No. 17-5093

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SOUNDBOARD ASSOCIATION,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
(Hon. Amit P. Mehta)

BRIEF OF *AMICUS CURIAE* PUBLIC GOOD LAW CENTER IN SUPPORT OF APPELLEES

Thomas Bennigson
(Counsel of Record)
Seth E. Mermin
Daniel Contreras
PUBLIC GOOD LAW CENTER
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 336-1899 (telephone)
(510) 849-1536 (facsimile)
tbennigson@publicgoodlaw.org

Attorneys for Amicus Curiae

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Public Good Law Center certifies as follows:

Parties and Amici

With the exception of the present *amicus curiae*, all parties, intervenors, and *amici* appearing before the district court and thus far in this Court are listed in both the Opening Brief for Soundboard Association and the Brief for the FTC.

Ruling Under Review

References to the rulings at issue appear in both the Opening Brief for Soundboard Association and the Brief for the FTC.

Related Cases

This matter has not previously come before this Court, and counsel for the *amicus curiae* is not aware of any related cases pending in this Court or any other court.

CORPORATE DISCLOSURE STATEMENT

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing. The general nature and purpose of *amicus curiae* is explained in the Statement of Interest at the beginning of the body of this brief.

CERTIFICATE OF COUNSEL

Pursuant to D.C. Circuit Rule 29(d), *amicus curiae* is not aware of any other organization or individual that plans to file an *amicus curiae* brief in support of Defendant-Appellant. For reasons explained in the Statement of Interest at the beginning of the body of this brief, *amicus* believes that its expertise and familiarity with the First Amendment issues involved in this case will be useful to the Court.

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GLOSSARY

FTC – Federal Trade Commission

SBA – Soundboard Association

TSR – Telemarketing Sales Rule, 16 C.F.R. Part 310

INTEREST OF AMICUS CURIAE

The Public Good Law Center is a public interest law firm specializing in constitutional issues relating to the regulation of business and the vindication of the rights of consumers.[1] Through *amicus* participation in cases of particular significance for consumer protection, public health, and civil liberties, Public Good seeks to establish and maintain rules of law that vindicate the proposition that all are equal before the law. Public Good's *amicus* briefs frequently address the First Amendment, particularly in the consumer context. Those briefs have included filings in the United States Supreme Court, the Circuit Courts of Appeals, and state Supreme Courts – including recent briefs in this Court on consumer-related First Amendment issues: *Philip Morris v. United States*, 801 F.3d 250 (D.C. Cir. 2015); *Nat'l Ass'n of Mfrs v. SEC*, 800 F.3d 518 (D.C. Cir. 2015); and *American Meat Institute v. USDA*, 760 F.3d 18 (D.C. Cir. 2014).[2]

Amicus curiae seeks leave to file separately in order to present the Court with a clearer view of how the technology at issue actually operates, and a broader perspective of the potential impact of the Court's decision on what may seem a limited issue.

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund the preparation of the brief. And no person other than *amicus curiae*, its members or its counsel contributed money to fund preparing or submitting the brief.

[2] The parties have consented to the filing of this brief.

Soundboard Association (SBA) has offered a decidedly benign view of the effects of soundboard technology and the reasons for its adoption (*see* Appellant's Opening Br. at 5) – a view somewhat at odds with the results of investigations by journalists and others who have explored the technology in practice. Those investigations may offer the Court a clearer picture of why FTC staff has now determined that telemarketing calls using soundboard technology should be deemed robocalls.

The Court's decision, and particularly its interpretation of *Reed v. Town of Gilbert*, 135 S. Ct. 2219 (2015), may significantly affect government's ability to bring reasonable rules of the road to bear in any situation where "communication" is at issue. If the First Amendment is as broad and absolute as Plaintiff maintains, and protection for speech truly undifferentiated across all categories of communication, then not only will a great deal of computer-generated "speech" be placed beyond regulation, but also there will be, "by a leveling process," *less* protection for core political, artistic and religious speech overall. *Ohralik v. Ohio St. Bar Ass'n*, 436 U.S. 447, 455 (1978).

INTRODUCTION AND SUMMARY OF ARGUMENT

Michael Scherer, Washington bureau chief of TIME *magazine, recorded a call to his cell phone from "a woman with a bright, engaging voice," identifying herself as Samantha West, offering a deal on health insurance*. Zeke Miller & Denver Nicks, *Meet the Robot Telemarketer Who Denies She's A Robot: Our Encounter With an All-Too-Convincing Robot*, TIME.COM (Dec. 10, 2013).[3]

> SW: "I'm calling about an online request you once made about health insurance coverage. We work with all major companies and compare --"
>
> MS: "Hey, are you a robot?"
>
> SW: (*Laugh*.) "What?! NO! I *am* a real person. Maybe we have a bad connection. I'm sorry about that."
>
> MS: "That's crazy. I mean, you sound so much like a robot."
>
> SW: "I *am* a real person. Maybe we have a bad connection. I'm sorry about that."
>
> MS: "Will you tell me you're not a robot? Just say, 'I'm not a robot.' Please?"
>
> SW: "I *am* a real person."
>
> MS: "I mean I believe you. But will you just say, 'I'm not a robot.'? It'll make me feel better to hear you say it."
>
> SW: (*Laugh*.) "There *is* a live person here."

