No. 16-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Patriotic Veterans, Inc. is a non-profit advocacy group that disseminates recorded messages through automated telephone dialing machines. These calls address matters of public concern, including positions taken by candidates and officeholders. Automation provides prompt, effective, and consistent delivery of Patriotic Veterans' message. Indiana criminalizes this speech because some might find automated calls annoying. Yet the statute exempts many such calls by commercial speakers.

The Seventh Circuit upheld this speech-restrictive statute. It is the first circuit to approve a limitation on automated calls since this Court changed the framework for content-based discrimination in *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2227 (2015). In doing so, the Seventh Circuit contradicted at least two of this Court's decisions and created a circuit split with the Fourth Circuit, which relied upon *Reed* to strike down a similar restriction on automated calls.

1. Whether Indiana's statute creates a content-based restriction that cannot survive strict scrutiny under *Reed*?

2. Whether the statute is a valid time, place, and manner restriction?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Petitioner is a non-governmental, non-profit entity with no parent corporation.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Patriotic Veterans, Inc. seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

On January 3, 2017 the United States Court of Appeals for the Seventh Circuit issued an opinion and judgment reported at 845 F.3d 303 (7th Cir. 2017) and reproduced in the appendix to this Petition ("App.") at 1a. The judgment of the United States District Court for the Southern District of Indiana, entered on April 7, 2016, is reported at 177 F. Supp. 3d 1120 (S.D. Ind. 2016) and is reproduced at App. 8a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 based on Patriotic Veterans' claims under 42 U.S.C. § 1983. The Seventh Circuit had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision at issue (Ind. Code § 24-5-14-5) is reproduced in the Appendix at App. 24a.

INTRODUCTION

Patriotic Veterans places automated calls around the country. These calls convey messages on public policy issues that matter to veterans and other voters. Those same calls are criminal in Indiana. Although the automated calls contain core political speech, Indiana's Automatic Dialing Machine Statute ("ADMS") precludes Patriotic

Veterans from placing them even to those who wish to receive them. Violating the ADMS's prohibition on political speech is a Class C misdemeanor punishable by 60 days in prison and a fine for each call. *See* Ind. Code § 24-5-14-10; Ind. Code § 35-50-3-4.

The Seventh Circuit upheld this criminal penalty for political speech. That decision violates the First Amendment and requires this Court's intervention in at least four respects.

First, the Seventh Circuit's opinion conflicts with its sister circuit decision in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015), which invalidated a South Carolina statute that also prohibited political speech through automated calls while allowing other forms of automated communication.

Second, the Seventh Circuit carved into the content-discrimination analysis established by *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015). It did this by upholding a statute that treats political speech as criminal while authorizing speech on commercial matters and other favored topics. The Seventh Circuit presumed these categories of speakers received implicit "consent" to receive automated calls, a legal construct that undermines the sea change in First Amendment protection that *Reed* represents. It conflicts with this Court's instruction in *Reed* that lower courts should not imbue a statute with a "content-neutral justification" when the statute itself makes content-based distinctions.

Third, the Seventh Circuit failed to apply strict scrutiny to Indiana's decision to shut the door on a widely used method of political speech. Automated calls are a catalyst for participation in the modern democratic process. They are one of the most effective, efficient means for grassroots advocacy groups to spread messages and encourage citizens to redress their grievances to elected officials. Although well-funded organizations may resort to traditional media, smaller, grassroots groups need to reach their audience in a timely and cost-effective manner through automated calls. The Seventh Circuit opinion – if upheld and extended to other jurisdictions – would quash this fluid form of communication. The statute has this result despite the fact that automated calls are at times the only practical way for those engaged in the political process to address their constituents and allow groups like Patriotic Veterans to generate grassroots contacts between constituents and their elected representatives.

Fourth, the Seventh Circuit overlooked the direct conflict between the Indiana statutory scheme and this Court's precedents in *Martin v. Struthers*, 319 U.S. 141 (1943) and *Watchtower v. Stratton*, 536 U.S. 150 (2002).

STATEMENT OF THE CASE

Patriotic Veterans is a not-for-profit Illinois corporation and a grassroots advocacy group. Its purpose is to inform and educate the public on a variety of public policy issues. It advocates positions on important topics, supports and opposes pending legislation at the federal and state level,

and encourages grassroots lobbying by veterans and others.

The Chairman of Patriotic Veterans is James Nalepa, a 1978 graduate of the United States Military Academy. He is a combat veteran who served in various leadership capacities in the U.S. Army. Retired Col. Chuck Thomann is one of the founders of Patriotic Veterans. He is a combat veteran of three major wars, and has been a spokesman for Patriotic Veterans' issue advocacy calls.

Patriotic Veterans uses automatically dialed phone calls to deliver messages on a variety of topics of public interest. These calls encourage veterans and others to address their grievances to government officials and facilitate contact between voters and their representatives.

Patriotic Veterans often needs to send messages in a short period of time, such as before a significant vote in Congress or a state legislature. In those instances, only automated calls can reach an audience with the needed speed, breadth, and efficiency. No other mode of speech meets these requirements. Calls by live operators cannot be made fast enough or in great enough numbers for messages to be timely and completely delivered. The cost of live operators is about eight times higher than automated calls. Radio and television ads are prohibitively expensive and are often sold out by the end of an election cycle.

Patriotic Veterans' calls provide short voice recordings from a spokesperson such as retired Col. Thomann or singer Pat Boone. These calls are delivered to a predetermined list during a predetermined time period. In Patriotic Veterans' experience, recipients will listen to an entire call between 20 to 30 percent of the time. Another 35 to 50 percent of calls are left in their entirety on voicemail or answering machines. Somewhere between 55 to 80 percent of all automated calls are delivered in full to their intended recipients.

