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

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

LINGO TELECOM LLC'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION AND BACKGROUND

Plaintiffs move to preliminarily enjoin Steve Kramer, Life Corporation ("Life Corp"), and Lingo Telecom, LLC ("Lingo") from placing illegal robocalls. ECF No. 47-1 ("PI Mot."). The request comes months after the end of a brief robocall campaign—the "New Hampshire Robocalls"—that purportedly misled voters about the New Hampshire Primary. Those calls "were created by Steve Kramer," *id.* at 4, and, as a result, Plaintiffs devote nearly their entire motion to Kramer's misdeeds, Kramer's motivations, and the likelihood that Kramer will act again. But Lingo is not Kramer. It is a telephone company[1] that did not know—and could not have known—the contents of the calls or any unlawful motivations of the parties that created and placed them. Indeed, once Lingo learned of the New Hampshire Robocalls, it immediately terminated Life Corp as its customer. Thus, whatever case Plaintiffs may have against Kramer or Life Corp, they are not entitled to a preliminary injunction against Lingo.

Plaintiffs fail to show that they are likely to succeed on any of their claims against Lingo. Plaintiffs cannot establish standing to pursue prospective relief against Lingo because they do not plausibly allege that Lingo will imminently harm them or that an injunction would redress their harms. Even if Plaintiffs had standing, they have failed to plausibly allege any claims against Lingo—much less show a likelihood of success on them—as Lingo has already explained in its motion to dismiss. *See* ECF No. 53-1 ("MTD Mem.").

Plaintiffs fail on the other preliminary-injunction factors too. They fail to show irreparable harm that would befall them absent an injunction against Lingo and instead tally up harms that have already occurred and that a preliminary injunction would not solve. Moreover, it would be

[1] Specifically, Lingo is a communications service provider that offers IP-based voice, data, mobile, and other services to businesses, consumers, and other carriers.

inequitable for the Court to enter an injunction against Lingo based entirely on the acts of Kramer before Kramer has even appeared. And the remedy Plaintiffs request is unlawful and ineffectual.

For these reasons, the Court should deny Plaintiffs' motion as to Lingo.

STANDARD OF REVIEW

A "preliminary injunction is an extraordinary remedy never awarded as of right." *Sosa v. Massachusetts Dep't of Correction*, 80 F.4th 15, 25 (1st Cir. 2023) (quotations omitted). To obtain a preliminary injunction, a plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 42 (1st Cir. 2024) (quotations omitted).

ARGUMENT

I. PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

Plaintiffs are unlikely to succeed because they cannot show that this Court has Article III standing over their claims for injunctive relief against Lingo. Even if Plaintiffs could clear that hurdle, their claims against Lingo are meritless.

A. Plaintiffs Are Unlikely To Succeed In Invoking This Court's Jurisdiction Over Their Requests For Prospective Relief Against Lingo.

In all cases, a plaintiff must establish Article III "standing to obtain the relief sought." *McBreairty v. Miller*, 93 F.4th 513, 518 (1st Cir. 2024). Because "showing a likelihood of success on the merits necessarily includes a likelihood of the court's reaching the merits," Plaintiffs must show they are likely to succeed on "establishment of jurisdiction, including standing." *Pietrangelo v. Sununu*, 2021 WL 1254560, at *5 (D.N.H. Apr. 5, 2021) (Barbadoro, J.) (quotations and alterations omitted). "For there to be standing, the plaintiff must have suffered an injury in fact, that is fairly traceable to the challenged conduct, and that may be redressed by the requested relief."

McBreairty, 93 F.4th at 518. And "standing is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). "Standing for injunctive relief depends on whether the plaintiff is likely to suffer future injury." *In re Evenflo Co., Mktg., Sales Pracs. & Prod. Liab. Litig.*, 54 F.4th 28, 41 (1st Cir. 2022) (alterations and quotations omitted). Specifically, the future injury must be "actual or imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992) (quotations omitted); *see Roe v. Healey*, 78 F.4th 11, 20 (1st Cir. 2023).

1. Plaintiffs Fail To Allege Or Show Likely Success In Establishing An Imminent Future Injury Traceable To Lingo.

Plaintiffs lack standing to pursue the prospective relief they seek against Lingo in their motion because they have failed to show any imminent future injury traceable to Lingo. Although Plaintiffs claim there "is every reason to believe that" Lingo "will continue to transmit deceptive and coercive AI-generated robocalls," Compl. ¶ 59, ECF No. 1, they fail to identify any such reason. And "[c]onclusory assertions" do not "suffice" for standing. *Dantzler, Inc. v. Empresas Berrios Inventory & Operations, Inc.*, 958 F.3d 38, 47 (1st Cir. 2020); *see also Roe*, 78 F.4th at 21 ("merely invoking the possibility of these events is not enough").

Plaintiffs also allege that Lingo previously "faciliat[ed] unlawful robocalls." Compl. ¶ 59. But Plaintiffs cite to "investigations" and "*suspected* illegal traffic." *Id.* ¶ 24 (emphasis added); PI Mot. 8. And even if Lingo previously carried unlawful robocalls, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief." *Lujan*, 504 U.S. at 564 (quotations and alterations omitted); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983); *Roe*, 78 F.4th at 21; *Gray v. Cummings*, 917 F.3d 1, 19 (1st Cir. 2019).

If anything, Lingo's past behavior confirms that it is unlikely to cause Plaintiffs future harm. Lingo has long prohibited its customers from carrying spoofed traffic, Lingo Telecom, LLC,

Tariff FCC No. 1, § 2.3.3(A) (Aug. 2, 2022) ("*Lingo FCC Tariff*"), *available at* https://tinyurl.com/5n6px997, and from using Lingo's services "for any unlawful purposes," *id.* § 2.2. Life Corp, Plaintiffs allege, did not abide by these terms and placed illegal calls from a number it lacked the right to use. Compl. ¶ 32; PI Mot. 5. After Lingo received "notice" of the New Hampshire Robocalls, it quickly "suspen[ded]" Life Corp from using Lingo's services. *See* Johnson Decl. (attached), Ex. A. Lingo terminated Life Corp as a customer on February 7. *Ibid.*