[3] *At* http://newsfeed.time.com/2013/12/10/meet-the-robot-telemarketer-who-denies-shes-a-robot

> MS: "I know there is. It would just make me feel so much better to hear *you* say, 'I am not a robot.'"
>
> ***
>
> SW: "Yes, I'm a real person."
>
> MS: "Right, but will you say, 'I'm not a robot'?"
>
> SW: (*Long pause*.) (*Laugh*.) "Enrollment center. Are you there?"

Id. (audio file).

The reporter wasn't sure exactly who, or what, he was interacting with.

> When Scherer asked point blank if she was a real person, or a computer-operated robot voice, she replied enthusiastically that she was real, with a charming laugh. But then she failed several other tests. When asked 'What vegetable is found in tomato soup?' she said she did not understand the question. When asked multiple times what day of the week it was yesterday, she complained repeatedly of a bad connection.

Id.

What Mr. Scherer had encountered was a telemarketer using soundboard technology. Samantha West wasn't a real person. The name "Samantha West" and her persona were fake. But there likely was a real person, in a call center overseas, ordered not to use his or her own (non-American-accented) voice, pushing buttons on a screen – trying desperately to make a sale. "Samantha West is not a robot but a computer program used by telemarketers outside of the United States . . . to allow English speakers with thick non-American accents to sort through leads to find real prospective buyers before passing them off to

agents back in the United States." Denver Nicks, *Robot Telemarketer Employer: Samantha West Is No Robot*, TIME.COM (DEC. 17, 2013).[4]

The reason for the technology is simple – in the words of a leading provider, "Outsourcing without the accents!"[5] That is, telemarketers use the technology because they believe Americans are more likely to make a purchase if they believe they are speaking to another American. But Americans generally resent the intrusiveness of this technology, at least when used for telemarketing. Janelle Nanos, *The Onslaught of Spam Calls Will Keep Getting Worse*, BOSTON GLOBE (May 11, 2017)[6] ("Infuriated at being constantly interrupted during the dinner hour, … Americans' rage turned toward the robotic 'Rachel from card services'").

And the reason that people resent the technology, and that FTC staff has now determined that the Telemarketing Sales Rule [TSR] applies, is equally simple: they see it as just another form of robocalling. A spokesperson for the telemarketing trade group Professional Association for Customer Engagement (a group relied on by Plaintiff, *see* Appellant's Opening Br. at 8), agreed: she thought "Samantha West – … the software with pre-recorded statements

[4] *At* http://newsfeed.time.com/2013/12/17/robot-telemarketer-samantha-west
[5] *At* http://avataroutsourcing.com (Avatar Technologies).
[6] *At* https://www.bostonglobe.com/ideas/2017/05/11/the-onslaught-spam-calls-will-keep-getting-worse/2w1tyrSnzEj8NPO81hUUBK/story.html

deployed by telemarketers with non-American accents – fell under the category of 'robocall.'" Nicks, *Robot Telemarketer Employer*, *supra*.

It is difficult to disagree. The reported abuses of soundboard technology received by the FTC match those that plague recipients of other forms of robocalls: telemarketers operating soundboards make more than one call at a time, their responses often make no sense, they open calls with prerecorded messages and immediately pass off consumers who press "1" to live agents. (*See* FTC Opp. to Mot. for PI at 23-24.)

If the definition of a robocall poses little obstacle to the FTC's interpretation, the First Amendment poses even less. The robotic parroting of prerecorded phrases hardly constitutes the type of "speech" which the First Amendment is designed to protect. Given its essentially infinite replicability, if computerized speech – Siri, Alexa, et al. – were afforded First Amendment protection, the result could be a crippling deluge of illimitable, intrusive sound. With respect to soundboard technology, the most that can be said – and even this is a dubious assumption – is that it is a *means* of *conveying* speech. And a given means of transmitting speech may be limited as long as the government has a substantial reason for the restriction, has narrowly tailored the restriction, has applied the restriction without regard to content, and has left ample alternative means of communication available. *Ward v. Rock Against Racism*, 491 U.S. 781,

791 (1989); *ANSWER v. District of Columbia*, 846 F.3d 391, 403-04 (D.C. Cir. 2017).

The TSR handily meets these conditions: the restrictions on robocalls further a valued interest in being left alone in one's home, are limited to a particularly pernicious type of communication that is essentially costless to the caller yet exacting of consumers' time and privacy, and leave available multifarious other means of contacting potential consumers. Yet if Soundboard Association's arguments are accepted, the FTC would not only be powerless to restrict the use of soundboard technology, but also could not continue to regulate even the type of automatic dialers that no one disputes result in robocalls. Indeed, under the absolutist standard Plaintiff puts forward, there would be no basis for distinguishing commercial speech from core speech. That is not what the Supreme Court held in *Reed v. Town of Gilbert*, 135 S. Ct. 2219 (2015), and this Court certainly need not so hold here.