Patriotic Veterans' issue advocacy calls are often "live transfer" calls in which recipients can ask to directly connected to the office of a public official to express views on an important public issue. This allows ordinary citizens the ability to communicate with and influence public officials in ways otherwise available only to advocacy groups with deeper resources.

Patriotic Veterans is sensitive to privacy concerns. It gives call recipients information as to how they may remove themselves from its calling list. Patriotic Veterans does not make calls to cellphones. It complies with federal and state regulations regarding the time in which calls may be made. It does not use calls to engage in fundraising.

It also is able to delete recipients on the Indiana "do not call" list from its own lists, which protects those who do not want to receive calls.

Despite the value Patriotic Veterans finds in placing automated political calls in other states, it cannot do so in Indiana because of the ADMS. Indiana enacted the ADMS in 1988. The ADMS provides that a caller may not place automated calls unless a recipient has consented or the "message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered." Ind. Code § 24-5-14-5.

The ADMS criminalizes non-compliant calls. Violations are a Class C misdemeanor punishable by 60 days confinement and a fine of $500. Ind. Code § 24-5-14-10.

The ADMS provides three exceptions that allow automated calls from certain speakers to certain listeners:

(1) "To subscribers with whom the caller has a current business or personal relationship";

(2) "From school districts to students, parents, or employees"; and

(3) "When employers employees of work schedules."

Id.

Prior to 2006, Indiana's Attorney General did not enforce the ADMS as to political calls. The ADMS was "widely ignored" during political campaigns. Indiana changed course after conceding (in a separate lawsuit not involving Patriotic

Veterans) that the state's do-not-call list does not apply to political calls. After making that concession, Indiana's Attorney General announced for the first time that he would enforce the ADMS as to political speech and issue advocacy.

If Indiana's law did not exist, Patriotic Veterans would place automated phone calls related to its mission to Indiana veterans and voters. It has not done so because of Indiana's restriction on automated political phone calls.

In 2010, Patriotic Veterans filed this as-applied challenge to the ADMS in the Southern District of Indiana seeking: (1) a declaration that the ADMS is invalid as applied to Patriotic Veterans; and (2) a permanent injunction against the ADMS's enforcement against Patriotic Veterans.

Patriotic Veterans asserted two grounds for the ADMS' invalidation. First, it alleged that the ADMS was preempted by federal laws and agency rules that regulated the same subject matter. Second, it alleged that the ADMS, as applied to interstate calls on political or campaign issues, violated the First Amendment of the Constitution by suppressing Patriotic Veterans' speech.

Patriotic Veterans and the State filed cross-motions for summary judgment in 2010. On September 27, 2011, the district court ruled that federal law preempted the ADMS. *Patriotic Veterans, Inc. v. Indiana ex rel. Zoeller*, 821 F. Supp. 2d 1074, 1079 (S.D. Ind. 2011). It did not reach the First Amendment issue. *Id.* at 1079 n. 5.

The State appealed the district court's ruling to the Seventh Circuit. It held that federal law did not preempt the ADMS. *Patriotic Veterans, Inc. v. Indiana*, 736 F.3d 1041 (7th Cir. 2013). The Seventh Circuit remanded for consideration of the First Amendment issue. *Id.* at 1054.

On April 7, 2016, the district court granted summary judgment for the State, ruling that the ADMS did not violate the First Amendment. App. 8a.

The Seventh Circuit affirmed in a six-page opinion authored by Judge Easterbrook. *Patriotic Veterans,* 845 F.3d 303 (7th Cir. 2017); App. 1a. The opinion concluded that the ADMS did not make a content-based distinction between types of speech and survived intermediate scrutiny because of the State's putative interest in preventing "unwanted calls." App. 3a-6a. Although Patriotic Veterans makes no calls to cellphones, the opinion placed particular emphasis on annoyance from calls made to cellphones. *Id.* The Seventh Circuit also ruled that the Indiana law was constitutional under this Court's First Amendment doctrine as a "time, place, and manner" regulation. *Id.*

REASONS FOR GRANTING THE PETITION

I. The Court should grant *certiorari* to resolve the conflict between circuits regarding content-based regulation of automated calls.

The ADMS elevates solicitations, debt collection, and other commercial speech above Patriotic Veterans'

issue advocacy. Using an "implied consent" construct never applied by this Court, the Seventh Circuit found that this content-based distinction did not warrant strict scrutiny. This decision contradicts with this Court's holding in *Reed* and conflicts with the Fourth Circuit's decision in *Cahaly,* which struck down an autodialer law that made content-based distinctions on who may make such calls. The Court should grant *certiorari* to review the Seventh Circuit opinion.

A. The Seventh Circuit's opinion conflicts with the Fourth Circuit's decision in *Cahaly* and threatens a nationwide restraint on the ability of grassroots organizations to rely on automated calls.

In an opinion that conflicts with the Seventh Circuit decision below, the Fourth Circuit struck down South Carolina's autodialer statute in *Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015). The *Cahaly* decision relied on the standard applicable to content-based speech set out in *Reed.* It found that prohibiting automated calls on political topics but allowing other forms of speech created a content-based distinction under *Reed*: "Here, the anti-robocall statute applies to calls with a consumer or political message but does not reach calls made for any other purpose. Because of these facial content distinctions, we do not reach the second step to consider the government's regulatory purpose." *Cahaly*, 796 F.3d at 405.

Patriotic Veterans arguments also rely on the *Reed* standard *See* Section I.B, *infra.* The statute bars calls on core political speech but authorizes commercial speech. Yet the Seventh Circuit

treated the ADMS as a content-neutral time, place, and manner restriction and upheld it under intermediate scrutiny. App. 6a-7a. This result directly conflicts with the conclusion reached by the Fourth Circuit in *Cahaly*.

