No. 16-1198

IN THE

Supreme Court of the United States

PATRIOTIC VETERANS, INC.,

Petitioner,

v.

CURTIS HILL, ATTORNEY GENERAL OF INDIANA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF *AMICI CURIAE* FREE SPEECH COALITION, FREE SPEECH DEFENSE AND EDUCATION FUND, CONSERVATIVE LEADERSHIP PAC, GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, AMERICAN TARGET ADVERTISING, INC., 60 PLUS, 60 PLUS FOUNDATION, EBERLE ASSOCIATES, PERSONHOOD ALLIANCE, INC. AND PERSONHOOD MISSISSIPPI IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Free Speech Coalition, Free Speech Defense and Education Fund, Gun Owners of America, Inc., Gun Owners Foundation, 60 Plus, 60 Plus Foundation, Personhood, Inc. and Personhood Mississippi are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. American Target Advertising, Inc. and Eberle Associates are for-profit firms that assist non-profit organizations in their programs and fundraising. Conservative Leadership PAC is a political action committee formed in 1990 by Morton C. Blackwell. Some of these *amici curiae* have used automated calls in the past; all desire to protect fundamental First Amendment rights and the right of all entities to freely engage in automated calls for both political and non-political purposes.

Many *amici curiae* have filed *amicus curiae* briefs on similar issues, and all are dedicated to the correct construction, interpretation, and application of the law. Their interests also include protecting the constitutional rights of their donors.

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[1] Counsel for a party did not author this brief in whole or in part, and no such counsel or party made a monetary contribution to fund its preparation or submission. No person or entity other than *amici curiae* or their counsel made a monetary contribution to the preparation and submission of this brief. All parties have timely consented to the filing of this brief, and were provided timely notice of our intent to file.

Given the strong interest of your *amici curiae* in the issues presented and their active participation in efforts to protect their members, preserve our fundamental rights, and inform and persuade voters on issues of public concern, *amici curiae* suggest that this brief may be helpful to the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Indiana's Automatic Dialing Machine Statute ("ADMS")[2] criminalizes automated calls unless the recipient has consented or the "message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered." App. 26a. The statute does carve out three exceptions, however:

(1) Messages from school districts to students, parents, or employees;

(2) Messages to subscribers with whom the caller has a current business or personal relationship; and

(3) Messages advising employees of work schedules. App. 26a.

[2] Ind. Code § 24-5-14-5 (App. 26a).

Petitioner, Patriotic Veterans, Inc., is a not-for-profit grassroots advocacy group that places automated calls on issues of public concern. It brings an as-applied constitutional challenge against the statute.

Indiana's ban on unconsented to automated calls by grassroots advocacy groups such as Petitioner constitutes an abridgement of the freedom of the press. That abridgement strikes at the core of the nation's need for political discussion and action at the grassroots level.

Too often the people receive news and commentary only from broadcast media conglomerates and special interest fat cats. Grassroots advocacy groups are underfunded and underrepresented in the debate on issues of great concern. The Free Press Clause was intended to facilitate dissemination and amplification of a diversity of voices; Indiana's ADMS stifles those voices and unduly constrains a vital source of independent views and analysis so essential to our republic's well-being.

Automated calls on matters of political concern should be protected under the Free Press Clause because, like the printing presses of old, they are an important means of disseminating a diversity of voices from those of modest means.

In addition, Indiana's law erects a harsh barrier to the circulation and distribution of pure political speech while allowing an exception for commercial speech. Such a barrier is inconsistent with the

spirit of freedom of speech. The Fourth Circuit respected that spirit and struck down a similar law; the Seventh Circuit did not.

This Court should accept certiorari, resolve the conflict between the circuits, and reaffirm the vitality of the freedom of the press on this important issue.

REASONS FOR GRANTING THE PETITION

I. AUTOMATED CALLS ADVOCATING POLITICAL ACTION SHOULD BE EXTENDED PROTECTION UNDER THE FREE PRESS CLAUSE.

Freedom of speech and the press are essential to the maintenance of our republic. For most of our nation's history, we have been united in defending these freedoms, and the courts have steadily expanded their reach. Not so today.

We live in what some have called a "post-constitutional" society.[3] University campuses, once a bastion of anything-goes free speech free-for-alls, are now steadily closing themselves off to speakers with whom they disagree. Anti-harassment codes are on the rise, hate speech is the new public enemy number one, and Americans are more willing than ever before to dispense with the

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[3] Peter Van Buren, "What We've Lost Since 9/11: Taking Down the First Amendment in the Post-Constitutional US," www.truth-out.org (June 16, 2014).

guarantees of the First Amendment. *See, e.g.*, David Harsanyi, "The First Amendment is Dying," www.thefederalist.com (Nov. 11, 2015) (citing studies showing that some forty percent of those surveyed believe the First Amendment "goes too far").