Distinctions made on the basis of relationship do not turn a carefully drawn rule (very much unlike the hodgepodge of standards at issue in *Reed*) into an extra-constitutional exercise. The only distinction legitimately at issue in this appeal – between those who have previously given to a charity and those who have not – is a relationship-based classification that has nothing to do with the

content of any message, and that readily passes intermediate time-place-manner scrutiny.

To consider Plaintiff's proposed alternative standard (or its array of arguments that were not raised in the district court) is to realize its impracticability. If SBA is correct, then the government cannot restrict junk faxes, *contra Missouri ex rel. Nixon v. American Blast Fax, Inc*., 323 F.3d 649 (8th Cir. 2003) (upholding restrictions on unsolicited faxes), or email spam, *contra Mainstream Marketing Services, Inc. v. F.T.C*., 358 F.3d 1228, 1237 (10th Cir. 2004) (upholding restrictions on spam), or telemarketing texts to cell phones, *contra Gomez v. Campbell-Ewald Co*., 768 F.3d 871, 874 (9th Cir. 2014) (upholding restrictions on unsolicited text messages), unless it prohibits the use of each technology in its entirety. And government could not do anything – short of an absolute prohibition (which Plaintiff would no doubt challenge as insufficiently tailored) – to restrain the unlimited growth of computer-generated "speech" that multiplies essentially costlessly and could come to fill every device and every second in our lives.

That is not, it is safe to say, what James Madison had in mind; and it is not what the First Amendment requires today. The First Amendment exists to protect human beings, not "Samantha West."

ARGUMENT

I. SOUNDBOARD TECHNOLOGY – LIKE OTHER FORMS OF ROBOCALLING – COERCIVELY AND ABUSIVELY INVADES PRIVACY, CONTAINS NO INHERENT SAFEGUARDS, IS DECEPTIVE, AND HAS PROVED A BANE TO THE PUBLIC.

The FTC staff's addition of soundboard technology to the category of robocalls was a decision almost a decade in the making. It was not taken lightly; and it was not taken wrongly.

By reducing the cost of placing a telemarketing call to almost nothing, soundboard technology – like other forms of robocalling – allows for unprecedented levels of intrusion into the privacy of the home, intrusion that can be escaped only by abandoning one's phone. Market forces consequently generate "a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy," 15 U.S.C. § 6102(a)(3)(A), and which actual consumers *do* consider coercive and abusive. *See infra* § I.A. Moreover, by masquerading as conversations with actual human beings (with North American accents), soundboard-initiated calls are *more* "deceptive" than other robocalls, in violation of § 6102(a)(1).

It is possible to describe soundboard technology in innocuous terms. Using a soundboard system, call center agents dial a phone number, but instead of speaking with the consumer, they initiate specially tailored opening pitches

and responses to the consumers' questions. Alexis C. Madrigal, *Almost Human: The Surreal, Cyborg Future of Telemarketing*, THE ATLANTIC (Dec. 20, 2013).[7] The agents do this by selecting one of dozens of pre-recorded statements, responses, or follow-up questions on their screen. *Id*. They can even select a pre-recorded "laughter" button to better simulate human interaction. *Id*.

But as the manufactured laughter suggests, there are limitations to the system, and they are disquieting. Operators cannot respond intelligently to questions that the system has not anticipated. *Id.* In fact, the point of the system is to eliminate humanity: as the CEO of one soundboard company has bragged, "What [business] people like about our technology is that an agent can't say anything that is not already approved to be said. When an agent interacts with your customers, it will sound like they are having a wonderful day." Sara Jarman, *Who's on the Other Side of the Line?,* KSL.com (March 31, 2016).[8]

It is no surprise that even a sympathetic journalist would dub soundboard technology "creepy" and a form of "cyborg telemarketing." Madrigal, *Almost Human*, *supra*. And it is equally unsurprising that FTC staff would determine, after seeing the system in action, that it falls squarely in the category of robocalling.

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[7] *At* https://www.theatlantic.com/technology/archive/2013/12/almost-human-the-surreal-cyborg-future-of-telemarketing/282537

[8] *At* http://www.ksl.com/?sid=39122933&nid=1012

A. Soundboard Technology Is Coercively And Abusively Intrusive.

It is difficult to overstate the intrusiveness of automatically dialed calls into the daily lives of Americans. Estimates of the volume of robocalls made to American households now range well above 2.5 *billion* every month. Christopher Mele, *Robocalls Flooding Your Cell Phone? Here's How to Stop Them*, N.Y. TIMES (May 11, 2017).[9] From December 2015 to December 2016, the year the FTC added soundboard calls to its definition of restricted robocalls, that number increased by 50% – in a single twelve-month period. *Id*. Experts suggest robocalls now make up some 35 percent of all phone calls placed in the United States. *See In re Blackboard, Inc.*, FED. COMMC'N COMM'N, FCC 16-88 (Aug. 4, 2016), at 19 (statement of Commissioner Rosenworcel)[10]; CONSUMER REPORTS, *Rage Against Robocalls* (July 24, 2015).[11] The epidemic of abuse is something "[t]echnology is enabling at a scale we haven't seen before." Mele, *Robocalls*, *supra*.

