingo continuously engaged in illegal conduct that led to the NH Robocalls. Absent an injunction, that conduct, and the associated injuries, are likely to continue.

Life has worked with Kramer on robocalls since 2010. The fact that the company has ended its relationship with him, Defs.' Life Corp. and Voice Broad. Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj., ("Voice/Life Opp.") at 4, ECF No. 80, does not mean it will not be used again to make illegal robocalls that intimidate voters. To the contrary, their fourteen-year history of working with Kramer indicates a propensity to traffic robocalls. Moreover, the fact that Voice does not have *any* legal or compliance team, Decl. of Jeff Fournier, ECF No. 80-2 ¶ 24, undercuts any asserted commitment to avoid trafficking illegal robocall campaigns in the future. Kramer himself has said "with a mere $500 investment, anyone could replicate" his actions, Messages with Alex Seitz-Wald, ECF No. 71-28, at 4, but that requires participation by these companies. If they are not enjoined by the court, such participation is likely to recur, with corresponding injuries inflicted.

ii. Plaintiffs have shown their injury is likely concrete and particularized.

"Particularity demands that a plaintiff must have personally suffered some harm." *Katz v. Pershing, LLC*, 672 F.3d 64, 71 (1st Cir. 2012); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 n.1 (1992). Defendant Life alleges that the Plaintiffs have not shown particularity, but that is incorrect. The Individual Plaintiffs were harmed by receiving threatening, intimidating, and coercive robocalls—an injury plainly particular enough to confer standing.

Recent Supreme Court precedent establishes that the League also has organizational standing. An organization is injured particularly, the Court explained, when the defendant's action

"directly affected and interfered with [the organization's] core business activities." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 395 (2024). The League's core business is to encourage informed and active participation in the government, which they facilitate by encouraging citizens to register to vote and participate in elections. *See* Tentarelli Decl. ¶¶ 2-3. The illegal robocalls directly interfered with League's ability to continue this core business as it has been forced to divert human and other resources that would have gone into voter registration. *See* Stewart Decl. ¶ 12. Without an injunction, the League will be forced to continue these costly diversions to combat future illegal robocall campaigns. *See* Decl. of Elizabeth Tentarelli ("Tentarelli Decl.") ¶¶ 11-13, ECF No. 29.

Defendants' reliance on *Equal Means Equal v. Ferriero*, 3 F.4th 24 (1st Cir. 2021), fails. There, the First Circuit rejected organizational standing for "lobbying activities" or "pure-issue advocacy." *Id.* at 30. But when addressing the robocalls, the League was not lobbying the government or advocating on an issue—it was attempting to ensure proper voter information and registration. Because those are core business activities, *Ferriero*'s holding is inapposite.

b. Plaintiffs are likely to show the alleged injury was caused by the Defendants.

Causation "requires the plaintiff to show a sufficiently direct causal connection between the challenged action and the identified harm," *Katz*, 672 F.3d at 71 (citing *Lujan*, 504 U.S. at 560), which cannot be "overly attenuated." *Donahue v. City of Boston*, 304 F.3d 110, 115 (1st Cir. 2002). Plaintiffs meet the standard of showing a likelihood of a sufficiently direct casual connection between the Defendants' actions and the illegal robocalls intimidating, threatening, and confusing voters because each of the Defendants was directly involved at a key step of the process. For example, Voice added a sentence to the end of the illegal robocalls instructing voters to call the

spoofed number to opt out of future calls. Kramer Notice of Apparent Liab., ECF No. 71-3 ¶ 11,[1] Life conveyed that it had the legal authorization to utilize Kathy Sullivan's spoofed telephone number, *id.* ¶¶ 11, 14-16, and Lingo did not properly comply with the STIR/SHAKEN framework in attesting the calls, leading to their validation. *See* ECF No. 71-11 ¶¶ 7, 14 n.59. Moreover, by deliberately failing to maintain a robust legal and compliance team, Defendants missed the opportunity to stop the NH Robocalls when they were carried out. *See* ECF No. 71-11 ¶ 23; ECF No. 80-2 ¶ 24. Defendants are therefore causally responsible for the NH Robocalls and if they are not enjoined, are likely to cause similar harm again in the future.

c. Plaintiffs have shown that the alleged injury is redressable.

To establish redressability is likely, Plaintiffs "need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm." *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 318 (1st Cir. 2012) (citations omitted). Additionally, redressability is a "matter of degree," *Katz*, 672 F.3d at 72.