The Seventh Circuit's opinion declined to follow *Cahaly* because the statute in *Cahaly* expressly referenced political speech. This argument ignores the breadth of Indiana's statute compared to South Carolina's more limited (and now void) statute. The South Carolina statute selected only certain types of automated calls to ban. It allowed all other types of calls to continue. S.C. Code Ann. § 16–17–446(A). By contrast, Indiana swept up *all* automated calls, but then grants exceptions to favored speakers making non-political calls. Ind. Code § 24-5-14-5. This is a distinction without a difference

In any event, *Reed* already rejected this "targeting" analysis. *See id.* at 2223. *Reed* made clear that the government's "targeting" of a particular type of speech is not the test for determining whether strict scrutiny must apply. *Id.* The *Reed* standard sets aside the government's motivation and does not probe whether the government actually intended to censor speech. *Id.* at 2228. *Reed* explained that "[g]overnment regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227.

A regulation failing this standard is content based "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting *Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410, 429 (1993)).

So long as a regulation of speech makes distinctions based on the topic addressed in the speech, it is content based and subject to strict scrutiny. *Id.* Whether political speech is singled out for coverage in the law, or singled out for exclusion from the law's exceptions, should not matter

More recently, a district court struck down Arkansas's autodialer ban in *Gresham v. Rutledge*, 198 F.Supp.3d 965 (E.D. Ark. 2016). The Arkansas statute prohibited the use of autodialers for political speech as well as for the sale of goods and services. *Id.* at 968 (citing Ark. Code Ann. § 5-63-204(a)(1)). Because it restricted political speech – "which 'is, and has always been, at the core of the protection afforded by the First Amendment'" – the Court followed *Reed* and *Cahaly* and applied strict scrutiny. *Id.* at 969 (quoting *281 Care Comm. v. Arneson*, 766 F.3d 774, 787 (8th Cir. 2014)).

The lower courts' confusion is further demonstrated by the Seventh Circuit's reliance on a handful of autodialer cases that arose before *Reed* to claim the ADMS is content neutral. Those cases apply the test for viewpoint discrimination that *Reed* rejected. The Seventh Circuit opinion stands

alone as the only post-*Reed* circuit court decision to uphold an autodialer restriction.

Content-based regulation of autodialers is therefore a matter of great national concern. Patriotic Veterans is one of thousands of grassroots organizations who need automated calls to disseminate their messages. If the Seventh Circuit's conclusion is allowed to calcify into settled law, states would gain a bludgeon capable of preventing an entire method of political speech.

This risk is palpable given the incentives entrenched interests have to create the type of content-based barriers barred by *Reed.* Preventing affordable means of speech favors entrenched interests. Well-funded incumbents logically have incentives to curtail speech by political opponents and outsiders. Automated calls level the electoral playing field by giving grassroots organizations a chance to be heard in the democratic process. "By depriving potential opponents of a tool that allows for cost-effective, targeted, critical messaging and simultaneously appeases its constituents, incumbent politicians can use banning robocalls as a winning campaign issue." Jason C. Miller, *Regulating Robocalls: Are Automated Calls the Sound of, or a Threat to, Democracy?*, 16 MICH. TELECOMM. & TECH. L. REV. 213, 239 (2009) (footnotes omitted).

For example, if Patriotic Veterans placed 500,000 calls throughout Indiana, some of those would reach recipients within the districts of "swing" representatives. Those calls in turn would

prompt interested citizens to contact their representatives, a type of "live transfer" call that Patriotic Veterans facilitates. That outreach could be critical in influencing a wavering legislator in the waning hours before a vote.

This contact between representative and constituent promotes legislative accountability to constituents. The First Amendment finds no value in the desire to halt efforts to let constituents be heard. But the Seventh Cirfwcuit gives legislatures a legal fiction – "implied consent" – with which to silence speech.

Conversely, no rational explanation exists for allowing "annoying" commercial calls while placing political speech on a lower plane. For instance, a Congressional report has concluded that "[c]omplaint statistics show that unwanted commercial calls are *a far bigger problem* than unsolicited calls from political or charitable organizations." H.R. Rep. 102–317, at 16 (1991) (emphasis added).

While relying on modern technology, autodialed calls are a modern extension of established forms of protected political speech such as canvassing. The knock on the door is replaced with the ringing of the phone. There is no reason to believe the phone is more intrusive than the knock. One can ignore the door as easily as hang up the phone. As the Oregon Supreme Court explained in striking down that state's ban on autodialed calls:

> The spoken word is our most popular and, to date, most significant form of communication. Newer forms of transmitting communications have arisen in the last 200 years. The telegraph (Cook, Wheatstone, Morse, 1837) enables people to communicate messages through an electrically charged wire by using a coded sound system. The telephone (Bell, 1876) carries the sound of one's voice through electrically charged wire. Radio (Marconi, 1895) carries signals through the air that may be received and transformed, by electronic means, into the sound of voices.
>
> Audio recordings enable people to record their voices in another medium that may be replayed virtually anywhere. Most recently, people communicate with computers by voice, and computers replicate the human voice by technologically simulating its sound. . . .
>
> The fact that one's means of expression is by a recording or simulation of one's voice does not alter its essential nature – speech.

Moser v. Frohnmayer, 845 P.2d 1284, 1285-86 (Or. 1993).

This Court has explained that no matter the channel of communication, the importance of political speech prevents the State from entirely foreclosing the use of that channel for political speech. *Citizens United v. Federal Election Comm'n,* 558 U.S. 310 (2010).

The First Amendment takes the courts out of the business of choosing the modes of communication used by political speakers. In *Citizens United,* the Court explained that:

> While some means of communication may be less effective than others at influencing the public in different contexts, any effort by the Judiciary to decide which means of communications are to be preferred for the particular type of message and speaker would raise questions as to the courts' own lawful authority. Substantial questions would arise if courts were to begin saying what means of speech should be preferred or disfavored. And in all events, those differentiations might soon prove to be irrelevant or outdated by technologies that are in rapid flux.