The ever-decreasing price of robocalls has made – and continues to make – them an attractive business proposition. "[T]he cost of a marketing call, in both long-distance charges and human wages, has declined to the point that the

[9] *At* https://www.nytimes.com/2017/05/11/smarter-living/stop-robocalls.html
[10] *At* https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-88A1.pdf
[11] *At* http://www.consumerreports.org/cro/magazine/2015/07/rage-against-robocalls/index.htm

spammer makes money if only one in a million people takes the bait." Nanos, *The Onslaught of Spam Calls*, *supra*. In particular, "[t]he combination of [internet-based telephone service] and autodialers make[s] it extremely easy for folks to blast out 100,000 to millions of calls at very, very, very low cost, and they don't have to do it from within the US." *Id*. *See also* Jennifer Schlesinger, *Robocalling Soars Despite 'Do Not Call' Registry, As Scammers 'Couldn't Care Less' About Bothering Consumers*, CNBC (June 25, 2017)[12] ("You can make millions of calls from anywhere in the world for a tiny amount of money").

In 2008, the FTC foresaw the current state of affairs: "[T]he savings in labor costs that can be realized by substituting prerecorded calls for sales agent calls are not simply theoretical. The potential for these real savings suggests prerecorded calls likely will increase if they are permitted." Telemarketing Sales Rule (TSR), 73 FED. REG. 51164, 51167 (Aug. 29, 2008).

As one consumer group noted to the FTC, "If [prerecorded message telemarketing] wasn't so attractive, the telemarketing industry would not be pressing so vigorously for its use to be sanctioned." *Id.* That is, it may be true that using soundboard technology increases compliance with mandated

[12] *At* http://www.cnbc.com/2017/06/25/robocalling-soars-despite-do-not-call-registry-as-scammers-couldnt-care-less-about-bothering-consumers.html

disclosures, but it is not ease of compliance that has driven the technology's adherents – or that has driven this lawsuit. It is profit.

Even before robocalling reached its current volume, consumers' antipathy was well documented. The FTC found almost a decade ago that "[c]onsumers are adamant that prerecorded calls are abusive of their privacy." 73 FED. REG. at 51167. The Commission had received "overwhelming evidence of consumer aversion to prerecorded message calls" and "the hijacking of their telephone service." *Id*. at 51167-68. "More than 13,000 consumer comments … opposed the creation of a safe harbor for prerecorded telemarketing calls." *Id*. at 51167. And that was before the recent sharp increase in the volume of calls regularly invading the privacy of virtually every American home.

As FTC staff determined, companies using soundboard technology have provoked the same customer complaints as companies employing more traditional robocall technologies: staff reported receiving an increasing number of complaints about telemarketers using soundboard technology in ways that make the calls "indistinguishable" from "standard . . . robocalls." ECF No. 1-2 (Nov. 10, 2016), at 4. Consumers were not getting appropriate responses to questions or comments, calls were abandoned or dropped, call center agents were often unresponsive to requests to speak to an operator, consumers often did not know that there was an operator behind the pre-recorded voice, and operators

regularly handled multiple calls at the same time. Lesley Fair, *Court Opinion Considers Soundboard Technology and the Robocall Rule*, FTC (May 3, 2017).[13]

This last and most telling aspect of robocalling has been repeatedly confirmed in lawsuits, *see, e.g., Fitzhenry v. ADT Corp.*, No. 14-80180, 2014 WL 6663379 (Nov. 3, 2014) (S.D. Fla. 2014) ("This technology allows a sales agent to carry on three 'conversations' simultaneously, using computer key strokes to play prerecorded audio snippets intended to respond to the call recipients' statements and questions"); through investigative articles, Madrigal, *Almost Human, supra* ("a single call-center worker will run two or even three calls at the same time"); and by industry members themselves. *Id*. As one call center boasts in its promotional materials, the technology allows the employees of a single call center to make millions of calls each month. *Perfect Pitch Tech – The Best Outsourcing Solution*, YOUTUBE (Apr. 28, 2014).[14] There is a reason that soundboard technology has been dubbed "the new spam." Sean Gallagher,

[13] *At* https://www.ftc.gov/news-events/blogs/business-blog/2017/05/court-opinion-considers-soundboard-technology-robocall-rule
[14] *At* https://www.youtube.com/watch?v=fDdExfQPUec&autoplay=

The New Spam: Interactive Robo-Calls From the Cloud as Cheap as E-Mail, ARS TECHNICA (Apr. 15, 2015).[15]

B. Soundboard Technology Is Deceptive.

The widespread adoption of soundboard technology was driven not to ensure accurate disclosures, *see* Appellant's Opening Br. at 5, or to provide "clarity, consistency, calm demeanor," *id*., or to assist "call agents with certain disabilities." *Id*. Rather, the technology was developed and implemented to save money by allowing call centers to keep telemarketing jobs overseas while hiding that fact. Madrigal, *Almost Human*, *supra*.