Plaintiffs have shown that it is likely that the preliminary injunction requested would at least partially redress the injury in the case, and in fact the combination of enjoining all the Defendants would have a substantial likelihood of preventing the injury reoccurring. While robocalls may be a complex issue, these Defendants' culpability is not: Lingo has been contacted and fined by various government agencies, as previously described, for allowing illegal robocalls into their network and not properly adhering to the STIR/SHAKEN framework. Voice and Life worked directly with Kramer, who has been utilizing robocalls for years. ECF No. 80-2, ¶¶ 10, 15.

[1] Voice and Life insist that they had no knowledge of the content of the robocall, Voice/Life Opp. at 4, but that cannot be true if Voice added language to the call.

Whether third parties or other telecommunications companies are involved in future illegal robocalls is irrelevant. The question in this case is not whether the injunction can redress robocalls in general, but whether the injunction would redress illegal robocalls used to manipulate and intimidate voters. The answer is, "yes."

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

a. The NH Robocalls Violated the Voting Rights Act ("VRA")

Defendants baselessly argue that threatening to strip voters of their right to vote in a future election is not threatening, intimidating, or coercive. No one believes that. A person's right to vote is and must be sacrosanct, a cornerstone of our democracy and of our individual rights. "[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Nat'l Coal. On Black Civic Participation v. Wohl*, 498 F. Supp. 3d 457, 464 (S.D.N.Y. 2020) ("*Wohl I*") ("The right to vote embodies the very essence of democracy.").

Courts "routinely deem restrictions on fundamental voting rights irreparable injury," *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014), and for good reason. Each election—whether primary or general, local or national—is important and necessary for the functioning of our democracy, and must be protected. It is threatening, intimidating, and coercive to call thousands of voters to tell them that voting in one election will strip them of their right to vote in another.

In November 2024, New Hampshire voters will elect not just the U.S. president, but their U.S. Representatives, Governor, and key state and local officials. The NH Robocalls warned these voters that to vote in this critically important election, they would have to "save" their vote. The implication was clear: voting in the primary would cost them their right to vote in the General Election. The political threat—the loss of the right to vote in an important election—is at least as

serious as the consequences threatened in the robocalls at issue in *Nat'l Coal. On Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, (S.D.N.Y. 2023) (*"Wohl II")*. *Wohl II*, 661 F. Supp. 3d at 113 (communications that "inspire[ed] fear of legal consequences, economic harm, dissemination of personal information, and surveillance" may qualify as unlawful threats or intimidation); *see also Daschle v. Thune,* Case No. 04-4177, Temporary Restraining Order (TRO), D.S.D. Nov. 2, 2004 (finding a violation of Section 11(b) where defendants followed Native American voters from polling places, and copied or recorded voters' license plate numbers). And, as in *Wohl II*, the threat at issue here violates the VRA.

Contrary to the Defendants' assertions, the NH Robocalls included a number of elements that would be persuasive to a reasonable person. *See Wohl II*, 661 F. Supp. at 123 (noting that the call "markedly lacked any outlandish details or other cues that may indicate to an ordinary listener that it should not be taken seriously."). The robocalls deepfaked President Biden's voice, used language associated with President Biden, emphasized the importance of the 2024 general election, and identified the sender as Kathy Sullivan, a respected figure in New Hampshire's Democratic Party and leader of an effort to support President Biden's write-in campaign. The Individual Plaintiffs immediately recognized President Biden's voice, explained they became suspicious due to their above-average knowledge of elections, and expressed concern that other voters would be deceived and therefore intimidated from voting. *See* ECF Nos. 71-18 ¶¶ 5-9; 71-19 ¶¶ 5-11; 71-20 ¶¶ 6-10. The President of the League of Women Voters New Hampshire Liz Tentarelli declared that the organization "must perform extra work to reassure voters that votes will be counted fairly, and voters do not lose their right to vote in the general election if they cast a vote in the primary election." *See* ECF No. 71-29 ¶ 11.