Thus, it is "speculative" at best—and realistically, unlikely—that Plaintiffs' injury will "imminently" recur in a manner traceable to Lingo. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013). Life Corp is no longer a Lingo customer, so any future injury would have to come from "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560. That unknown third party would have to violate the law and its contract to place an illegal robocall. That illegal robocall would have to use AI technology and be election-related, deceptive, and convincing enough to trick the individual plaintiffs into not voting or to require the organizational plaintiffs to divert additional resources. "Such a sequence is too attenuated to support a claim that future injury is certainly impending, or that there is a substantial risk it will occur." *Roe*, 78 F.4th at 21; *Clapper*, 568 U.S. at 414. Absent a likely future injury, Plaintiffs lack standing. *Ibid.*

Plaintiffs also do not show Lingo is more likely to carry illegal calls than other telephone companies after terminating Life Corp. Instead, Lingo "face[s] much the same risk of future [illegal traffic] as virtually every" provider. *Webb v. Injured Workers Pharmacy, LLC*, 72 F.4th 365, 378 (1st Cir. 2023). Thus, Plaintiffs "lack standing" against Lingo for this reason too. *Ibid.*

2. Plaintiffs Fail To Allege Or Show Likely Success In Establishing That A Prospective Remedy Against Lingo Would Redress Their Injuries.

Plaintiffs lack standing for another independent reason. Even if they showed an imminent injury, it could not "be redressed by the requested relief." *McBreairty*, 93 F.4th at 518. Plaintiffs'

motion and Complaint ask the Court to preliminarily enjoin all Defendants (including Lingo) from distributing (i) AI-generated robocalls without consent, (ii) spoofed calls, and (iii) unlawful calls. *See* ECF No. 47-27, ¶¶ 1–3 ("Prop. Order"); *see* Compl. Prayer for Relief, ¶¶ a–e.

Plaintiffs' requested relief "would not remedy the alleged injury"—i.e., future unlawful robocalls. *Haaland v. Brackeen*, 599 U.S. 255, 292–93 (2023). The Federal Communications Commission ("FCC"), law enforcement, and industry have invested years and countless resources to "combat" illegal robocalls using "an incremental, multi-pronged approach." *Advanced Methods to Target & Eliminate Unlawful Robocalls*, Seventh Report and Order, 38 FCC Rcd. 5404, ¶¶ 6–7, 2023 WL 3686042 (2023) ("*Seventh Robocall Report*"). The reason for this approach is that robocalls are a "complex problem" with "no 'silver bullet' fix." *Id.* ¶ 1. This is because there are large volumes of both illegal robocall traffic *and* "wanted, or even essential, traffic." *Id.* ¶ 55. Regulators and voice providers are not clairvoyant, nor, under the Wiretap Act, are they allowed to listen in on customer calls, absent exceptional circumstances. *See* 18 U.S.C. § 2511(1)(a) (generally prohibiting "intercept[ion]" of calls). So the trick is stopping illegal robocalls without knowing their content *ex ante* and without impeding legitimate robocalls, such as "emergency notifications" or "appointment reminders." *Seventh Robocall Report* ¶ 55.

Plaintiffs' request for prospective relief flies in the face of this reality by asking the Court to order Lingo to simply not carry illegal calls. If only it were so easy. Lingo can—and does—take steps to mitigate illegal traffic, pursuant to regulations promulgated by the FCC. *See, e.g.*, Lingo Management, LLC, Robocalling Mitigation Plan v4.2024, *available at* https://tinyurl.com/35jzntwp. But neither Lingo nor any other telephone company can wave a wand and prohibit every person from picking up the phone and saying something unlawful. Likewise, Lingo cannot prohibit all spoofed calls because spoofing is often legal. *See, e.g.*, *Walsh*

v. TelTech Sys., Inc., 821 F.3d 155, 163 (1st Cir. 2016) (noting "spoofing's legitimate importance for . . . consumers who wish to provide a temporary call-back number" (quotations omitted)). Illegal robocalls are a real and complex problem that can result in consumer injury. But that "asserted injury" is not "redressable in federal court" by an injunction against a single telephone company, *United States v. Texas*, 599 U.S. 670, 676 (2023), because no order from this Court can provide the "'silver bullet' fix" Plaintiffs request, *Seventh Robocall Report* ¶ 1.

The Court should dismiss Plaintiffs' requests for prospective relief as to Lingo for lack of standing. *See, e.g.*, *Do No Harm v. Pfizer Inc.,* 96 F.4th 106, 121 (2d Cir. 2024). At minimum, the Court should deny Plaintiffs' motion for a preliminary injunction on standing grounds.

B. Plaintiffs Are Unlikely To Succeed On The Merits Of Their Claims Against Lingo.

1. Plaintiffs' Election-Law Claims Are Unlikely To Succeed Against Lingo.

a. Plaintiffs Are Unlikely To Show That Lingo Intimidated, Threatened, Or Coerced Anyone In Violation Of The VRA.

The Voting Rights Act ("VRA") provides that no person "shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person" to stop them from voting. 52 U.S.C. § 10307(b). Plaintiffs argue the New Hampshire Robocalls were intimidating because they sought to mislead voters with a "deepfake" of President Biden's voice. PI Mot. 13–14. The deepfake, Plaintiffs say, told voters to not vote in the primary and instead "save" their vote for the General Election. *Ibid.* They claim the calls were "targeted" toward "likely Democratic voters." *Id.* at 14. And they claim that "the caller identification information . . . was spoofed." *Ibid.* (quotations omitted). However, Lingo did none of these things. The calls "were created by *Steve Kramer*" and "distribute[d]" by "*Life Corp*." PI Mot. 4–5 (emphasis added). Lingo was merely the telephone company. It did not create the calls, place them, or review their content.

Plaintiffs fail to explain why *Lingo* is liable for Kramer and Life Corp's calls. Indeed, they do not mention Lingo once in their VRA merits section. *Id.* at 10–15. It "is not on [this Court] to construct a party's argument for him." *United States v. Cruz-Ramos*, 987 F.3d 27, 40 (1st Cir. 2021). Plaintiffs' failure to articulate a theory of VRA liability as to Lingo "waives this claim" for purposes of the motion. *Ibid*; *see also FinSight I LP v. Seaver*, 50 F.4th 226, 236 (1st Cir. 2022) (explaining claim "devoid of developed argumentation" is "waived"). For that reason alone, Plaintiffs are unlikely to succeed on their VRA claim.