Id. at 326.

While *Citizens United* concerned political speech by highly funded organizations, grassroots organizations like Patriotic Veterans have the same interest in disseminating their message. Automated calls represent the surest and most efficient means for smaller organizations to deliver their message. Curtailing this entire mode of communication undercuts this basic First Amendment interest.

As one commentator has explained, automated calls "A functional democracy is noisy, rowdy, and sometimes annoying. Robocalls, however, are the sound of democracy in action." Silencing or limiting speech invariably protects the incumbent power

structure. Rather than being concerned about the disturbing noise of the ringing phone, we should be alarmed at the potential for silence." *Miller*, *supra*, at 253 (footnotes omitted).

B. Because Indiana's statute discriminates against protected political speech, the Seventh Circuit misapplied *Reed* in upholding it.

The Court should also grant *certiorari* because of the Seventh Circuit's deviation from the Court's teachings in *Reed*. That case represented a sea change in First Amendment law by modifying the standard for determining when government regulates speech based on its content. 135 S.Ct. at 2227.

The *Reed* standard puts aside the government's motivation and does not probe whether the government actually intended to censor speech. Id. at 2228. Whatever its intent, if the government regulates based on the "topic discussed," it is content based. *Id.* This remains true "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993)). Any such content-based regulation of speech is "presumptively unconstitutional" and must be reviewed under strict scrutiny. *Id.*

Applying this methodology, the Court struck down an Arizona town's ordinance that treated the entire category of religious speech differently from political and other types of speech. *Id.*

The Seventh Circuit decision upholding the ADMS is a significant departure from the teaching of *Reed* that will be followed by other lower courts if this Court does not intervene. Despite *Reed,* the ADMS restricts automated political speech but allows automated speech on commercial topics. It favors speakers with a "business" message over speakers who wish to engage in the cornerstone right to free speech. The ADMS allows automated calls from debt collectors and solicitors. It criminalizes messages on matters of public concern. The statute's exemptions allow preferred commercial forms of speech while simultaneously suppressing core political speech. As was the case when this Court invalidated the ordinance in *Reed*, political speech "is treated differently from [speech] conveying other types of ideas." 135 S.Ct. at 2227.

Because the ADMS places political speech in a disfavored position among various categories of speech, the statute must be subject to strict scrutiny.

The Seventh Circuit treated the statute as content neutral by holding that the ADMS' exceptions are not based on content. It concluded that "implied consent" for automated calls existed within the business and other relationships favored by Indiana's statute. App. 13a.

This "implied consent" theory runs directly afoul of *Reed.* The Court instructed in *Reed* that motivation and intent did not matter. *Reed* told the lower courts that a "content-neutral justification, or lack of 'animus toward the ideas contained' in the

regulated speech" no longer matter in analyzing speech-restrictive statutes. *Reed,* 135 S.Ct. at 2227. The Seventh Circuit constructed just such a "content-neutral justification" when it relied on "implied consent" to save the Indiana statute from strict scrutiny. This construct does not save the statute, as "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* at 2228.

The ADMS is the type of content-based restriction for which *Reed* compels strict scrutiny. The statute allows commercial entities to make automated calls, without limit, to those with whom they maintain a "current business or personal relationship" Ind. Code § 24-5-14-5. The Seventh Circuit interpreted this as "implied consent" to discuss whatever matter suits that commercial entity. The ADMS authorizes automated sales calls as well as calls from debt collectors, arguably the most pernicious and "annoying" type of unsolicited calls. By contrast, the ADMS criminalizes speech from non-commercial advocacy groups regardless of the caller's relationship with the recipient.

The ADMS allows consumer credit card companies, cable companies, banks, and other service providers to send limitless automated messages to sell their goods and services. It effectively opens the door to automated calls from the thousands of commercial entities with whom Hoosiers share their phone numbers – a necessary

part of many business transactions and online purchases.[1]

Reading these relationships as "consent" to unlimited calls would come as a shock to the thousands of Hoosiers who maintain a "current business or personal relationship" with commercial entities wanting to solicit their business. Ind. Code § 24-5-14-5.

In reality, the ADMS regulates *speech*. Regardless of the relationship between the parties, the statute allows some speech by automated calls but bans other speech by automated calls. It does so based on speakers and their messages. Its exceptions are not grounded in consent. They are discrimination based on content.

Even if – contrary to the language of the statute – the ADMS's exceptions rest on "consent," Indiana still has elevated commercial transactions above political speech because it does not extend the same broad definition of "implied consent" to *other* instances where consent could be implied. For instance, a person registering as a member of a political party impliedly consents to communications on political matters. Voters consent to being part of the political process, including speech related to that process. This leap in logic is no greater than the chasm the Seventh Circuit hurdled in assuming that a fleeting "business" relationship creates consent for

[1] Those commercial entities could not call those on Indiana's do-not-call list.

unlimited automated calls. Yet business calls with "implied consent" are authorized; political calls with similar forms of "implied consent" remain criminal.

The "implied consent" construct therefore is a proxy for the speech in which these actors may engage under the ADMS. The ADMS authorizes messages by certain speakers about matters of interest to them. Regardless of the relationships involved, the ADMS grants them leave to use autodialers. Political speech is disfavored and may not flow through autodialers.

Some states exempt nonprofit organizations but not businesses in their restrictions on automated calls. *See, e.g.*, Ala. Code § 8-19A-4; Wisc. Code § 100.52(1)(j). The ADMS took the opposite approach by exempting businesses and censoring nonprofit organizations through criminal sanctions. The statute would permit an automated call campaign to millions of customers of retailers, including chain retailers, credit card companies, banks, and utilities. These calls would not be limited by topic and could, for instance, support a bill to increase taxes or to decrease defense spending.[2] The same statute that allows these calls would *bar* automated calls by grassroots

[2] The ADMS also allows school districts, as well as businesses, to make unlimited calls to parents, which may include calls on such public issues as the benefits of a proposed school tax increase or annexation of property into the district.

organizations like Patriotic Veterans who oppose that same tax increase or defense cuts.