Defendants incorrectly suggest that because the Plaintiffs describe the call as deceptive, it cannot be threatening and intimidating. The call was both. It threatened and intimidated voters via deception. *See Wohl II*, 661 F. Supp. 3d at 121 ("Defendants' false utterances in the Robocall were made in order to intimidate or threaten voters who were exercising their right to vote."); *see id.* at 92, 119-21 (repeatedly identifying the robocalls as misleading or false). The fact the Defendants deceived voters about the consequence of voting in the presidential primary does not make the untruthful statement any less intimidating or threatening. *See id.* at 118 (true threats may be proscribed "even where the speaker has no intention of carrying them out" (quoting *United States v. Turner*, 720 F.3d 411, 420 (2d Cir. 2013)).[2] Here, Defendants also promote narrow, unsupportable interpretations of "threat" and "intimidation" that would, bizarrely, allow voters to be intimidated or threatened as long as the parties responsible for the intimidation were lying about the threatened consequences. The VRA must be given "the broadest possible scope." *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969). To suggest that a robocall must be accurate to be threatening would undermine the intent and purpose of the VRA.

b. Plaintiffs are likely to show that Defendants violated the VRA

Lingo was not an innocent bystander in the scheme to disseminate the deepfake robocalls. *See* Lingo Opp. at 12. It applied A-level STIR/SHAKEN attestations of the purported originating phone number—which in fact spoofed a respected Democratic Party operative's number—to over ten thousand robocalls based solely on the word of Life (based on a blanket check-the-box form from July of 2021) and did nothing to verify that Life was authorized to use the phone number in

[2] Defendant Lingo relies on inapposite cases to argue otherwise. *Ferrari v. Vitamin Shoppe Indus. LLC*, 70 F.4th 64, 73 (1st Cir. 2023). *Ferrari* is a case about whether the Federal Food, Drug, and Cosmetics Act has an efficacy requirement for health supplements. It has nothing to do with the VRA nor about the role that deception may play in a threat. In *Rudisill v. McDonough*, 144 S. Ct. 945, 955 (2024), the Court rejected a narrow, unsupportable interpretation of the word "coordination" in a law related to a veteran's benefits.

violation of "reasonable 'Know Your Customer' [] protocols". ECF No. 71-11, ¶¶ 1, 15. Lingo played a critical role in the scheme and "dressed the call with a veil of legitimacy to mislead its listeners into believing the statements made in the call were true." *Wohl II*, 661 F. Supp. 3d at 123.

Lingo's role is not, as Lingo argues, comparable to the role of a provider that transmits calls between two single individuals, and their violations were not merely technical.[3] "The STIR/SHAKEN framework . . . is a vital tool designed to give consumers more confidence that caller ID information is accurate," and emerged during "a proliferation in the misuse of spoofing technology by malicious actors." ECF No. 71-11 ¶¶ 2, 7. By blatantly disregarding the laws and regulations that guide providers' responsibilities to call recipients, Lingo enabled precisely the kind of malicious calls contemplated by these laws and regulations. *Id.* ¶ 23.[4]

Life and Voice similarly played a crucial role in the voter intimidation scheme. Voice allowed its client, Kramer, to select a spoofed number (and as the FCC investigation revealed, Voice also listened to and edited the message). Life (an alter ego of Voice) then provided to Lingo the spoofed number expecting that Lingo—however unlawfully—would provide the calls with a false "A-level" attestation. *Id.* ¶¶ 3, 11-15. Life, via Voice, and Lingo together transmitted thousands of deepfake robocalls, assigned A-level attestation, thereby playing a central role in reaching, deceiving, threatening, and intimidating thousands of voters in a matter of hours.

[3] The cases and laws cited by Lingo are inapposite. *O'Brien v. W. U. Tel. Co.*, 113 F.2d 539 (1st Cir. 1940) is an 84-year-old telegraph case. *Comcast Corp. v. National Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 335 (2020) does not involve robocalls, and relates to plaintiffs' burden of proof under a wholly different statute. 18 U.S.C. § 2511 is a wiretapping statute; 47 U.S.C. § 230 provides limited immunity for interactive computer services, which Lingo plainly is not. None of these sources suggest that Lingo is shielded from liability under the VRA.

[4] Lingo's attempts to add qualifications to Section 11(b) to evade liability are unavailing. Lingo does not support its argument that Section 11(b) is disinterested in "technical violations," or that it's actions—which played a core role in the scheme—were merely "technical." Similarly, Lingo's assertions that it is not a "first-party" actor in the scheme and that the VRA "contemplated first-party action" are unavailing. Lingo. Opp. at 12. It cites only to its own Motion to Dismiss, which in turn cites only *Walsh v. TelTech Sys., Inc.*, 821 F.3d 155 (1st Cir. 2016), which analyzed a Massachusetts consumer protection statute and did not involve robocalls—and notably identified a few legitimate uses of spoofing by *individuals* that are not applicable to spoofing by the senders of robocalls. *Id.* at 163.