Even if this Court were to "wink-wink these forfeiture and waiver issues away," *Universitas Educ., LLC v. Granderson*, 98 F.4th 357, 374 (1st Cir. 2024), Plaintiffs' VRA claim against Lingo would still fail. Plaintiffs say in their background section—but not their VRA argument—that Lingo gave "certain of the calls 'A-level STIR/SHAKEN' attestations." PI Mot. 5, 8. Perhaps Plaintiffs mean that (i) STIR/SHAKEN attestations are the equivalent of spoofing, and (ii) spoofing a phone number constitutes voter intimidation. *Ibid.* If that is their argument, it is wrong on the latter contention alone. Displaying incorrect caller ID information—the only act Plaintiffs attribute to Lingo other than carrying the calls—did not intimidate voters.

But even if it did, Lingo did not spoof the calls. Plaintiffs conflate two distinct concepts: (i) spoofing, and (ii) STIR/SHAKEN attestations. Spoofing occurs where "*the caller* falsifies caller ID information that appears on a recipient's phone." *Call Authentication Trust Anchor*, Report and Order and Further Notice of Proposed Rulemaking, 35 FCC Rcd. 3241, ¶¶ 1–2, 2020 WL 1634553 (2020) (emphasis added) ("*FCC Call Authentication Order*"). STIR/SHAKEN, by contrast, is a standard implemented by voice providers to "reduce the effectiveness of illegal spoofing." *Id.* ¶ 2. Under STIR/SHAKEN, providers are legally required to "attest" to their level of confidence that a call is coming from the phone number that appears on the caller ID, with A

being the highest confidence and C being the lowest. *Id.* ¶ 8; *see* 47 U.S.C. § 227b(b)(1); 47 C.F.R. § 64.6301(a). Because not all spoofing is illegal, "STIR/SHAKEN does not distinguish legal calls from illegal ones." *Advanced Methods to Target & Eliminate Unlawful Robocalls*, Third Report and Order, Order on Reconsideration, and Fourth Further Notice of Proposed Rulemaking, 35 FCC Rcd. 7614, ¶ 48, 2020 WL 4187350 (2020) ("*FCC Unlawful Robocalls Order*").

Lingo did not spoof the call because it was the provider, not "the caller." *FCC Call Authentication Order* ¶ 1. Although Plaintiffs' motion plays fast and loose with this basic fact, the FCC notice they cite clearly states "*[t]he caller* chose to display in the caller identification field of the calls, a number that apparently was not assigned to them." *See* ECF No. 47-9, at 4 (emphasis added). Because *Life Corp* placed the calls at *Kramer's* direction, one or both of those parties chose the number to be displayed in the Caller ID field—not Lingo. So, at most, Plaintiffs accuse Lingo of not knowing that the calls were spoofed by Life Corp and/or Kramer. But failing to identify a spoofed call (or giving it the wrong attestation) did not intimidate any voters. Indeed, if Lingo had given the calls a C-level attestation, the calls would have still been spoofed, would have still contained the same deepfake message, and would have still targeted the same call recipients.

Plaintiffs also say in their background section—not their VRA argument—that Life Corp "relied on Lingo's services to disseminate the robocalls." PI Mot. 5. To the extent Plaintiffs are suggesting that Lingo is liable under the VRA for third-party calls placed on its network, they are mistaken. *See* MTD Mem. 6–9. For one, that theory of liability is inconsistent with the "ordinary usage" of the statutory terms. *K.L. v. Rhode Island Bd. of Educ.*, 907 F.3d 639, 642 (1st Cir. 2018). For example, if person A threatened person B over the telephone, nobody in ordinary usage would say that the telephone company threatened person B. *Cf. Ashworth v. Albers Med., Inc.*, 410 F.

Supp. 2d 471, 481 (S.D. W.Va. 2005) ("telephone companies are not liable to those defrauded when the telephone lines are used to perpetrate fraudulent schemes.").

That ordinary understanding is also reinforced by "the backdrop of the common law." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 589 U.S. 327, 335 (2020); *see also United States v. Reynolds*, 98 F.4th 62, 71 (1st Cir. 2024). Prior to the passage of the VRA in 1965, it was understood at "common law" that third-party intermediaries were not liable for their customers' messages except for "rare cases where the transmitting agent of the [intermediary] happened to know that the message was spurious." *See, e.g.*, *O'Brien v. W. U. Tel. Co.*, 113 F.2d 539, 541–43 (1st Cir. 1940) (affirming telegraph company's privilege). As the First Circuit explained, it "would be preposterous" to impose a duty on intermediaries to "carefully scrutinize[ ]" their customers' messages "to see if they conveyed any defamatory meaning." *Id.* at 543.

That commonsense rationale is even more true today. Shortly after passage of the VRA, Congress made it generally illegal for intermediaries to review their customers' messages. *See* Pub. L. No. 90-351, § 802, 82 Stat. 197, 213–14 (1968). Thus, as Congress has repeatedly amended the VRA, *see, e.g.*, Pub. L. No. 109-246, 120 Stat. 577 (2006), courts have continued to employ the principle that intermediaries are not liable for their customers' messages. *See, e.g.*, *Lunney v. Prodigy Servs. Co.*, 94 N.Y.2d 242, 249–51 (1999) ("transmitting e-mail is akin to that of a telephone company, which one neither wants nor expects to superintend the content of its subscribers' conversations"), *cert. denied* 529 U.S. 1098 (2000); *Anderson v. New York Tel. Co.*, 35 N.Y.2d 746, 750–51 (1974) (holding telephone company not liable for libel, just as "Xerox Corporation" could not "be held responsible were one of its leased photocopy machines used to multiply a libel many times"); *Marczeski v. Law*, 122 F. Supp. 2d 315, 325–27 (D. Conn. 2000) (holding creator of Internet "chat room" could not be held liable for libel).