The ADMS therefore selects among various speakers in deciding who may make automated calls. In doing so, it selects which speech is lawful and which is criminal. The parameters for making this distinction rest on the topic of the call and the speakers involved. While restricting automation for political calls, the statute's exceptions permit businesses to use that technology to convey their messages. *See* Ind. Code § 24-5-14-5. Yet political speakers with every bit the same "relationship" or "implied consent" are not only left out, but face criminal sanctions if they use the same method as other speakers. This culling of political speech from the favored categories under the statute constitutes viewpoint discrimination under *Reed*, 135 S.Ct. at 2227.[3]

[3] The Seventh Circuit's implied consent construct also conflicts with the consent language already in the ADMS. The statute separately allows automated calls where the recipient "has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message." Ind. Code § 24-5-14-5. This provision would have little meaning if the *other* exceptions to the statute applied only to those who also consented. Indiana also maintains an extensive "do not call" list that protects the privacy of those who decide not to receive calls.

If allowed to stand, the Seventh Circuit's opinion opens the door to further encroachments onto free speech rights. It sets a new "floor" for regulating automated calls that other states may rush to meet, and suggests a method by which legislatures may ban other means of disseminating political or ideological messages. Elected officials may find regulating speech an easy way to placate some constituents or preserve their legislative seats. That concern animated the Fourth Circuit's decision in *Cahaly,* which arose out of an incumbent's complaints about automated calls advocating another candidate. *Cahaly*, 796 F.3d at 405. But the plain language of the First Amendment (and this Court's cases construing it) prevents legislation that restricts core political speech based on the message it conveys.

Worse yet, the Seventh Circuit's "relationship" metaphor creates a methodology that masks speech-restrictive legislation. Speech restrictions should be viewed as speech restrictions. Legal fictions like "implied consent" or "relationships" have no role when a statute's plain meaning, and the reality of its application, is to bar political speech. These extra-statutory constructs have never served as a veneer to cover speech-restrictive regulations.

Yet if the Seventh Circuit opinion stands, the government gains a powerful tool to circumvent the First Amendment. Speech cases should not morph from examining statutory language to hypothecating about potential relationships or

phantom consent given by listeners not before the court.

C. The ADMS cannot pass strict scrutiny where the government interest is limited to "annoyance" and the ADMS is not narrowly tailored.

Strict scrutiny requires a statute to serve a "compelling state interest." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The statute must also be "narrowly tailored" to serve that interest and must use the "least restrictive means" to regulate. *Id.* This standard presumes that a statute is unconstitutional. *Reed*, 135 S.Ct. at 2227. It is "well-nigh insurmountable." *Meyer*, 486 U.S. at 424.

Indiana offers only a single interest to justify the ADMS – the sound of a ringing telephone. There is no public safety danger. There is no physical intrusion into residents home. Indiana's sole justification for this speech-restrictive statute is that some residents might be annoyed when the phone rings to deliver Patriotic Veterans' messages.

A ringing telephone has been a fact of American life for more than a century. A ring is a brief sound every adult has heard. It is a sound we experience numerous times each day. It is as fleeting as it is familiar, as any call may promptly end at the will of the receiver. The length of this transaction is in the hands of the listener, who may chose for herself whether to hear the proffered political message or immediately end a call.

Just as this Court held that "the knocker on the front door is treated as an invitation or license … permit[ing] the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave," *Florida v. Jardines*, 133 S.Ct. 1409, 1415 (2013) (quoting Breard v. Alexandria, 341 U.S. 622, 626 (1951)), the public listing of a phone may be considered a license to be called, absent an affirmative step to the contrary, such as registering for a "do not call" list. The resident may ignore the call, or receive the visitor.

Having to hear a ring and lift a receiver is hardly the type of *compelling* state interest that can warrant content-based restrictions on political speech. And despite the Seventh Circuit's concern to the contrary, Patriotic Veterans does not make calls to cellphones.

Applying the State's "annoyance" argument to different media illustrates the problem with applying it to political speech. Many citizens in an election year would claim annoyance from political messages blasted through our televisions and radios (or even through Internet ads). These citizens simply turn the dial, just as a call recipient may hang up a phone. The government has no compelling interest in restricting political commercials that cause annoyance. The government similarly has no compelling interest in banning automated calls that have the same political content.

The ADMS prevents *all* automated political calls, including those that are welcome by the recipient and not perceived as harassment or telemarketing. The ADMS targets selective inconvenience. The undisputed facts show that between 20 to 30 percent of all automated calls are delivered to the listener in their entirety, while another 35 to 50 percent go to voicemail and disturb no one. Cir. App. 37.

The State cites an ungrounded fear that Patriotic Veterans would flood Hoosiers with thousands of calls. This is an as-applied challenge. Hyperbole about what some other caller might do has no basis in the record, a matter of particular concern given *the State's* burden to prove its compelling interest. The State appears to believe that because calls can be made faster by autodialers, groups like Patriotic Veterans would *repeat* their message over and over to "harass" Hoosiers with a flood of political messages.

Once a message is delivered to a recipient, Patriotic Veterans has no need to deliver it again. The autodialers provide speed to ensure that messages are delivered in a timely fashion and address issues as they arise. This desire for speed does not indicate a desire to inundate. The State cannot support its strict scrutiny burden through conjecture.

The government's alleged interest is undermined by the fact that the ADMS allows "annoying" phone calls from creditors, commercial entities, schools, and employers. The State is

selective in what it deems an annoyance. Salespeople and debt collectors may annoy Hoosiers at will on the basis of a single business transaction. The statute is therefore not furthering a compelling interest, but is choosing which topics and voices are worthy of being heard and which are not.