Section 11(b) does not include an intent requirement, *see* 52 U.S.C. § 10307(b); *Wohl II*, 661 F. Supp. at 116 ("That no intent need be shown is evident not only in the statutory text but also in the VRA's legislative history."); *League of United Latin Am. Citizens—Richmond Region Council 4614 v. Pub. Int. Legal Found.*, No. 1:18-cv-423, 2018 WL 3848404 at *4 (E.D. Va. Aug. 13, 2018); *Daschle*, Case No. 04-4177, TRO ("Whether the intimidation was intended or simply the result of excessive zeal is not the issue . . . ."). Thus, it does not matter *why* Defendants participated in the scheme. What matters is they played a critical and purposeful role in it. They disseminated thousands of robocalls with false attestations, having failed to follow protocols in place to protect callers from precisely the type of unlawful scheme that targeted voters here, and in so doing violated the Voting Rights Act.

c. Plaintiffs are likely to show that Defendants violated state law

Plaintiffs have demonstrated that they are likely to succeed on the merits of their state election claims. Contrary to their claims, Defendants' liability does not rest on creating a prerecorded political message or completing calls to registered voters. *See* RSA 664:14-a, b. Instead, Defendants' involvement in "deliver[ing]" the message or "misrepresent[ing]" its origin triggers liability. *See id.*

To avoid that reality, Lingo unsuccessfully attempts to simplify its extensive involvement. But Lingo served a critical role in the scheme's implementation. As the originating provider for 13,235 NH Robocalls, Lingo used its authentication technology to misrepresent that it had the authority to use the caller ID of the personal cell phone number of a key figure in the New Hampshire election landscape just two days before the primary.

Lingo's assertion that it cannot be liable because it did not "know" the content or origin of the calls is of no import for two reasons. ***First***, Section 664:14-a plainly creates liability for either "deliver[ing] ***or*** knowingly caus[ing] to be delivered" a certain prerecorded political message.

RSA 664:14-a (emphasis added). No scienter modifies "deliver," and the legislature's use of the word "or" between "deliver or knowingly cause to be delivered" "indicate[s] an alternative between different . . . things." *See Boyle v. City of Portsmouth*, 154 N.H. 390 (2006). Thus, the statute does not explicitly impose a "knowing" standard, let alone an intent to violate the statute. By falsely authenticating Sullivan's caller ID alone, Lingo delivered the political robocalls.

Second, Lingo's pattern of conduct only reinforces its knowing violation of the state election laws. "[T]he requirement of knowing action requires proof of a voluntary act proceeding neither from mistake nor inadvertence." *Ives v. Manchester Subaru, Inc.*, 126 N.H. 796, 803 (1985). The FCC concluded that Lingo's active involvement in the NH Robocalls scheme was "willful[] and repeated[]" (ECF No. 71-11 ¶ 16). Other regulators have put Lingo on notice of its longstanding misconduct. *See* ECF Nos. 71-12 at 2 (documenting "high-volume illegal and/or suspicious robocalling campaigns" "since at or before January 2020"); 71-13 at 1 (documenting "illegal robocall traffic" over seventeen months). Lingo's actions here—combined with its multi-year track record—belie any suggestion of mistake or inadvertence. *See Ives*, 126 N.H. at 803.

For the same reasons, Lingo's conduct satisfies the requisite causality.[5] In New Hampshire, "[c]ausation focuses on the mechanical sequence of events." *Carignan v. N.H. Int'l Speedway*, 151 N.H. 409, 414 (2004). Lingo cannot seriously dispute its causal connection to the harm here. As the FCC makes fully apparent, Lingo played an essential role in effectuating the NH Robocalls scheme: Lingo's false authentication made it difficult for recipients of the spoofed robocalls to discern the political messages' artificiality, leading to Plaintiffs' injury. *See* ECF No. 71-11 ¶ 1.

Finally, Defendants reliance on non-binding dicta from *O'Brien v. N.H. Democratic Party*, 166 N.H. 138 (2014), also fails. *O'Brien* announced "three elements" of standing and determined

[5] As an initial matter, Lingo's reference to *Walsh v. Tel* is misplaced. Walsh interpreted an unfair competition statute under Massachusetts law. *See* 821 F.3d 155.

that a political candidate plaintiff failed to satisfy those elements. *Id.* at 143. The court's further discussion of a non-plaintiff voter's confusion was "nonessential" to the court's evaluation of the political candidate plaintiff's standing and thus "truly dicta." *See In re Est. of Norton*, 135 N.H. 62, 64 (1991). That discussion, therefore, "does not control" this case. *See Appeal of Town of Lincoln*, 172 N.H. 244, 253 (2019); *Arcam Pharm. Corp. v. Faria*, 513 F.3d 1, 3 (1st Cir. 2007);[6] *see also Lord v. Lovett*, 146 N.H. 232, 238 (2001) ((courts are "not required [] to give dicta the deference accorded by *stare decisis* to actual holdings") (quotations omitted)).