Courts read federal statutes to accord with these basic background principles. Where a statute made it unlawful to "disclose" certain communications, the Seventh Circuit held that web-hosting providers did not "disclose any communication" where their customers posted information on a website. *See Doe v. GTE Corp.*, 347 F.3d 655, 658–59 (7th Cir. 2003). That court's analogy is telling: "[j]ust as the telephone company is not liable as an aider and abettor for tapes or narcotics sold by phone," a "web host cannot be classified as an aider and abettor of criminal activities conducted through access to the Internet." *Id.* at 659. Similarly, where a statute prohibited making obscene communications, courts and the FCC alike concluded that communications providers "will not generally be liable for illegal transmissions" under the federal statute "unless it can be shown that they knowingly were involved." *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, Memorandum Opinion, 2 FCC Rcd. 2819, ¶ 8–9, 1987 WL 344925 (1987). Just like the statutory terms "disclose" and "communication" do not impute liability to the intermediaries through which those disclosures or communications are made, the statutory terms "intimidate, threaten, or coerce" do not impute liability to the intermediaries through which those intimidations, threats, or coercions are made.

"This natural reading of [the statute] also avoids the absurd results that would follow from" a contrary interpretation. *McNeill v. United States*, 563 U.S. 816, 822 (2011). Plaintiffs would hold liable a phone company that played no part in creating the unlawful content and that is legally prohibited from reviewing the content. *See* 18 U.S.C. § 2511(1)(a). And the phone company would have risked liability under its tariffs and federal law if it failed to carry its customers' calls. *See, e.g.*, 47 U.S.C. §§ 201, 202; *see also Lingo FCC Tariff*. That outcome is absurd on its face. It would also raise serious constitutional concerns by holding a party liable for an offense it did not itself commit and had no way to know was being committed. *See, e.g.*, *United States v.*

Collazo-Aponte, 216 F.3d 163, 196 (1st Cir. 2000) (explaining "due process constrains" liability "where the relationship between [a party] and the substantive offense is slight"), *vacated on other grounds*, 532 U.S. 1036 (2001); *see Kong v. United States*, 62 F.4th 608, 616 (1st Cir. 2023) (construing statute to avoid "serious constitutional concerns").

Plaintiffs are thus unlikely to succeed in showing that Lingo violated the VRA.

b. Plaintiffs Are Unlikely To Show That The Calls Were Intimidating Threatening, Or Coercive.

Even if the messages from the New Hampshire Robocalls could be imputed to Lingo (they cannot), the New Hampshire Robocalls contained no intimidation, threats, or coercion that would violate the VRA. Plaintiffs say, at most, that the calls attempted to *deceive* voters. *See* PI Mot. 3 (arguing calls "deceived voters"), 12 ("manipulation and suggestion"). But Section 11(b) says nothing about deception. By contrast, the very next subsection—Section 11(c)—penalizes "giv[ing] false information." 52 U.S.C. § 10307(c). The one after that penalizes "mak[ing] any false, fictitious, or fraudulent statements." *Id.* § 10307(d). "So Congress knows how to add" a prohibition on deception, and "excluded one" in Section 11(b). *Ferrari v. Vitamin Shoppe Indus. LLC*, 70 F.4th 64, 73 (1st Cir. 2023). Congress also separately prohibited "interfer[ing]" "in any manner" with "the exercise of the free right of suffrage," 52 U.S.C. § 10102, showing that it also knows how to add a broader catchall that would presumably encompass deception. Courts "generally presume differences in language like this convey differences in meaning." *Rudisill v. McDonough*, 601 U.S. 294, 308 (2024) (quotations omitted). Here, these linguistic presumptions are especially potent because a broad construction would potentially outlaw inadvertent mistakes or opinions about the voting process, raising "serious questions of the validity of [the statute] under the First Amendment." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–78 (1988) (narrowly construing the phrase "threaten, coerce, or

restrain" to avoid First Amendment concerns). Thus, Congress's prohibition on intimidation, threats, and coercion does not also prohibit the deception alleged to have occurred in this case.

c. Plaintiffs Are Unlikely To Show That Lingo Knowingly Misrepresented Or Delivered Robocalls In Violation Of State Law.

Plaintiffs' claims fare no better under state election law. *See* MTD Mem. 10–12. To succeed on a claim under NH RSA 664:14-b, I, Plaintiffs must prove that Lingo "knowingly misrepresent[ed] the origin of a telephone call." Plaintiffs argue that "Defendants" (collectively) spoofed caller ID information and used a deepfake to impersonate President Joe Biden. PI Mot. 17–18. But Lingo had nothing to do with either alleged misrepresentation. As explained, spoofing occurs where "*the caller* falsifies caller ID information that appears on a recipient's phone," *FCC Call Authentication Order* ¶ 1 (emphasis added), and Lingo was not the caller, *see supra* Section I.B.1.a. Indeed, Plaintiffs admit that "*Kramer* directed the caller ID to display" the wrong "phone number." PI Mot. 17–18 (emphasis added). And they do not suggest that Lingo knew about the spoofing. They in fact say the opposite: Lingo gave the calls "A-level STIR/SHAKEN attestations," indicating that Lingo believed that the calls came "from the number displayed on Caller ID." PI Mot. 5 n.2; *accord Lingo FCC Tariff* § 2.3.3(A) (prohibiting customers from spoofing). Likewise, Plaintiffs allege that *Kramer* created the deepfake, PI Mot. 4–5, and they fail to allege that Lingo had any knowledge of its existence—much less a role in shaping its content. Thus, Plaintiffs are unlikely to succeed in showing that Lingo violated NH RSA 664:14-b, I.

The same is true for Plaintiffs' claim under NH RSA 664:14-a, II. For that claim, Plaintiffs must prove that Lingo "deliver[ed] or knowingly cause[d] to be delivered a prerecorded political message" that did not disclose the entities responsible for the call. But again, Plaintiffs do not argue that Lingo had any role in shaping the content of the prerecorded message in the New Hampshire Robocalls. Lingo would not have been able to screen for—or add—any of the

disclosures that Plaintiffs allege are missing. Thus, Plaintiffs are unlikely to succeed that Lingo violated NH RSA 664:14-a, II.

Plaintiffs also cannot hold Lingo liable under these statutes based on the contents of calls placed by Lingo's customers. Like federal courts, New Hampshire courts construe statutory "language according to its plain and ordinary meaning." *Coffey v. New Hampshire Jud. Ret. Plan*, 957 F.3d 45, 49 (1st Cir. 2020) (quoting *In re Carrier*, 165 N.H. 719, 721 (2013)). New Hampshire courts also construe statutes in accord with "the common law unless the statute clearly expresses" a contrary "intent." *State v. Etienne*, 163 N.H. 57, 74 (2011). And they construe statutes to avoid "absurd" results. *Coffey*, 957 F.3d at 50. The same limitations on intermediary liability that apply under federal law, therefore, necessarily apply also under the analogous New Hampshire statutes.