This case presents a rare opportunity to reaffirm the value of free speech and a free press in the context of core political speech. Petitioner emphasized particularly the harm to free speech in its petition; this brief will concentrate on the abridgement of the freedom of the press.

A. The Freedom of the Press[4] was Intended Primarily to Foster Public Debate on the Issues of the Day for the Benefit of the People.

"The First Amendment . . . rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, [and] that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

The need for a broad range of ideas from a broad range of viewpoints was deemed essential to the survival of the republic: We share "a profound

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[4] The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ." U.S. CONST. amend. I.

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966) (White, J., concurring).

The "basic concern that underlies the Constitution's protection of a free press" is "the broad societal interest in a full and free flow of information to the public." *Branzburg v. Hayes*, 408 U.S. 665, 726-27 (1972) (Stewart, J., dissenting).

> [T]he guarantee is "not for the benefit of the press so much as for the benefit of all of us." *Time, Inc. v. Hill*, 385 U.S. 374, 389 [(1967)]. Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society.

Id.

In the early days of our republic, the most efficient means of achieving a broad dissemination of views was via the printing press. But it is generally agreed that the clause was not intended to protect the press as an *industry*; rather, it was

intended to protect the press as a *means* whereby all citizens might avail themselves of a conduit by which they might reach a wider audience. *E.g., Citizens United v. FEC*, 558 U.S. 310, 352 (2010) ("'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.'") (quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting) (*citing First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978)).

As Professor Eugene Volokh wrote, "the dominant understanding of the 'freedom of the press' has followed the press-as-technology model" [instead of the "press-as-industry" model] and "[t]his was likely the original meaning of the First Amendment." Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L.Rev. 459, 538 (2012).

Justice Joseph Story shared this view. In his influential *Commentaries on the Constitution*, he wrote: "the language of this amendment imports no more, than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person . . . or attempt to subvert the government." 3 J. Story,

Commentaries on the Constitution of the United States, §1874 (Boston, Hilliard, Gray, & Co. 1833).[5]

B. Automated Calls on Issues of Public Concern Should be protected by the Free Press Clause.

This Court has greatly expanded the reach of the free press clause in recent years, often recognizing new technologies fulfilling the role of the printing presses and so coming within the ambit of the Free Press Clause. For example, although in 1915 the Court rejected the claim that motion pictures are deserving of protection under the free press clause, *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915)[6], in 1952, this Court reversed itself and held that motion pictures were indeed entited to protection under the First Amendment through both the free

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[5] This same understanding was shared at the time of the adoption of the Fourteenth Amendment. *See, e.g.,* Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 455 (Boston, Little, Brown & Co. 1868).

[6] The Court affirmed the decision of the Northern District court of Ohio holding that motion pictures were *not* entitled to the protection of the First Amendment free speech or free press clauses (although on appeal petitioners asserted only the Ohio Constitution's parallel provisions, not the First Amendment's provisions). The *Mutual Film Corp.* Court reasoned that motion pictures were mere "spectacles" operated for profit, and though entertaining, "capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition." *Id.* at 244.

speech and the free press clauses. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

The *Burstyn* Court reasoned that motion pictures were "a significant medium for the communication of ideas" and they might affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression." *Id.* at 501.

Thereafter, the First Amendment's protective umbrella was expanded to cover not just speech, but expressive conduct, theatre, sexually explicit material, flag burning, and much more.

Today, even the production of violent video games is deemed protected by the free press clause. *See Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786 (2011).

> Like the protected books, plays, and movies that preceded them, video games communicate ideas--and even social messages--through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection.

Id. at 790.

The Court in *Brown* noted that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears." *Id.* at 790 (quoting *Joseph Burstyn, Inc.*, *supra*, 343 U.S. 495, 503).

Here, Petitioner's automated calls present a "new and different medium for communication." As the Petition makes clear, Petitioner's robocalls do precisely what the printing press did in the early days of the nation: they facilitate the mass dissemination of information on matters of public concern at a low cost. *See* Pet. for Cert. at 31-32. In fact, these automated calls embody the essence of what the Free Press Clause was intended to protect.

In this sense, Petitioner's automated calls are analogous to the door-to-door canvassers in *Martin v. Struthers*[7] or *Watchtower Bible and Tract Soc. v. Town of Stratton*.[8] As Petitioner explained, instead of a door knock there is the ring of a phone. Pet. for Cert. at 13, 31. In fact, it may be argued that automated calls are *less* intrusive than the door-to-door canvassers, because one may answer a phone call without the need to make oneself presentable

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[7] 319 U.S. 141 (1943).
[8] 536 U.S. 150 (2002).

or even get out of one's chair, assuming the phone is within reach.