The enormous increase in robocalls has resulted not only from the tremendous decrease in the cost of placing international calls over the Internet as opposed to traditional telephone wires, but also from the far lower price of labor overseas as opposed to the U.S.: "Call centers are like water…. They flow to the place of the lowest labor cost." *Id.* Despite these incentives, the path to essentially limitless calling was blocked by one remaining obstacle: the fact that Americans, who have little objection to working with *inbound* overseas call centers when they telephone customer service, generally do not like the idea of being disturbed at home by *outbound* telemarketers located in other countries.

[15] *At* https://arstechnica.com/ information-technology/2015/04/the-new-spam-interactive-robo-calls-from-the-cloud-as-cheap-as-e-mail

See Alexis C. Madrigal, *The Only Thing Weirder Than a Telemarketing Robot*, THE ATLANTIC (Dec. 13, 2013)[16] ("[W]hile Americans accept customer service and technical help from people with non-American accents, they do *not* take well to telemarketing calls from non-Americans. The response rates for outbound marketing via call center are apparently abysmal"). Soundboard technology offered a solution: it purports to eliminate the issue of the call coming from overseas by disguising the caller as an American. As one provider puts it, "Our patented . . . software erases foreign accents, allowing our telemarketing and fundraising agents to sound like Wall Street pros for a fraction of the price." Avatar Outsourcing, Homepage.[17]

There is thus more than a little deception in the Soundboard Association's prescribed response to a person asking if he is talking to a robot: "I am a live person using scripted responses to ensure the information I give you is accurate. Is that OK with you?" SBA Code of Conduct, Section 5.6.1.[18] That scripted answer misstates the real reason for the use of soundboards: to enable those without American-accented English to sound American. That is, to fool people.

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[16] *At* https://www.theatlantic.com/technology/archive/2013/12/the-only-thing-weirder-than-a-telemarketing-robot/282282

[17] *See* Avatar Technologies, http://avataroutsourcing.com; *see also* http://avataroutsourcing.com/telefundraising/(video demonstration)

[18] *At* http://soundboardassociation.org/wp-content/uploads/Soundboard-Association_Code-of-Conduct_9_2_16.pdf

Given the urgency of the sharp rise in robocalls, Americans' increasingly tenuous privacy even inside their own homes, and the evidence of actual – not theoretical – industry conduct, it was entirely reasonable for FTC staff to have determined that calls using soundboard technology should be deemed robocalls and restricted accordingly. In making that determination, Commission staff was simply following the congressional directives that it act to prevent telemarketers from "undertak[ing] a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy," 15 U.S.C. § 6102(a)(3)(A); 73 FED. REG. at 51167 n.9, and that it "prescribe rules prohibiting deceptive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1).

II. THE FIRST AMENDMENT PRESENTS NO OBSTACLE TO APPLYING THE TELEMARKETING SALES RULE TO SOUNDBOARD TECHNOLOGY.

FTC staff's application of the Telemarketing Sales Rule to soundboard technology comports fully with the First Amendment.

Since the policy does not target the content of any message, but only a certain manner of communicating messages, it is subject not to strict scrutiny, which applies to limitations based on the *content* of core, noncommercial speech, but to "the less demanding time, place, or manner test to assess content-neutral restrictions." *Initiative & Referendum Inst. v. U.S. Postal Serv.*, 685 F.3d

1066, 1070 (D.C. Cir. 2012). Even the heightened scrutiny of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), is inapplicable. *Central Hudson* concerned an outright ban on certain advertising content – promotion of electricity use. *Id.* at 558. By contrast, the TSR, like a limitation on allowed levels of amplified sound on public streets, imposes no "restriction upon the communication of [certain] ideas or discussion of [certain] issues," but only provides "reasonable protection in the homes or business houses from … distracting noises." *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).

Consequently, the policy is constitutional, provided it is "narrowly tailored to serve a significant governmental interest, and … leave[s] open ample alternative channels for communication." *American Library Ass'n v. Reno*, 33 F.3d 78, 88 (D.C. Cir. 1994) (quoting *Ward*, 491 U.S. at 791); *see also City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47 (1986). Since the rule is tailored to advance the government's substantial interest in protecting the peace and privacy of telephone users, and leaves open ample alternative methods for contacting potential donors, it passes muster.

The sole distinction in the TSR that Soundboard Association properly challenges – between professional fundraisers' charitable solicitation ("telefunding") calls made to potential new donors and those made to preexisting donors – is based on the relationship between the caller and the recipient of the

call rather than the content of the conversation.[19] That distinction does not make the TSR as applied here content-based.