So, as with the VRA, the New Hampshire election-law statutes do not impose vicarious liability on voice providers for their customers' calls. Nobody in ordinary usage or at common law would say that a telephone company "knowingly misrepresents" information when one of its customers makes a misrepresentation in a phone call. *See supra*. Similarly, the "word 'delivers,' as used in [the common law]," does not encompass "one who merely makes available to another equipment or facilities that he may use himself for general communication purposes," including "a telephone company." Restatement (Second) of Torts § 581 (Am. L. Inst. 1977). Interpreting the statutes in accord with this plain meaning also avoids an absurd and constitutionally dubious outcome: imposing liability on telephone companies for the contents of messages that they are unable to review, monitor, or edit. Thus, Plaintiffs cannot use the actions of Kramer and Life Corp to show a likelihood that *Lingo* "knowingly misrepresented" information, NH RSA 664:14-b, I, or "deliver[ed]" calls, NH RSA 664:14-a, II, in violation of New Hampshire law.

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

Plaintiffs' VRA and state-law claims fail for another independent reason: they are unlikely to show that Lingo proximately caused any injury from the election-law violations. *See* MTD Mem. 13–14. Courts "generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). The "proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Id.* at 133.

Plaintiffs are unlikely to show that Lingo proximately caused any harm to them. The First Circuit's decision in *Walsh v. TelTech Sys., Inc.*, 821 F.3d 155 (1st Cir. 2016) is instructive. That case concerned "a prepaid minutes-based calling service—named SpoofCard—that allow[ed] customers to disguise the phone number from which they place calls" and to "alter their voices." *Id.* at 157–58. A third party "used that service to disguise her identity" and deliver harmful messages to the plaintiff. *Ibid.* The plaintiff sued the provider of SpoofCard for violating a "broad . . . consumer protection statute." *Id.* at 160. The First Circuit held that the plaintiff had "not met her burden of establishing proximate causation" because the third-party customer's "actions were" not "reasonably foreseeable to" the provider where there were "illegitimate and legitimate uses of the SpoofCard service." *Id.* at 163–64. Just like the provider of SpoofCard, Lingo's offering of a legitimate service is "too remote" to subject it to liability for the misdeeds of its customers.[2] *Ibid.*

[2] Indeed, the risk of wrongdoing from the SpoofCard service was, if anything, more foreseeable than the risk of wrongdoing from Lingo's voice service. SpoofCard published "promotional material" expressly highlighting "illegitimate" uses of the service. *Walsh*, 821 F.3d at 163–64. Here, by contrast, there is no allegation that Lingo promoted any "illegitimate" use of its service. To the contrary, it prohibits such unlawful uses. *See Lingo FCC Tariff* § 2.2.1.

e. Plaintiffs Are Unlikely To Succeed On Their Election-Law Claims Because They Lack Valid Causes Of Action For Them.

(1) Voting Rights Act Claim

Because "there exists no private right of action under Section 11(b) of the VRA," *Andrews v. D'Souza*, 2023 WL 6456517, at *11 (N.D. Ga. Sept. 30, 2023), Plaintiffs are unlikely to prevail in alleging Lingo "violate[d] Section 11(b) of the VRA," PI Mot. 10; *see* MTD Mem. 14–16.

The "power to create a private right of action . . . lies exclusively with Congress." *Iverson v. City Of Bos*., 452 F.3d 94, 100 (1st Cir. 2006); *see also Buntin v. City of Bos.*, 857 F.3d 69, 74 (1st Cir. 2017). If Congress "has not explicitly provided for private enforcement," then a private right of action "must be implied." *Bonano v. E. Caribbean Airline Corp.*, 365 F.3d 81, 83–84 (1st Cir. 2004). Such implied rights of action "must be 'unambiguously conferred.'" *Allco Renewable Energy Ltd. v. Massachusetts Elec. Co.*, 875 F.3d 64, 69 (1st Cir. 2017). And "the existence of other express enforcement provisions" may "preclude[ ] . . . a private right of action." *Id.* at 70.

This Court can "begin with the obvious: Congress . . . has not explicitly provided for private enforcement of" Section 11(b). *Bonano*, 365 F.3d at 83–84. Section 11 says nothing about private enforcement. *See* 52 U.S.C. § 10307. The VRA instead contemplates private suits by "an aggrieved person" only to "enforce the voting guarantees of the fourteenth or fifteenth amendment." *Id.* § 10302(a)–(c). Even if that provision creates a private right of action, *but see Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204, 1211–13 (8th Cir. 2023), it offers no help to Plaintiffs. Because "Section 11(b) stems from the Elections Clause rather than the 14th or 15th Amendments," it does not fall within this "statutory language." *Andrews*, 2023 WL 6456517, at *11; *accord League of United Latin Am. Citizens - Richmond Region Council 4614 v. Pub. Int. Legal Found.*, 2018 WL 3848404, at *3 (E.D. Va. Aug. 13, 2018). Thus, any private right of action "must be implied." *Bonano*, 365 F.3d at 84.

The VRA's "other express enforcement provisions" strongly "cut against finding an implied private cause of action." *Allco*, 875 F.3d at 70; *see also Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). The statute gives the Attorney General the right to enjoin violations of Section 11. *See* 52 U.S.C. § 10308(d). For other provisions, the Attorney General may also seek monetary and criminal penalties. *Id.* § 10308(a)–(c). And, as explained, the statute's text contemplates a cause of action for other provisions of the VRA. *Id.* §§ 10302(a)–(c), 10310(e). Because the VRA "expressly provide[s] for an intricate enforcement framework, involving both [the Government] and private litigants," any "assertion that the [statute] gives" Plaintiffs an unenumerated "private right" is "unavailing." *Allco*, 875 F.3d at 73–74; *accord Andrews*, 2023 WL 6456517, at *11.

(2) State-Law Claims

Plaintiffs are unlikely to succeed on their claims under NH RSA 664:14-a, II and NH RSA 664:14-b, I because they were not "injured," as required to bring a private suit under those provisions. *See* NH RSA 664:14-a, IV(b); NH RSA 664:14-b(II)(b); *accord* MTD Mem. 16–18.