Rather than follow *O'Brien*'s dicta, this court should look directly to RSA 664:14-a and -b. Plaintiffs' injury is of the type that the New Hampshire legislature intended to prevent by promulgating that law. As its legislative history makes clear, RSA 664:14 was enacted to counter the precise nuisance present here: "offensive" messages that intruded on Plaintiffs' "rights to privacy" and rendered Plaintiffs "unable to determine who made the recording" or "who paid for the message[.]" *See* House Comm.e on Election Law, Public Hearing on HB 332 (N.H. Feb. 4, 2003) (Statement of Rep. Paul Spiess, Prime Sponsor of HB 332). By receiving—at Defendants' hands—spoofed, misappropriated robocalls on the eve of the primary election, all Plaintiffs suffered the very circumstances that the New Hampshire legislature sought to remedy.

d. Plaintiffs are likely to show that Defendants violated the TCPA

Defendants argue that they cannot be directly liable under the TCPA because they did not "initiate" the NH Robocalls, characterizing themselves as "middlemen," Voice/Life Opp. at 10, or "innocent bystander[s]," Lingo Opp. at 1, who are immune from liability absent a showing that they "control[led] the recipients, timing, or content" of the NH Robocalls. *See* Lingo Opp. at 22.

[6] Defendants' cherry-picked reference to *United Nurses & Allied Pros v. NLRB*, 975 F.3d 34, 40 (1st Cir. 2020) for the proposition that federal courts are "bound by" "considered dicta" is also misleading. To be sure, courts in the First Circuit are "bound by the ***Supreme Court's*** 'considered dicta.'" *Id.* (emphasis added). But that principle does not apply here. *O'Brien* is not a decision from the United States Supreme Court.

Defendants' arguments misstate the applicable test for TCPA liability, and misrepresent the critical role that they played in creating, falsifying, and distributing the NH Robocalls.

In 2015, the FCC released guidance clarifying the question of who "initiates" a call for the purpose of TCPA liability. *In the Matter of Rules and Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, FCC 15-72, 30 FCC Rcd. 7961 (July 10, 2015) (the "2015 FCC Order"). Per that guidance, entities—like the Defendants—that provide calling platform services may be held liable under the TCPA where they are "so involved in the placing of a specific telephone call as to be deemed to have initiated it." *Id.* at 7980 ¶ 30 (*quoting In re DISH Network*, LLC, 28 FCC Rcd. 6574, 6583 ¶¶ 26–27 (2013)). In making this determination, the adjudicator must "look to the totality of the facts and circumstances surrounding the placing of a particular call to determine . . . whether another person or entity was so involved in placing the call as to be deemed to have initiated it, considering the goals and purposes of the TCPA." *Id.* The FCC further specified that the "intent of Congress, when it established the TCPA in 1991, was to protect consumers from the nuisance, invasion of privacy, cost, and inconvenience that autodialed and prerecorded calls generate." *Id.* at 7979-80 ¶ 29 (footnotes omitted).

The 2015 FCC Order identified factors to consider when assessing a defendant's TCPA liability, including: (1) the extent to which the defendant controls the call's message; (2) the extent to which the defendant "willfully enables fraudulent spoofing of telephone numbers," and (3) whether the defendant "who offers a calling platform service for the use of others has knowingly allowed its client to use that platform for unlawful purposes." *Id.* at 7980-84 ¶¶ 30-37. The FCC's list of factors are not exclusive. *See id.* ¶ 30; *Cunningham v. Montes*, 378 F.Supp.3d 741, 748 (W.D. Wis. 2019). Courts have also considered other factors when making a TCPA liability assessment, including whether a defendant (1) "actively helped . . . bypass spam filters," *Bauman*

v. Saxe, No. 2:14-CV-01125-RFB-PAL, 2019 WL 591439, at *3 (D. Nev. Feb. 13, 2019), (2) "had a right to control the conduct, but nevertheless, permitted the robocalls to be broadcast through their assigned telephone numbers," *Hurley v. Messer*, No. CV 3:16-9949, 2018 WL 4854082, at *4 (S.D.W. Va. Oct. 4, 2018), or (3) "profited from" the robocalls, *Mey v. All Access Telecom, Inc.*, No. 5:19-CV-00237-JPB, 2021 WL 8892199, at *3 (N.D.W. Va. Apr. 23, 2021).