The debilitating alternative standard proposed by SBA would make it all but impossible for government to regulate not just incoming telefunding calls, but *any* telemarketing calls – indeed, to regulate any particular kind of communication – without simultaneously regulating *all* communication of that kind. *Reed* requires no such result. *See ANSWER*, 846 F.3d at 405. This Court may readily set aside Plaintiff's overreading of the decision, which would jettison, *sub silentio*, the entire commercial speech doctrine along with the tradition of contextual assessment basic to First Amendment jurisprudence. *See, e.g., Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

[19] As explained more fully below, *see* § II.B., the challenge to this distinction is the only First Amendment challenge properly before this Court. Having raised only this as-applied argument below, SBA is not free to bring what is essentially a facial challenge to the entire TSR on appeal. *See Kinney v. D.C.*, 994 F.2d 6, 10 (D.C. Cir. 1993) (noting "our rule that we will not hear an argument made for the first time on appeal" absent an "intervening change in the law"). Since *Reed*, apparently the sole basis for Plaintiff's new argument, was decided *before* Soundboard Association filed this lawsuit, there has been no relevant change in the law to relieve Plaintiff from the operation of the rule. Accordingly, this brief does not address the substance of SBA's remaining arguments.

A. Application Of The Telemarketing Sales Rule's Charitable Solicitation Regime To Soundboard Technology Is A Valid, Content-Neutral Restriction On A Manner Of Communication.

FTC staff's application of the TSR to soundboard technology is a valid restriction on a manner of communicating. "A basic principle of the First Amendment . . . permits the government to impose reasonable time, place, and manner regulations as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *ANSWER*, 846 F.3d at 406–07 (internal quotation marks omitted). The TSR meets those requirements.

1. The TSR as applied to charitable solicitations is content neutral.

The rule is content neutral. "Content distinctions are of special concern under the First Amendment because they pose the risk that government is favoring particular viewpoints or subjects." *ANSWER*, 846 F.3d at 403. Here, there is no such concern. The TSR does not single out "specific subject matter for differential treatment." *Reed*, 135 S. Ct. at 2230. Its applicability does not turn on "the topic discussed or the idea or message expressed." *Id.* at 2227. It plainly was not "adopted by the government because of disagreement with the message the speech conveys." *Id*. (citation, internal quotation marks and editing omitted).

Further, no inquiry into the content of the call is needed to determine whether the rule applies: the difference in treatment is easily "justified without reference to the content of the regulated speech." *Id.*

Rather, the TSR simply distinguishes between those who have already given to a charitable organization and those who have not. That distinction "simply reflects the commonsense understanding," *ANSWER*, 846 F.3d at 403, that people who have given to a particular charity in the past are less likely to feel intruded upon by an automatic call from that organization than are those with no prior relationship to the organization.

Earlier decisions have reached a similar conclusion. Like the TSR rule, the anti-robocall statute upheld in *Patriotic Veterans, Inc. v. Zoeller*, 845 F.3d 303 (7th Cir. 2017), contained exceptions: it did not apply to messages from school districts to students, parents, or employees; to messages between persons or entities with existing relationships; or to messages from employers to employees. *Id.* at 304. Yet the Seventh Circuit held that the exceptions "collectively concern who may be called, not what may be said, and therefore do not establish content discrimination." *Id*. at 305. The Eighth Circuit similarly found content-neutral a statute that exempted certain robocalls from a state law prohibition because "the exempted groups are defined by their relationship to the

caller, not by the content of their messages." *Van Bergen v. Minnesota*, 59 F.3d 1541, 1551 (8th Cir. 1995).

Finally, this Court has observed that the sort of "cursory examination" necessary to determine whether a statement is an "oral protest" rather than a random conversation, or a sign is for "an event" rather than some other purpose, does not render a law drawing those distinctions facially content-based. *ANSWER*, 846 F.3d at 404 (quoting *Hill v. Colorado*, 530 U.S. 703, 722–23 & n.30 (2000)).[20] Here, determining whether a call recipient has previously donated to the telefunder's charity does not require even "cursory examination" of the contents of a phone call. The TSR is not a content-based regime.

2. The TSR serves a substantial government interest and is tailored to advance that goal.

The TSR is narrowly tailored to foster a substantial government interest. The government has a significant interest in protecting consumers from telemarketing abuse, particularly in their homes. *See, e.g., Patriotic Veterans,* 845 F.3d at 304-05 (approving goals of "protecting phone subscribers' peace and quiet" and preventing phones "from frequently ringing with unwanted calls").

[20] *Reed* itself confirms this interpretation. Three Justices from the six-member majority noted explicitly in a concurring opinion that a sign restriction "distinguishing between on-premises and off-premises signs" would be permissible – despite the fact that one cannot know whether a sign is "on-premises" without looking at the speech it contains. *Reed*, at 135 S.Ct. 2218, 2233 (Alito, J., conc.).

The Supreme Court has consistently recognized that domestic privacy is a value of the highest order, *Florida Bar v. Went For It, Inc*., 515 U.S. 618, 625 (1995), and that "in the privacy of the home . . . the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *FCC v. Pacifica Found*., 438 U.S. 726, 748 (1978); *accord Frisby v. Schultz,* 487 U.S. 474, 484-485 (1988) ("a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions").