The Supreme Court of New Hampshire's decision in *O'Brien v. New Hampshire Democratic Party*, 166 N.H. 138 (2014) is instructive. There, a plaintiff alleged a violation of NH RSA 664:14-a, II against a defendant that placed political robocalls without "the required disclosures." *Id.* at 140–41. Because the statute allows suit only by a "person injured by another's violation," the court explained that the plaintiff had to show "(1) a violation of the statute; (2) an injury; and (3) that the violation of the statute caused the injury." *Id.* at 143 (quotations omitted). The court found that a call-recipient voter would not be able to establish the third prong of this showing where she submitted an affidavit stating that she was "confused about the legitimacy of the message," which "did not make sense to" her.[3] *Id.* at 145 (quotations omitted). The court

[3] Plaintiffs attempt to downplay the New Hampshire Supreme Court's analysis as "dicta." PI Mot.

explained that the voter could not establish that her injury was "caused by" the statutory violation because her "confusion flowed from the political content of the message, rather than from the alleged absence of the required disclosure." *Ibid.*

Like the voter in *O'Brien*, Plaintiffs here have failed to allege an injury stemming from a violation of NH RSA 664:14-a, II or NH RSA 664:14-b, I. To begin, Plaintiffs do not claim to have suffered any "legal injury against which the law was designed to protect." *O'Brien*, 166 N.H. at 142. The statutes at issue here are designed to protect against voter confusion.[4] *See id.* at 145 (assessing voter confusion to analyze statutory standing). But all of the individual plaintiffs knew "the call was illegitimate." PI Mot. 3. The organizational plaintiffs also make no allegation that they were confused. Because Plaintiffs were not confused, they were not "injured" for purposes of either state statute.

But even if Plaintiffs alleged a cognizable statutory injury, they fail to establish that it comes "from the alleged" violations. *O'Brien*, 166 N.H. at 145. The crux of Plaintiffs' case is that the New Hampshire Robocalls deceived voters by telling them "that exercising their right to

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19. But courts are "bound by" the "considered dicta" of a controlling jurisdiction. *United Nurses & Allied Pros. v. NLRB*, 975 F.3d 34, 40 (1st Cir. 2020); *see Cont'l W. Ins. Co. v. Superior Fire Prot., Inc.*, 2019 WL 1318274, at *5 & n.11 (D.N.H. Mar. 22, 2019) (Laplante, J.) ("the court is bound by the New Hampshire Supreme Court's construction of the statute").

[4] Plaintiffs claim that the "injury" is (i) the interference with their right to privacy and the quiet enjoyment of their home, and (ii) not knowing who made the call or paid for the message. PI Mot. 19. Both theories "improperly conflate a statutory violation with an injury." *O'Brien*, 166 N.H. at 145. The misrepresentation and lack of disclosures are the violation; the resulting confusion is the injury. By conflating these concepts, Plaintiffs' theories of injury do not work under the statutes. First, if the injury stemmed from merely receiving the call, then it would not be "caused by" the misrepresentation or omitting the required disclosures. *Contra* NH RSA 664:14-a, IV(b); NH RSA 664:14-b, II(b). Second, the injury cannot be merely not knowing who made or paid for the call (or merely receiving a misrepresentation) because then every violation would necessarily satisfy the statutory injury requirement, and *O'Brien* rejected that "a violation of the statute is, in and of itself, sufficient to allow the plaintiff to recover." 166 N.H. at 143–45 (rejecting "construction" that "would render meaningless the word 'injured'").

vote in the New Hampshire Primary" would render them "unable to vote in the General Election." PI Mot. 13–14. Thus, any injury necessarily "flowed from the political content of the message, rather than from the alleged absence of the disclosure." *O'Brien*, 166 N.H. at 145. Even if the message disclosed Kramer as "the fiscal agent" or displayed a different phone number, that "additional information would not have clarified" that voters could participate in the General Election if they voted in the primary. *Ibid.* Thus, because Plaintiffs do "not allege an injury flowing from the alleged statutory violation," they lack statutory standing. *Id.* at 146.

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

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

Lingo satisfies all three elements of Section 230. *First*, Lingo's voice over Internet Protocol ("VoIP") service is an "interactive computer service." *See* 47 U.S.C. § 230(f)(2). Because the calls were given STIR/SHAKEN attestations, PI Mot. 5, they were necessarily "carried over Internet Protocol (IP) networks." FCC, *Combating Spoofed Robocalls with Caller ID Authentication*, https://tinyurl.com/yc6kecav (last visited May 17, 2024) ("the STIR/SHAKEN

framework is only operational on IP networks"). The FCC has explained that VoIP "is a service that falls squarely within the phrase 'Internet and other interactive computer services' as defined in sections 230(f)(1) & 230(f)(2)." *Vonage Holdings Corp.*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, ¶ 34 n.115, 2004 WL 2601194 (2004); *see also IP-Enabled Servs.*, Report and Order, 24 FCC Rcd. 6039, ¶ 15, 2009 WL 1362812 (2009); *accord United States v. Stratics Networks Inc.*, 2024 WL 966380, at *1, *12 (S.D. Cal. Mar. 6, 2024) (holding that "ringless voicemail and voice over internet protocol" service was interactive computer service); *Zoom Video Communications Inc. Privacy Litigation*, 525 F. Supp. 3d 1017, 1029 (N.D. Cal. 2021).

Second, Plaintiffs' VRA and state-law claims are "based on information provided by another information content provider." *Monsarrat*, 28 F.4th at 318 (quotations omitted). Kramer satisfies the "broad definition" of information content provider, *Lycos*, 478 F.3d at 419, because he "created" the "New Hampshire Robocalls." PI Mot. 4. Life Corp, at Kramer's direction, delivered the resulting content using "Lingo's services." *Id.* at 5. Plaintiffs do not suggest Lingo had any role in creating the New Hampshire Robocalls. Thus, "Plaintiff[s] seek[ ] to hold [Lingo] liable for content generated by third party users." *Stratics Networks*, 2024 WL 966380, at *14; *see also Small Justice LLC v. Xcentric Ventures LLC*, 873 F.3d 313, 321–23 (1st Cir. 2017).