Lingo asks the Court to disregard the 2015 FCC Order and adopt a "plain meaning" definition of "initiate," Lingo Opp. at 22, or to require a showing that call intermediaries must "control the recipients, timing, or content" of a call to be held liable under the TCPA. *Id.* at 23. These arguments have been considered and rejected before. *See Spiegel v. EngageTel Inc.*, 372 F. Supp. 3d 672, 682 (N.D. Ill. 2019) (refusing to entertain argument that FCC's definition of "initiate" conflicts with TCPA's "plain language" and rejecting defendant's effort to interpret 2015 FCC Order as creating a "bright line" multifactor test). Defendants cite no case in which a court has accepted an invitation to disregard the FCC's views on what constitutes a violation of the TCPA. This court should not be the first.

Applying the test utilized by the FCC and the courts, Defendants were sufficiently involved in the making of the NH Robocalls to be deemed to have initiated them. Multiple factors identified by both the FCC and courts weigh in favor of TCPA liability, including:

- Voice offered its client the functionality to spoof robocalls (ECF No. 71-3 ¶ 11);
- Voice had the opportunity to review the content of the robocall—which featured a deepfake voice of the President of the United States telling voters not to exercise their fundamental right to vote—and nevertheless facilitated the distribution of the calls (*id.*);
- Voice edited a portion of the calls' content, adding a fraudulent callback number matching the spoofed number that appeared on recipients' caller ID displays (*id.*);
- Life falsely conveyed to Lingo that it had the legal authorization to use the spoofed phone number that appeared on recipients' caller ID displays (*id.* ¶¶ 11, 14-16); *see also* ECF No. 71-11, at 20 ("[N]o one disputes that Life. had no right to use that caller ID")).

- Lingo has an extensive and well-documented history of knowingly allowing its clients to use Lingo's platform for unlawful purposes, but failed to implement the necessary steps to prevent bad actors from abusing its services (*see, e.g.*, ECF No. 71-12, at 1 (letter from Multistate Litigation Task Force demanding that Lingo "take steps to prevent its network from continuing to be a source of apparently illegal robocalls"); ECF No. 71-13, at 2 (letter from Federal Trade Commission demanding that Lingo cease and desist from "routing and transmitting illegal robocall traffic knowingly"); *see also* ECF No. 71-11, at ¶ 23 (describing Lingo's "glaringly deficient KYC practices")).

- Lingo controlled whether the robocalls were transmitted (*see* ECF No. 71-11, at ¶ 23 ("Had Lingo implemented KYC principles—in compliance with its obligations—it would have likely discovered the hoax and prevented the consequences[.]"));

- Lingo willfully enabled the fraudulent spoofing of the NH Robocalls by providing the calls A-level attestations, thereby helping the robocalls avoid detection and blocking by downstream internet providers (*see* ECF No. 71-11, at ¶ 16 (detailing Lingo's "willfull[] and "repeated[]" violations of STIR/SHAKEN rules)); and

- Voice, Lingo, and Life profit from the dissemination of robocalls (*see, e.g.*, ECF No. 71-10, at 25-26 (quoting Voice and Life's owner as stating that his firm generated $8 million in 2022 via "mass communication[]" calling campaigns); ECF No. 71-14, at 5, 8 (detailing $20,000 settlement with Lingo in connection with task force targeting telecommunications companies "who profit[] by accepting scam calls into the U.S. telecommunications system and passing them on to unsuspecting consumers").

The Defendants should similarly be held liable considering the goals and purposes of the TCPA. Each of the Defendants appears to take the position that they have little to no responsibility to conduct due diligence or exercise oversight to prevent the abuse of their platforms. But providers of calling platform services "cannot blithely sit back and blame [their] customers for any TCPA violations that result from [the] use of [their] service." *See Cunningham v. Montes*, 378 F.Supp.3d 741, 748 (W.D. Wis. 2019). As evidenced by the Multistate Litigation Task Force's letters to Lingo, Pls.' Mot. for Prelim. Inj., ECF No. 71-12, at 2, Life Corp, and Walter Monk (the owner of Voice), ECF No. 47-10, at 3, the Defendants have an obligation to comply with the TCPA and play a critical role in achieving its objectives, i.e., protecting individuals from the nuisance, invasion of privacy, cost, and inconvenience associated with robocalls. Defendants have utterly failed in this regard.