If motion pictures of dubious quality and violent video games are afforded free speech and free press protection, how much more should automated political calls be afforded protection. These calls are neither "spectacles" nor intended for mere entertainment; they are not produced for personal profit but for the good of the community, to inform and persuade on matters of great public concern. They further the purposes of the freedom of the press as envisioned and intended by the Framers, and therefore should be extended like protection.

This Court should grant certiorari to clarify the reach and protection afforded by the Free Press Clause to automated calls advocating political action in the face of broad prophylactic measures like Indiana's ADMS.

II. THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE PROPER LEVEL OF SCRUTINY TO LEGISLATIVE BARRIERS TO POLITICAL SPEECH.

Political speech "is central to the meaning and purpose of the First Amendment." *Citizens United supra*, 558 U.S. 310, 329 (*citing Morse v. Frederick*, 551 U.S. 393, 403 (2007)). "The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Eu v. San Francisco Cty. Democratic Cent.*

Comm., 489 U.S. 214, 223 (1989) (internal quotation marks omitted).

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). Consequently, "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United*, *supra*, 558 U.S. at 339.

Petitioner's speech is core political speech. It is intended to equip voters to make informed choices among candidates and on issues of public importance. Pet. for Cert. at 3. Petitioner's speech is also geared toward assisting citizens in petitioning the government for a redress of their grievances. *Id.* at 4.

Indiana's ADMS imposes a prior restraint on Petitioner's speech. It thus strikes at the core of the freedom of the press. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("it has been generally, if not universally, considered that it is the chief purpose of the guaranty [of freedom of the press] to prevent previous restraints upon publication").

After all, the First Amendment protects not merely the publication of information, but its distribution as well. "'Liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the

publication would be of little value.'" *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (quoting *Ex Parte Jackson*, 96 U.S. 727, 733 (1878)).

The Seventh Circuit, applying intermediate scrutiny, found that the ADMS was a reasonable time, place and manner regulation in part because it served the State's interest in protecting against annoying calls. Pet. for Cert., App. 5a-6a. Petitioner, however, adduced evidence that as many as 80 percent of its automated calls are "delivered in full to their intended recipients." Pet. for Cert. at 4. This evidence suggests that a significant number of recipients might *want* to hear what Petitioner has to say and do not consider the calls annoying. A blanket ban is at best a clumsy tool, especially in the context of political speech.

Moreover, Indiana's ban on automated political calls contains an exception for commercial calls, where the caller has a "current business or personal relationship" with the recipient.[9] App. 26a. But as pointed out by the court in *Cahaly v. Larosa*, 796 F.3d 399 (4th Cir. 2015), a U.S. House of Representatives committee concluded that complaint statistics showed that "'unwanted *commercial* calls are a far bigger problem than unsolicited calls from *political* or charitable organizations.'" *Id.* at 406 (quoting H.R. Rep. 102-

[9] The use of automated calls with those with whom one who has a current *personal* relationship will undoubtedly be few indeed. The parties most likely to take advantage of this exception are commercial entities and debt collectors.

317, at 16 (1991)) (emphasis added). This finding raises serious questions concerning whether Indiana's ADMS is narrowly tailored to serve the interest asserted, given that it bans political calls but allows commercial calls.

James Madison, "the leading spirit in the preparation of the First Amendment,"[10] wrote that based on the observation of the positive effects of the freedom of the press in the States before the Founding, and recognizing that "[s]ome degree of abuse is inseparable from the proper use of everything," including the press, still "it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits." Report on the Virginia Resolutions, House of Delegates, Session of 1799-1800, in 4 Madison's Works, 544 (quoted in *Near v. Minnesota*, 283 U.S. at 718).

Madison's theme was perhaps best encapsulated in Justice Louis Brandeis' famous concurring opinion in *Whitney v. California*, 274 U.S. 357, 377 (1927): "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."

The Seventh Circuit has opted for enforced silence rather than more speech, and has employed a relaxed level of scrutiny. The *Cahaly* court, by

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[10] *Near v. Minnesota, supra*, 283 U.S. 697, 717.

contrast, in a very similar case recognized the content-based nature of South Carolina's anti-robocall statute and applied strict scrutiny, which predictably resulted in that statute being stricken. 796 F.3d at 405-06.

This Court should grant certiorari in order to resolve the conflict between the circuits and curtail the growing threat to political speech.

CONCLUSION

For all of the foregoing reasons, this Court should find grant the petition.

Respectfully submitted,

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