Third, Plaintiffs' VRA and state-law claims would treat Lingo "as the publisher or speaker of" the robocalls. *Monsarrat*, 28 F.4th at 318 (quotations omitted); *see also Backpage.com*, 817 F.3d at 19 (noting First Circuit's "capacious conception" of this prong of Section 230). Plaintiffs' VRA claim turns on whether the call contents were intimidating. PI Mot. 10–15. Plaintiffs' claim under NH RSA 664:14-a alleges that the calls "did not contain" required information. *Id.* at 18–19. And Plaintiffs' claim under NH RSA 664:14-b alleges that the calls "displayed" misleading "caller identification information" and "used" "President Biden's voice." *Id.* at 17–18. Thus,

"there would be no harm to [the Plaintiffs] but for the content of the" calls. *Backpage.com*, 817 F.3d at 19–20. Plainly then, "any liability against [Lingo] must be premised on imputing to it the" call contents—"that is, on treating it as the publisher [or speaker] of that information." *Lycos*, 478 F.3d at 422.

Thus, Plaintiffs are unlikely to succeed in overcoming Lingo's Section 230 immunity.

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

Plaintiffs are unlikely to succeed in their claim that Lingo violated the Telephone Consumer Protection Act ("TCPA") because they are unlikely to show that Lingo "initiated" the New Hampshire Robocalls within the meaning of 47 U.S.C. § 227(b)(1)(B). *See* MTD Mem. 21–25. Consistent with the plain meaning of that term, the FCC and the courts have long held that communications intermediaries generally do not "initiate" calls because they "do[ ] not control the recipients, timing, or content" of calls. *Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶ 33, 2015 WL 4387780 (2015); *see also Adzhikosyan v. Callfire, Inc.*, 2019 WL 7856759, at *2–*4 (C.D. Cal. Nov. 20, 2019); *Meeks v. Buffalo Wild Wings, Inc.*, 2018 WL 1524067, at *3–*5 (N.D. Cal. Mar. 28, 2018); *Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044, 1048–49 (S.D. Cal. 2015); *Smith v. Securus Technologies, Inc.*, 120 F. Supp. 3d 976, 981–83 (D. Minn. 2015). Because Plaintiffs have not alleged—much less shown—that Lingo controlled the recipients, timing, or content of the calls, they are unlikely to succeed on their TCPA claim against Lingo.

Courts have allowed TCPA claims to proceed against intermediaries only where they were in on the alleged scheme. *See, e.g.*, *Cunningham v. Montes*, 378 F. Supp. 3d 741, 749 (W.D. Wis. 2019) (not dismissing where telemarketing platform "set up and ran some of [its] clients' campaigns from start to finish"). But Plaintiffs have offered nothing to suggest that Lingo even knew about the allegedly unlawful content in the New Hampshire Robocalls—much less willingly

participated in the scheme. Plaintiffs completely ignore the general rule that intermediaries do not "initiate" calls and say nothing specific to Lingo in their TCPA merits argument. *See* PI Mot. 15–17. Again, it is not this Court's responsibility "to construct a party's arguments for him." *Cruz-Ramos*, 987 F.3d at 40. By not offering any explanation as to why Lingo should be deemed the initiator of the New Hampshire Robocalls, Plaintiffs "waive[d] this claim" for purposes of their motion, *ibid.*, and this Court can find Plaintiffs unlikely to succeed on this basis alone.

To the extent Plaintiffs mean to rely on Lingo's allegedly incorrect STIR/SHAKEN attestations—something not mentioned in their TCPA argument—those do not transform Lingo into the call initiator. Federal regulations *require* Lingo to "implement the STIR/SHAKEN authentication framework." 47 C.F.R. § 64.6301(a). As explained, "STIR/SHAKEN does not distinguish legal calls from illegal ones." *FCC Unlawful Robocalls Order* ¶ 48. So If Lingo's STIR/SHAKEN practices were deficient, that would be—at most—a violation of a "technical" or "procedural standard[ ]" "prescribe[d]" by the FCC under Section 227(d)(3). 47 U.S.C. § 227(d)(3). But "Section 227(d)(3) . . . does not give rise to a private cause of action." *Auguston v. Nat'l Admin. Serv. Co.*, 2023 WL 1810397, at *7 n.1 (E.D. Tex. Jan. 11, 2023) (quotations omitted), *report and recommendation adopted*, 2023 WL 1802389 (E.D. Tex. Feb. 7, 2023).

Finally, Plaintiffs are unlikely to succeed in showing that Lingo violated any of the TCPA's implementing regulations. *See* PI Mot. 15–16. Those regulations apply to the parties responsible for the content of the calls, *see* 47 C.F.R. § 64.1200(b)(1), (2) (requiring disclosures in the call itself), and the parties that place the calls, *id.* § 64.1200(d) (requiring opt-out procedures and do-not-call list). However, Lingo did not create the calls or place them—which Plaintiffs do not contest—so these claims fail too.

II. PLAINTIFFS HAVE NOT SHOWN THAT THEY WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION.

The individual plaintiffs cannot satisfy the requisite irreparable-harm showing for a simple reason: they allege "irreparable harm related to harm the plaintiff had already suffered, rather than to harm he would suffer if the preliminary injunction were not granted." *Gonzalez-Droz v. Gonzalez-Colon*, 573 F.3d 75, 80–81 (1st Cir. 2009). Indeed, the individual plaintiffs candidly admit that they "have already been harmed." PI Mot. 20. They say they were "subjected" (in the past) "to Defendants' attempted threats, intimidation, and coercion" and that they received (in the past) calls that violated state law. *Id.* at 20–21. They do not claim that they are currently being subjected to illegal calls or that they will receive illegal calls in the future. And although they say they "will suffer" from robocalls placed months ago, *id.* at 20, they offer nothing to substantiate that implausible statement or explain why an injunction would end any harm. Lacking any "future harm" or "ongoing detriment," the individual plaintiffs have not shown they will suffer irreparable harm absent an injunction. *Gonzalez-Dros*, 573 F.3d at 81.

The organizational plaintiffs' claims of irreparable harm suffer from the same issue. They claim that "the League has suffered, and will continue to suffer, by being forced to divert resources away from its mission" in order "to combat the disinformation spread" (in the past) "by the Defendants." PI Mot. 21. But Plaintiffs must show "irreparable harm *in the absence of an injunction*." *Gonzalez-Droz*, 573 F.3d at 79 (emphasis added). Here, that purported harm exists independent of any injunction because it is based on diverting resources to combat misinformation that has already been spread. A prospective injunction will not un-spread the misinformation, so the organizational plaintiffs cannot show "harm [they] would suffer *if the preliminary injunction were not granted*." *Id.* at 81 (emphasis added).