Defendants' argument that they are entitled to immunity under the TCPA because the NH Robocalls qualified as "political" under FCC regulations, *see* Voice/Life PI Opp. at 11-12, fares no better. It is unclear on what basis Voice and Life assert that these calls were "political." Perhaps it is because the robocalls contained an AI-generated voice of a politician—as opposed to an unelected official—without that politician's consent. Or perhaps it is because the robocall falsely threatened recipients that they would lose their voting rights if they participated in an upcoming election. Either way, it strains credulity to suggest that the FCC intended to create an exception to TCPA liability for purveyors of unauthorized deepfakes or threats so long as the initiator of the robocall can claim a nexus to politics.[7]

III. PLAINTIFFS HAVE ESTABLISHED IRREPARABLE HARM ABSENT AN INJUNCTION

The irreparable harm threatened here is the fundamental right to vote. *See League of Women Voters of N.C.*, 769 F.3d at 247 ("[c]ourts routinely deem restrictions on fundamental voting rights irreparable injury."). The Individual Plaintiffs have already been harmed by being subjected to the Defendants' attempted threats, intimidation, and coercion, and there is a strong likelihood that it will happen again if the Defendants are not permanently enjoined from deploying AI-generated robocalls.

Notably, the Defendants were able to reach thousands of voters in the course of just a few hours on a single day. The damage was done quickly, and within just two days of the New Hampshire Primary. The nature of illegal robocall schemes enables Defendants to intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce thousands of individuals within a

[7] Voice and Life also argue that the NH Robocalls contained an adequate opt-out mechanism, pointing to language suggesting that call recipients could "press two" to be removed from future calls. *See* Voice/Life Opp. at 11-12. Voice and Life neglect to mention that immediately after that sentence, the NH Robocalls provided a knowingly false opt-out number, ECF No. 71-11 ¶¶ 9-10, which at least one call recipient attempted to use, *see* Decl. of Kathleen Sullivan, ECF No. 71-17 ¶ 11.

short period of time, using a single recording. If voters are intimidated, threatened, or coerced, or otherwise prevented from voting in any remaining elections, there will be no way to undo or remedy these damages; their vote in that election is permanently lost. The future irreparable harm here is the long-term health of American democracy.

Further, the League cannot recover the time and resources they have already spent—and will continue to spend—to combat the harm caused by the Defendants. In the months leading up to the General Election, the League is forced to budget and allocate its limited resources to guard against the substantial threat posed by the Defendants. While the League typically spends the months leading up to the General Election focused on registering eligible voters, the League must now divert its resources to ensuring that Americans who have already registered to vote don't lose that right due to the Defendants' conduct. ECF Nos. 71-29 ¶¶ 11-14, 71-30 ¶¶ 11-14.

Finally, the Defendants are mistaken in asserting that the harm caused to the Plaintiffs cannot be traced to their actions. As extensively detailed above, the NH Robocalls would not have been able to threaten, intimidate, or coerce voters without Defendants' collective conduct.[8]

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST WEIGH IN PLAINTIFFS' FAVOR

The balance of equities is decisively in Plaintiffs' favor; Plaintiffs have an overwhelmingly strong interest in protecting the unimpaired right to vote free of intimidation, threats, or coercion. Defendants Lingo, Life, and Voice have each failed to demonstrate that any burden placed upon

[8] Defendants argue that the Plaintiffs caused a delay that detracts from the claim of irreparable harm. Any delay in Plaintiffs' initial filing was to ensure service was properly effectuated on Defendants, including Defendant Kramer, who was purportedly working in Europe from March 29 to May 13, 2024. *See* Pls.' Mot. for Alt. Serv., ECF No. 46-7, at 3. In any event, the "delay" raised by the Defendants does not undermine the need for injunctive relief. Furthermore, any delay caused by Plaintiffs' request to amend its original motion was reasonable and necessary in light of newly discovered information that is important to Plaintiffs' claims. *See e.g.*, *Wohl I*, 498 F. Supp. 3d at 474 (holding that a "two-month delay [does] not make [an] interim injunctive order inappropriate") (quoting *Mattina ex rel. Nat'l Labor Rel.'s Bd. v. Kingsbridge Heights Rehab. & Care Ctr.*, 329 F. App'x 319, 323 (2d Cir. 2009)).

them by the injunctive relief would outweigh both the public and the Plaintiffs' interest in protecting voters from harassment, intimidation, coercion, or fear.