Finally, the ADMS only fosters whatever "privacy" interest remains when taking into account Indiana's existing "do-not-call" list. Ind. Code § 24-4.7-4-1. That list already reduces the number of intrusive calls Indiana residents receive. The State contends that the do-not-call list eliminated more than 80 percent of calls for those on the do-not-call list. State Cir. Br. 5-6. It contends that the Privacy Act "led to a huge decline in telemarketing calls, remains highly successful, and is extremely effective." *Id.* at 53.

This impact leaves little purpose left to be served by the ADMS. The ADMS attacks whatever leftover "annoyance" exists are left after the sweeping impact of the do-not-call list. Its sole interest remaining is whatever marginal calls made be made outside the do-not-call list, which does not apply to political speech.

D. The ADMS is not narrowly tailored but allows the very "annoyance" the State claims it prevents.

The ADMS is not narrowly tailored because it sweeps all political speech into its prohibition, including speech listeners wish to receive. The ADMS could employ narrower means to achieve the same goal. It simultaneously undermines its

putative purpose by allowing the very "annoyance" for which it claims a compelling interest.

A statute fails the "narrowly tailored" test unless it is designed "to protect only unwilling recipients of the communications." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). The ADMS's restriction on automated political calls does not consider that many residents want to hear political messages. It is undisputed that some Indiana residents welcome political calls. Many listeners will hear the entire call. It also undisputed that these listeners are not annoyed or "harassed." Yet the ADMS sweeps away the rights of these listeners to receive automated political messages. *See, e.g., Frisby*, 487 U.S. at 485.

The Fourth Circuit's *Cahaly* opinion outlined the available narrower remedies in this circumstance. 796 F.3d at 405-06. *Cahaly* struck down the restriction on political speech because "[p]lausible less restrictive alternatives" exist, "includ[ing] time-of-day imitations, mandatory disclosure of the caller's identity, or do-not-call lists." *Id.* at 406.

A do-not-call list for automated political calls would address any concerns over "annoyance" without the sweep of the current restrictions on automated political calls. The State's sole response to this narrowly tailored result is to claim that a state-sponsored do-not-call list for automated political calls is somehow *more* restrictive than Indiana's current system. State Br. 42. Perhaps for businesses, which are given a broad exception

based, apparently, on "implied consent." But not for entities like Patriotic Veterans, which are prohibited from using automated calls to address issues of public concern.

The ADMS also cannot be narrowly tailored because, as previously discussed, it allows for many of the very "annoying" calls for which it claims a compelling interest. *Reed*, 135 S.Ct. at 2232.

In addition to allowing many automated calls, it allows calls by live operators. A ringing phone caused by a machine is no more annoying than one from a live operator. The State's expert conceded that the "norm of politeness" could make live operator calls even *more* burdensome on unwilling recipients by creating a barrier to simply hanging up. There is therefore no narrow tailoring between the live operator requirement and the intended purpose of the act to limit "annoyance."

Finally, the Seventh Circuit concluded that passive media such as websites or television commercials might serve the same purpose. These forms of communication are simply not analogous, as they lack the immediacy, timeliness, and expediency of automated calls. For passive media like websites, a person must affirmatively seek the message, depriving a speaker of the audience otherwise available by automated calls. Despite these unique features of automated calls, the State has virtually foreclosed this mode of communication through a sweeping bar that does not leave in place any similar or adequate means of communication.

II. The ADMS violates the freedoms of speech and press, in conflict with this Court's settled precedents.

Even assuming the ADMS is content neutral, the Seventh Circuit still needed to determine "whether Indiana . . . is entitled to make advance consent (express or implied) a condition of any automated phone call, regardless of subject." App. 5a. Before answering this question, the panel made some erroneous observations. First, the panel claimed that such calls are "unwanted," and "many recipients find [robocalls] obnoxious because there's no live person at the other end of the line." *Id.* at 6a. Second, the panel assumed (also, without reference to the record) that there are "plenty of [other] ways to spread messages." *Id.* Third, unsupported in the record, as well as irrelevant to the constitutional issues presented, is the circuit court's belief that "[m]ost members of the public want to limit calls." *Id.*

The panel therefore concluded, "[p]reventing automated messages to persons who don't want their peace and quiet disturbed is a valid time, place, and manner restriction." *Id.* In addition to being wrong on the facts,[4] the panel's conclusion is directly contrary to this Court's precedents.

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[4] Although not supported by the record, the circuit court also claimed that much of the public's supposed annoyance with automated calls would arise from calls to cellphones. App. 6a. Patriotic Veterans does not call cellphones.

A. The ADMS violates both the right to speak and the right to listen.

1. The Seventh Circuit Decision Conflicts with *Martin v. Struthers*.

The circuit court cites no Supreme Court precedent to support its conclusion that Indiana's statute is a valid time, place, and manner restriction.[5] And for good reason — the court's decision directly conflicts with the First

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[5] The circuit court cited four cases from the Eighth and Ninth Circuits. In only two of those was *Struthers* discussed, and the others disregarded it for reasons not applicable here. In *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the court based its decision on the fact that the recipient of the call "has no opportunity to indicate the desire not to receive such calls." *Here*, however, the recipient has the right to be added to the Indiana "do-not-call" list under the Indiana Telephone Privacy Act, Inc. Code § 24-4.7-1-1, *et seq*. Second, *Van Bergen* assumed that automated calling was a new technology which "should be only marginally more costly option," which the record in this case demonstrates to be false. In *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996), the Ninth Circuit followed the flawed *Van Bergen* decision. Neither case considered the "prior restraint" principle, and both cases antedated *Watchtower v. Village of Stratton*, decided almost a decade later, as discussed herein at Section II.B, *infra*.