The TSR is carefully tailored to preserve call-recipients' privacy while still permitting communications from telefunders. 73 FED. REG. at 51194. It is only robocalls that are restricted, on the ground that they are "more likely to disturb their peace." *Id*. at 51195. And it is only calls to people who are not previous donors or members of the organization that are limited. *Id*. Dialers may freely contact those with whom they have a preexisting relationship – or, conceived differently, those who have consented to receive the calls. *Cf. Van Bergen*, 59 F.3d at 1550 ("Not only are the three exceptions based on relationship rather than content, but the exceptions also all rest on a single premise: that the caller has a relationship with the subscriber implying the subscriber's consent to receive the caller's communications.")

Plaintiff's objection to the exception for preexisting relationships puts SBA in the odd position of arguing that the TSR should be restricting *more*

speech (assuming communication through soundboard technology constitutes protected speech at all) than the FTC believes necessary. *Cf. United States v. Playboy Entm't Group, Inc*., 529 U.S. 803, 815 (2000) ("Simply put, targeted blocking is less restrictive than banning").

The TSR is well tailored to its purpose.

3. The TSR leaves open numerous means for charitable organizations to communicate with potential donors.

Finally, the TSR "preserves ample alternative channels" for companies seeking donations. *ANSWER*, 846 F.3d at 408. "The rule does not limit anyone's ability to say in multiple ways . . . the very same thing" being communicated with the soundboard technology. *Id*. Charitable organizations may contract with telefunders who use live callers instead of prerecorded calls. They may even use their own employees or volunteers to deliver prerecorded messages. *See* 73 FED. REG. at 51195; *Nat'l Fed'n for the Blind v. F.T.C.,* 420 F.3d 331, 341-42 (4th Cir. 2005). Eleemosynary groups can (and do) employ media besides the telephone, including email, billboards, bulk mail, social media, television, and door-to-door canvassing. *See Patriotic Veterans*, 845 F.3d at 306 (noting "calls from live persons, and even recorded spiels if a live operator first secures consent"). The available alternatives need not "be the speaker's first or best choice" or "provide … the same audience or impact for the speech." *Gresham v.*

Peterson, 225 F.3d 899, 906 (7th Cir.2000) (citations omitted). Rather, the relevant inquiry is simply whether the challenged regulation "provides avenues for 'the more general dissemination of a message.'" *Ross v. Early*, 746 F.3d 546, 559 (4th Cir. 2014) (quoting *Frisby*, 487 U.S. at 484). Here, those avenues plainly exist.

B. Plaintiff's Proposed Standard Would Effectively Eliminate The Government's Ability To Regulate Any Type Of Communications.

Soundboard Association's arguments about content neutrality and the proper interpretation of *Reed* go well beyond the only First Amendment-based question properly before this Court: whether the distinction in treatment between telefunding calls placed to previous donors and those made to non-donors involves an impermissible content-based distinction. *See, e.g.*, Appellant's Opening Br. at 21. As the FTC explains, the attempt to introduce new arguments is procedurally improper and substantively baseless. *See* FTC Br. at 29-48. But it is nonetheless instructive to consider just where SBA's proposed reading might lead.

In seeking to manufacture a constitutional violation, first out of the distinction between cold calls and calls to previous donors, then out of other delineations made in the TSR, Plaintiff interprets *Reed* to condemn the notion of treating *any* category of speech differently from any other. *See* Appellant's

Opening Br. at 21 ("the district court completely ignored the fact that, on its face, the robocall prohibition describes telephone calls based solely on their content—i.e., *consumer* messages ('to induce the purchase of any good or service') and *charitable* messages ('to induce a charitable contribution')."

Plaintiff apparently believes that the United States Constitution enshrines a right – one unchangeable by anything short of a constitutional amendment – to place an unlimited number of calls to Americans' homes and cell phones. Indeed, Plaintiff's theory of the First Amendment would prevent the government from limiting (without wholly banning) *any* technology in a way that distinguishes among callers or subject matter. The call telling you that your child's school is closed because of snow or other emergency? It would have to be made by a live person – in New York City, to all 1.1 million students in the municipal school system. NYC Dept. of Education, About Us.[21] The notice from the gas company of an upcoming service outage in your neighborhood? The reminder you receive from your doctor's office about an upcoming appointment? Each would have to be issued individually. *Contra In re Blackboard, Inc.* (allowing informational calls from schools and utility companies). The only alternative would be permitting robocalls from every huckster in the world.

[21] *At* http://schools.nyc.gov/AboutUs/default.htm

This Court may safely set aside the Hobson's choice that Plaintiff sets before it. The First Amendment is a less rigid safeguard than SBA would have the Court believe. *Reed* did not limitlessly expand the definition of content-based distinctions. *See Patriotic Veterans*, 845 F. 3d at 306 (stating that decisions upholding robocall regulations as valid time-place-manner restrictions "have not been called into question by *Reed*"); *Gresham v. Picker*, 214 F. Supp. 3d 922 (E.D. Cal. 2016) (the decision in *Reed* does not reach "relationship-based, consent-based, or emergency-based distinctions").