First and foremost, the Supreme Court has unequivocally found that the right to vote is fundamental. *See Reynolds*, 377 U.S. at 555. There is no right "more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 12 (1964). The public has a strong interest in free and fair elections. Moreover, the parties have a compelling interest in maintaining the integrity of the voting place and preventing voter intimidation and confusion. *Burson v. Freeman*, 504 U.S. 191 (1992).

Defendants' responses make clear that they have no intention of implementing basic compliance protocols to prevent their systems from being abused by customers despite the role they each played in delivering thousands of unlawful robocalls to New Hampshire voters on the eve of an election. A ruling in favor of the Defendants would set a troubling precedent that companies such as Defendants will not held accountable for failing to prevent illegal activities such as AI-generated robocalls and tampering with the democratic process. Holding Defendants accountable for their actions is crucial for maintaining industry standards, enforcing laws designed to protect the public, and upholding the integrity of elections.

Additionally, entering an injunction against Defendants would not be inequitable because the relief sought does not put them in a "Hobson's choice," as asserted by Lingo. Lingo Opp. at 9, 28. The relief sought by the Plaintiffs involves specific measures to prevent unlawful robocalls and does not inherently conflict with the Defendants' ability to comply with federal laws such as the Wiretap Act and the Communications Act. The Wiretap Act contains an exemption for interceptions by an employee of a phone company who "intercept[s], disclose[s], or use[s] that

communication in the normal course of his employment while engaged in any activity which is a necessary incident . . . to the protection of the rights or property of the provider of that service." 18 U.S.C. § 2511(2)(a)(i); *see also id.* § 2510(5)(a)(ii). Plaintiffs seek an injunction to compel the Defendants to implement basic compliance measures aimed at preventing future unlawful robocalls. This includes enforcing protocols to ensure that their systems are not abused for illegal purposes, such as the mass distribution of robocalls in violation of legal standards. Compliance measures could include monitoring call patterns, implementing filtering technologies, or adopting stricter verification processes, none of which would breach federal interception laws. Additionally, the injunction aims to ensure compliance with the Communications Act, which regulates interstate and foreign communications by radio, television, wire, satellite, and cable and includes provisions to prevent abusive practices like unauthorized robocalls. By requiring the Defendants to adopt measures to prevent illegal robocalls, the injunction helps enforce the Communications Act's regulations rather than undermine them.

Furthermore, Defendants will suffer no harm if an injunction is granted against them, because no party has a legitimate interest in making future unauthorized, deepfake robocalls. Life and Voice assert that the injunction Plaintiffs seek, which would require defendants to monitor call content for possible use of AI generated recordings "would be incredibly burdensome and completely [] shift the business model of Voice." Voice/Life Opp. at 16. Defendants also assert that there is no known technical method for them to review calls for use of AI technology. *Id.* This is patently false. For example, Pindrop Security is a company that specializes in the detection of voice clones and audio deepfakes used in phone calls in real time.[9] Plaintiff's injunctive relief would not place an additional burden on Defendants, it would merely require them to comply with

[9]Fed. Trade Comm'n (Apr. 8, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-winners-voice-cloning-challenge.

federal and state statutes and regulations. The use of AI-generated voices in robocalls is illegal,[10] and a defendant cannot suffer harm from an injunction that merely ends an unlawful practice. *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73, 84-85 (D.D.C. 2020).

Both Life and Lingo assert that Plaintiffs seek an invalid remedy, but the requested relief is clear: Plaintiffs seek to enjoin Lingo from distributing AI-generated robocalls without the person's express, prior written consent; distributing spoofed telephone calls, text messages, or any other form of spoofed communication; and 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. As required by Local Rule 65.1 and Federal Rule of Civil Procedure 65(d)(1)(C), the requested relief is described in reasonable detail. Lingo can and must put measures in place to ensure its internal controls are not deficient to prevent an illegal robocall scheme such as the NH Robocalls from occurring again.

Finally, an injunction against Defendants is justified. The injunctive demands are consistent with federal laws and regulations and do not create conflicting legal obligations, nor do they place an undue burden on the Defendants. As such, the relief sought is equitable and necessary for achieving legal compliance and protecting the public's unwavering interest in the protection of the right to vote. Without Defendants' active participation in the NH Robocalls scheme, voters would not have received injurious phone calls. Therefore, Defendants' illegal conduct is a direct impediment on the right to vote, the equities favor Plaintiffs, and the public interest would clearly be advanced by the preliminary injunction sought against Defendants.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for a preliminary injunction should be granted.

[10] FCC, *FCC Makes AI-Generated Voices in Robocalls Illegal*, https://www.fcc.gov/document/fcc-makes-ai-generated-voices-robocalls-illegal

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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