> Amendment speech and press principles laid down in *Martin v. Struthers*, 319 U.S. 141 (1943). In *Struthers*, this Court rejected the notion that a city ordinance prohibiting door-to-door distribution of literature could be justified as a valid time, place, and manner regulation:
>
> > Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors. . . .

Id. at 146-47.

The Indiana statute falls short of this constitutional mark. Under the Indiana supervisory scheme, the caller is divested of the full right to distribute his message, and the recipient is divested of the full right to decide whether to receive each message. Rather, in order to initiate a conversation, the caller must say what the state tells him to say in the manner that the state tells him to say it. And since the record is clear that Patriotic Veterans cannot afford to comply with the Indiana law, the subscriber loses the freedom that he otherwise would have to accept or reject a call from Patriotic Veterans, which it could not afford to make using a "live caller." *See* Caprio Decl. ¶ 6;

Owens Decl. ¶ 10. The circuit court ignored the fact that the First Amendment freedoms of speech and of the press "embrace the right to distribute ... and necessarily protect the right to receive...." *Struthers*, 319 U.S. at 143.

By requiring preclearance consent as a condition of communicating, Indiana has sacrificed the constitutional interests of both the caller and the recipient. Instead, the Indiana law, just as the city ordinance in *Struthers*, "protect[s] the interests of all of its citizens, whether particular citizens want that protection or not." *Id.* at 143. In doing so, the Indiana law impermissibly "substitutes the judgment of the community for the judgment of the individual householder." *Id.* at 144.

And for what reason? According to the circuit court, the Indiana law is said to have been designed for "protecting phone subscribers' peace and quiet [by] [p]reventing the phone ... from frequently ringing with unwanted calls [which] uses [up the] phone owner's time and mental energy [and irritates] many recipients [who] find [the calls] obnoxious because there's no live person at the other end of the line." *Patriotic Veterans*, 845 F.3d at 305-06. Similarly, the *Struthers* city ordinance prohibiting door-to-door soliciting was "aimed at the protection of the householders from annoyance [and crime], including intrusion upon the hours of rest..." *Struthers*, 319 U.S. at 144. Yet, the *Struthers* Court was not persuaded by such arguments: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful

members of society engaged in accordance with the dissemination of ideas in the best tradition of free discussion." *Id.* at 145.

Contrary to the rule in *Struthers*, the circuit court elevated Indiana's purported rationale for the statute over the speech and press principles protecting the dissemination of ideas — principles which are absolutely essential for the operation and preservation of a constitutional republic. *See Talley v. California*, 362 U.S. 60, 64-65 (1960).

Solicitous of the importance of maximizing access to speech and press opportunities, the Struthers Court observed that door-to-door canvassing was "widespread[,] attest[ing] [to] its major importance..., [as] one of the most accepted techniques of seeking popular support," and "essential to the poorly financed causes of little people." *Struthers*, 319 U.S. at 145-46. In contradiction, the Seventh Circuit relied on the widespread use of telephone canvassing to justify the Indiana law.

The court dismissed Patriotic Veterans' concerns about the prohibitively higher cost associated with having a live operator obtain preclearance. Instead, the court preferred to allay the supposed "frustrat[ion of] the recipient" by sacrificing automated calls which are "cheap for the caller." *Patriotic Veterans*, 845 F.3d at 306. Essentially, the panel elevated distaste for unwanted telephone calls over the First Amendment rights of the communicator to

communicate and the recipient to be communicated with, contrary to the *Struthers* ruling that:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.

Struthers, 319 U.S. at 143.

The Court more recently extended *Struthers* by striking down a city ordinance calculated to require a village mayor's permission to engage in door-to-door soliciting. *See Watchtower Bible and Tract Society of New York, Inc. v. Stratton*, 536 U.S. 150 (2002). In order to satisfy the city, the canvasser was required first to fill out a Solicitor's Registration Form, disclosing his name, stating the "purpose" of his message, and the "goods or services offered," similar to the requirements of the ADMS. *See Stratton*, 536 U.S. at 155 n.2. Without hesitation, this Court struck down the ordinance as invalid on its face:

> On this method of communication the ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution.

Id. at 162.

The automated call is the modern day pamphlet. Instead of distributing one's message while walking door-to-door, today's technology enables messengers inexpensively to go phone-to-phone, and those phone calls are most certainly entitled to the same press protection as personal visits which, even more than telephone calls, use up a homeowner's "time and mental energy." 845 F.3d at 305-06. And, just as in those days when people took their message door-to-door free from government license and censorship, the phone-to-phone canvasser is constitutionally subject to censorship not by the government, but only by the "power of the householder [which] is unlimited." *See Rowan v. United States Post Office Dept.*, 397 U.S. 728, 737 (1970).

Just as the *Struthers* and *Stratton* homeowners were free to censor the pamphleteer at their front door by not answering the doorbell or refusing to hear the message, so too Indiana homeowners are free to censor an automated call by not answering the phone or by hanging it up.[6] In a constitutional republic, being required to expend a bit of precious "time and mental energy" should be viewed as the price — and truly not that much of a price — that Americans pay for living in a free society. As

[6] "In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail." *Rowan*, 397 U.S. at 736.

Justice Stevens observed at the close of his opinion in *Stratton*:

> The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today.

Stratton, 536 U.S. at 169.

B. The ADMS does not leave Patriotic Veterans with ample alternative channels for communication.

1. The Courts Below Failed to Consider the Specific Use of Automated calls by Patriotic Veterans.

Although the circuit court did not explain why it addressed other "ways to spread messages," such a showing is mandatory for time, place, and manner restrictions, which must "leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The district court stated that the ADMS does "leave[] open [such] ample alternative channels for communication." *Patriotic Veterans*, 177 F. Supp. 3d at 1128. The circuit court asserted that "[e]veryone has plenty of ways to spread messages." *Patriotic Veterans*, 845 F.3d at 306. The district court identified these alternative communication channels as "live telephone calls, consented to robocalls, radio and television advertising and

interviews, debates, door-to-door visits, mailings, flyers, posters, billboards, bumper stickers, e-mail, blogs, internet advertisements, Twitter feeds, YouTube videos, and Facebook postings." 177 F. Supp. 3d at 1128. The circuit court provided a shorter and somewhat different list — "TV, newspapers and magazines (including ads), websites, social media (Facebook, Twitter, and the like), calls from live persons, and even recorded spiels if a live operator first secures consent." 845 F.3d at 306.