Nor can the organizational plaintiffs show harm based on how they have reallocated resources for the future. Although they assert that they "must budget for and allocate limited resources to guard against the substantial threat posed by the Defendants," PI Mot. 21, they fail to allege (much less show) that an injunction would change how they allocate resources. In fact, their declarants claim to be worried about "similar robocalls in other states and for the general election" and have "raised [their] assessment of the" overall "threat level" for election robocalls. ECF No. 47-19, ¶ 10 (emphasis added); *see also* ECF No. 47-4, ¶ 12. Those assertions show that Plaintiffs are worried about robocalls more broadly and strongly suggest that the organizational plaintiffs will leave their robocall-mitigation resources in place, regardless of whether this Court enters an injunction against Lingo. Thus, they again fail to show "harm [they] would suffer *if the preliminary injunction were not granted*."[5] *Gonzalez-Droz*, 573 F.3d at 81 (emphasis added).

Because "irreparable harm" is an "essential prerequisite for equitable relief," denial is warranted on this ground alone. *Braintree Lab'ys, Inc. v. Citigroup Glob. Mkts. Inc.*, 622 F.3d 36, 41–43 (1st Cir. 2010) (quotations omitted).

III. THE EQUITIES AND THE PUBLIC INTEREST STRONGLY DISFAVOR A PRELIMINARY INJUNCTION AGAINST LINGO.

The equities and the public interest strongly disfavor preliminary relief against Lingo for at least three reasons. *First*, it would be inequitable to enter an injunction against Lingo before

[5] Because Plaintiffs' motion does not argue that they will suffer irreparable harm based on future actions, this Court need not consider such an argument. But even were such an argument before the Court, there is no evidence in the record suggesting that Lingo—a telephone company that did not create or have any knowledge of the robocalls—will imminently take any action that will deprive the individual plaintiffs of their right to vote or require the organizational plaintiffs to divert their resources. *See Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) ("A finding of irreparable harm must be grounded on something more than conjecture, surmise, or a party's unsubstantiated fears of what the future may have in store."); *accord Gonzalez-Dros*, 573 F.3d at 79 ("burden of demonstrating that a denial of interim relief is likely to cause irreparable harm rests squarely upon the movant" (quotations omitted)).

Kramer has appeared in the case. The "New Hampshire Robocalls were created by Steve Kramer." PI Mot. 4. Plaintiffs' evidence consists almost entirely of "contemporaneous text[s]" from Kramer, declarations describing conversations with Kramer, and press statements issued by Kramer. *Id.* at 4–7. And they ground their request for prospective relief in Kramer's "motivation[s]" and the likelihood that he will place illegal calls again in the future. *Id.* at 23–24 & n.5. But Lingo never had (and does not have) a relationship with Kramer, and he is not yet in this case. Before enjoining Lingo based entirely on the acts and statements of an unrelated third party, the Court should—at minimum—wait until that third party appears and is able to meaningfully respond.[6]

Second, Plaintiffs seek an invalid and unlawful remedy as to Lingo. They ask this Court to preliminarily enjoin Lingo from (i) "distributing AI-generated robocalls impersonating any person, without that person's express, prior written consent," (ii) "distributing spoofed telephone calls, text messages, or any other form of spoofed communication," and (iii) "distributing telephone calls, text messages, or other mass communications that do not fully comply with all applicable state and federal laws or that are made for an unlawful purpose." Prop. Order ¶¶ 1–3.

At minimum, that requested relief violates Local Rule 65.1 and Federal Rule of Civil Procedure 65(d)(1)(C) because it does not "describe in reasonable detail . . . the act or acts restrained or required." *See, e.g.*, *Francisco Sanchez v. Esso Standard Oil Co.,* 572 F.3d 1, 15 (1st Cir. 2009) ("An order that fails to comply with the prerequisites of Rule 65(d) should be set aside on appeal."). As explained above, neither Lingo nor any other telephone company can just

[6] If Plaintiffs properly served Kramer, he has until June 4 to appear—after the close of Lingo's preliminary-injunction briefing. But is not even clear that Plaintiffs' service was proper because they apparently assume (without a clear basis) that Kramer lives with his father. *See* ECF No. 57.

magically stop third-party customers from making calls that illegally use AI-generated content or that otherwise break the law. Plaintiffs also cite no authority to enjoin Lingo from distributing any spoofed communication. Spoofing is generally legal and holds "legitimate importance" for many callers. *Walsh*, 821 F.3d at 163. So, at most, Plaintiffs could request an injunction to prevent *illegal* spoofing, but that course poses the same problem: neither Lingo nor any other telephone company can tell *ex ante* and with certainty whether a spoofed call is made for an illegal purpose.

It is thus unclear what Plaintiffs would require Lingo to do (or not do) to effectively solve illegal robocalls. Although Plaintiffs hint in their motion at "deficient" "internal controls," they fail to name any deficiencies or controls and instead fault Lingo for not knowing the contents of calls. PI Mot. 24. Perhaps Plaintiffs mean to suggest that Lingo should screen the contents of all calls to traverse its network. But besides being technically impossible, that course would violate the Wiretap Act's prohibition on "intercepting" the contents of communications. *See* 18 U.S.C. § 2511(1). An order for Lingo to break the law is neither equitable nor in the public interest.

Third, Plaintiffs offer nothing on the other side of the ledger to justify an injunction against Lingo. Lingo of course agrees that the right to vote is important. But Lingo does not create robocalls, place them, or review their contents. It is a neutral conduit. Plaintiffs' attempt to enjoin a telephone company will do nothing to protect the right to vote.

Because the final two factors heavily and unanimously counsel against an injunction, denial is warranted on this basis alone. *Winter v. NRDC*, 555 U.S. 7, 26–33 (2008) (vacating preliminary injunction on sole ground that equities and public interest disfavored injunctive relief).

CONCLUSION

Lingo respectfully requests that the Court deny Plaintiffs' motion as to Lingo.

May 17, 2024

Respectfully submitted,

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