Plaintiff's apparent proposition that any law that applies differently to different categories of speech, or that applies only to certain categories of speech, is thereby subject to strict scrutiny flies in the face of established First Amendment jurisprudence. The existence of a separate commercial speech standard is, of course, itself a categorical distinction. *See Central Hudson*, 447 U.S. at 562-63 ("[t]he Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression."). Plaintiff's reading would require interpreting *Reed* to have eliminated the entirety of the commercial speech doctrine *sub silentio*. To put it mildly, it seems unlikely that the Supreme Court would have undertaken to eliminate the distinction in treatment between commercial speech and core speech – which it has explicitly recognized for at least 75 years, *see Valentine v. Chrestensen*, 316 U.S. 52

(1942); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Central Hudson*, 447 U.S. 557 – without ever saying so.

The far more plausible interpretation is that *Reed* does not apply to commercial speech. *See Matal v. Tam*, 137 S. Ct. 1744 (2017) (applying *Central Hudson* standard in a post-*Reed* case); *San Francisco Apartment Assoc. v. City and County of San Francisco*, 142 F. Supp. 3d 910, 922 (N.D. Cal. 2015) ("*Reed* is inapplicable to the present case, for several reasons, including that it does not concern commercial speech."); *Lamar Central Outdoor v. City of Los Angeles*, 245 Cal. App. 4th 610, 625 (2016) ("*Reed* . . . does not purport to eliminate the distinction between commercial and noncommercial speech. It does not involve commercial speech, and does not even mention *Central Hudson*"); *see also* Robert Niles, *Did* Reed v. Town of Gilbert *Silence Commercial Speech Doctrine? Early Signs Point to No*, BLOOMBERG LAW (Apr. 18, 2016)[22] ("[n]owhere in *Reed* does the court suggest that it intended to upset commercial speech doctrine: *Reed* doesn't discuss *Central Hudson* or other of the court's commercial speech cases"). As a recent article observed,

> Rather than applying to all free speech cases, *Reed* only applies to certain regulations of noncommercial speech and can be distinguished up, down, and sideways in other contexts. *Reed* does not displace existing

[22] *At* https://www.bna.com/reed-town-gilbert-n57982069969

> commercial speech doctrine, nor does it apply to general regulations of economic conduct.

Note, *Free Speech Doctrine After* Reed v. Town of Gilbert, 129 HARV. L. REV. 1981, 1981-82 (2016).

Apart from commercial speech, the Supreme Court has established numerous additional different standards of review based on categories of speech. To name but a few: Obscene speech is unprotected altogether, *Miller v. California*, 413 U.S. 15, 23-24 (1973), while indecent or profane speech in public is fully protected. *Cohen v. California*, 403 U.S. 15, 26 (1971). Laws limiting speech that incites imminent unlawful action are subject only to rational basis review. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). Fighting words may be entirely proscribed. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). If drawing categorical distinctions were made impermissible by *Reed*, as SBA suggests, then large swaths of First Amendment jurisprudence would have to be invalidated.[23]

Finally, *Reed* did not purport to change the long-established tradition in First Amendment jurisprudence of paying careful attention to the particular

[23] Cases extending *Reed* beyond its particular context have paid insufficient attention to the limits inherent in the opinion and its silence as to long-established precedent. *See, e.g., Cahaly v. LaRosa*, 796 F.3d 399 (4th Cir. 2015) (condemning the use of "consumer … message" (i.e., commercial speech) as a content-based category).

context and medium in which a given message is expressed. "Each method of communicating ideas is . . . a law unto itself" and the law "must reflect the . . . differing natures, values, abuses and dangers of each method." *Metromedia,* 453 U.S. at 501; *accord Lamar Central Outdoor,* 245 Cal. App. 4th at 625 ("*Reed* did not cite *Metromedia II* either, so *Reed* certainly did not overrule or disapprove that precedent").

Reed requires no wholesale overthrowing of First Amendment doctrine. Just as *Metromedia* was "about the law of billboards," 453 U.S. at 501, so, "[p]roperly understood," 135 S.Ct. at 2233, was *Reed* essentially about the law of (noncommercial) signs. It should have no impact on this case.

CONCLUSION

While Soundboard Association "invites this Court to be the first to say" that "the TCPA is unconstitutional" as applied to fundraising speech, the Court should, like its predecessors, decline Plaintiff's "gracious invitation." *Mey v. Venture Data, LLC,* -- F.Supp.3d --, No. 5:14-cv-123, 2017 WL 1193072, at *16 (N.D.W.Va., Mar. 29, 2017).

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Respectfully submitted,

/s/ *Thomas Bennigson*

Thomas Bennigson
Counsel of Record
Seth E. Mermin
Daniel Contreras
PUBLIC GOOD LAW CENTER
3130 Shattuck Avenue
Berkeley, CA 94705
(510) 336-1899
(510) 849-1536 (facsimile)
TBennigson@publicgoodlaw.org

Counsel for Amicus Curiae

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DATED: August 4, 2017

/s/ *Thomas Bennigson*
Thomas Bennigson

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I certify that I caused a copy of the foregoing Brief to be served via the Court's CM/ECF system on all counsel of record this 4th day of August, 2017.

/s/ *Vanessa Buffington*
Vanessa Buffington