The district court explained that it could see no First Amendment problem even with a statute which hampered Patriotic Veterans in communicating its message as desired — asserting that "an adequate alternative does not have to be the speaker's first or best choice, or one that provides the same audience or impact for the speech." 177 F. Supp. 3d at 1128 (emphasis added) (quoting *Weinberg v. City of Chicago*, 310 F.3d 1029, 1042 (7th Cir. 2002)). *Weinberg*, however, had relied on a Ninth Circuit decision which clearly stated that "'an alternative is not ample if the speaker is not permitted to reach the intended audience.'" *Id.* at 1042 (quoting *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990) (emphasis added)). At the very least, the *Bay Area Peace Navy* rule should apply in this case. As this Court has recognized, "[e]ven assuming for the sake of argument that the possibility of using a different medium of communication has relevance in determining the permissibility of a limitation on speech," such a different medium must be "reasonable alternatives

… in terms of impact and effectiveness." *Federal Election Commission v. Wisconsin Right to Life,* 551 U.S. 449, 477 n. 9 (2007). And it should have been clear that Patriotic Veterans does not have the "ample alternative channels" that this Court requires to communicate its message, as those channels do not allow it to reach its intended audience. *See* Sections II.B.2 and 3, infra.

2. Patriotic Veterans requires an efficient and prompt means to reach its audience.

In the district court, Patriotic Veterans explained that making calls using a live operator would cost eight times as much as placing automated calls, and without the use of automated telephone calls, it "could not afford to ... disseminate the same number of messages to the same number of voters." Caprio Decl. ¶ 6. Further, for Patriotic Veterans to accomplish its mission, it sometimes needs "to send messages in a short period of time, such as on the eve of an election or before a vote [in a legislative body] important to its members." Caprio Decl. at ¶ 7; *see also* Owens Decl. at ¶ 9. Thus, Patriotic Veterans needs a method of communication that is both cheap and can be accomplished quickly.

Neither the district court's list of 18 "ample other means" nor the circuit court's list of eight alternatives meets the need of Patriotic Veterans. To be sure, some of the identified means of communication can be engaged in cheaply. And some can be done quickly. A few can be accomplished both cheaply and quickly – but many

of those involve entirely Internet-based communications: websites, email, blogs, Twitter, YouTube, and Facebook — alternatives which would not actually reach Patriotic Veterans' target audience.

No one doubts the effectiveness of Internet communications and social media in reaching *some* voters, particularly younger ones. Patriotic Veterans could make an unlimited number of Tweets, YouTube videos, or Facebook posts without reaching many in its target audience. Its demographic includes large numbers of middle-aged and senior citizens who use telephone landlines — truly, "a venerable means of communication." The Seventh Circuit was fully aware of Patriotic Veterans' target demographic, as it noted when this case was before it earlier:

> in 2010, Patriotic Veterans, in partnership with singing idol Pat Boone sponsored nearly 1.9 million calls to veterans and seniors across the U.S. about cuts in Medicare as a result of the passage of Obamacare.

Patriotic Veterans, 736 F.3d at 1044.

This automated telephone call by Pat Boone (now age 82) clearly was intended to reach the target audience of "veterans and seniors," different from Katy Perry's Twitter feed. In *Weinberg* (relied on below), even the Seventh Circuit similarly recognized that target audiences often differ: "Blackhawk fans are a fundamentally

different market than the market for bookstore readers or Internet users." *Id.* at 1042.

Without automated telephone calls, Patriotic Veterans is simply not able to have its message reach its intended audience. As Patriotic Veterans' vendor explained below, "[i]n any campaign, whether for a candidate or an issue, we are aware of no faster or more cost-effective way [than automated telephone calls] to reach the voter." Owens Decl. ¶ 15. As this Court has made clear, "we presume that speakers, not the government, know best both what they want to say and how to say it." *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). Thus, the courts below erred when they effectively barred Patriotic Veterans' grassroots lobbying program because they presumed to know better than Patriotic Veterans how the organization could (or should) spread its message. The courts below felt at liberty to sanction a state law effectively barring automated calls, but, as this Court noted in *City of Ladue*, "'[a]lthough prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent — by eliminating a common means of speaking." *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994).

3. None of the Court-Identified Alternative Channels Allows for Effective Grassroots Lobbying.

As the circuit court related in its 2013 decision below, the calls made by Patriotic Veterans often

recruit a prominent person such as Pat Boone to present a recorded message. When recipients hear well-known and well-respected voices, they pay greater attention, thereby facilitating the educational message contained in these calls. This type of personal contact cannot be achieved nearly as effectively through any of the alternative channels of communications postulated by the courts below.

Furthermore, Patriotic Veterans generally uses automated telephone equipment to generate large numbers of grassroots communications with elected officials. To that end, persons called are given a sophisticated "live transfer" option to be connected directly with their member of the state legislature, so that they can more effectively petition their elected officials — generally by supporting or opposing legislation then pending. The only communications channel which allows Patriotic Veterans to communicate directly with their elected official in a cost and time effective manner is via telephone calls using automated dialing equipment. By enabling a person to communicate directly with one's elected representative, the automated call makes it possible for even the most humble citizen to exercise his First Amendment right to "petition [the Government] for redress of their grievances" in its "most pristine and classic form." *See Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

CONCLUSION

The Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

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