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

MEMORANDUM IN SUPPORT OF
DEFENDANT LINGO TELECOM, LLC'S MOTION TO DISMISS

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF CONTENTS

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Page(s)

Cases

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

Statutes

RETRIEVED FROM DEMOCRACYDOCKET.COM

Regulatory Authorities

Other Authorities

RETRIEVED FROM DEMOCRACYDOCKET.COM

INTRODUCTION

Plaintiffs in this case seek to hold accountable alleged bad actors that orchestrated an illegal robocalling scheme. To that end, they have sued the person that masterminded the scheme—a man named Steve Kramer who, Plaintiffs allege, used artificial intelligence ("AI") to create a recording that mimicked the voice of President Joe Biden and contained incorrect information about an upcoming election. Plaintiffs have also sued the entity Kramer hired to place those calls—a company called Life Corporation ("Life Corp").

But Plaintiffs also ask this Court to take an extraordinary additional step and hold *the phone company* liable for the calls placed by Kramer and Life Corp. That is because, in addition to Kramer and Life Corp, Plaintiffs named Lingo Telecom, LLC ("Lingo") as a defendant. Lingo offers voice-calling and broadband services. It does not create or place calls. There is no suggestion that Lingo was "in on" Kramer's scheme. The most Plaintiffs can say about Lingo is that the robocalls transited Lingo's network and that Lingo did not know that the calls were spoofed. If that were enough to hold Lingo liable, then every phone company could be vicariously liable for their customer's misdeeds. That is not—and cannot be—the law.

RETRIEVED FROM DEMOCRACYDOCKET.COM

None of the election-law statutes invoked by Plaintiffs can be read to hold telephone companies liable for calls made by their customers. That is most evident from the ordinary usage of the words in the statutory text. For example, if Person A "threatens" Person B over the phone, nobody would say that the telephone company "threatened" Person B. The common-law understanding—that communications intermediaries are generally not liable for their customers' messages—reinforces that plain meaning. And following that plain text avoids the absurd result of holding telephone companies liable for their customers' calls even where they have no way to monitor, review, or alter the contents of those calls. Plaintiffs' election-law claims falter on other

grounds too. They fail to show proximate causation by Lingo, lack causes of action, and fail to overcome Lingo's statutory immunity under Section 230 of the Communications Act.

Plaintiffs also fail to plausibly allege that Lingo violated the Telephone Consumer Protection Act. That statute authorizes relief against only parties that "initiate" illegal robocalls. But under the plain meaning of the statute and a mountain of precedent, a telephone company does not "initiate" calls absent some showing that it was actively involved in an illegal scheme. Plaintiffs fail to plausibly allege any facts suggesting that Lingo was even aware of Kramer's illegal robocalling scheme, much less actively involved in it.

Lingo is a strong supporter of election integrity and the democratic process. But it is neither lawful nor sensible to hold liable a phone company for its customers' calls where the company did not know—and is legally prohibited from knowing—the contents of those calls. Plaintiffs' claims against Lingo should be dismissed.

RETRIEVED FROM DEMOCRACYDOCKET.COM

BACKGROUND[1]

Plaintiffs allege a robocall campaign designed and carried out by Defendant Steve Kramer. Kramer "is a political consultant with over 20 years' experience organizing robocalls." Complaint ¶ 16, ECF No. 1 ("Compl."). He is a veteran of political robocall campaigns that feature AI-generated voices, which Plaintiffs refer to as "deepfakes." *Id.* ¶¶ 22–23, 60.

Kramer was "the architect of" the robocalling "scheme" at issue in this case. *Id.* ¶ 46; *see id.* ¶¶ 47 (Kramer "orchestrated the scheme"), 66–68 (same). Kramer "commissioned [a third party] to create a deepfake recording impersonating the voice of President Joe Biden." *Id.* ¶¶ 29–30, 36. Kramer had his father pay for the deepfake. *Id.* ¶ 31. Kramer hired Defendant Life Corp

[1] Because Lingo is seeking dismissal, it recites the facts as alleged in the complaint. *See United States ex rel. Zotos v. Town of Hingham*, 98 F.4th 339, 342 (1st Cir. 2024). Lingo does not concede the accuracy of any allegations.

to place the robocalls he commissioned. *Id.* ¶¶ 18, 32. Then, on January 21, 2024—two days before the 2024 New Hampshire Primary Election—Life Corp, at Kramer's direction, placed thousands of robocalls to New Hampshire residents. *Id.* ¶¶ 34, 42. Kramer and Life Corp "spoofed" the calls, meaning that they misrepresented the telephone number that placed the calls. *Id.* ¶¶ 32, 34, 36. The Complaint refers to these calls as the "New Hampshire Robocalls." *Id.* ¶ 2.

The New Hampshire Robocalls contained messaging about the New Hampshire primary. They reminded voters that the primary was on Tuesday and encouraged "nonpartisan and Democratic Voters" to not vote in the Republican primary because it would "only enable[ ] the Republicans in their quest to elect Donald Trump again." *Id.* ¶ 35. The calls urged recipients to "save your vote for the November election" where they could "help in electing Democrats up and down the ticket." *Ibid.* And they opined that the recipient's "vote makes a difference in November, not this Tuesday." *Ibid.* Finally, the robocalls instructed the recipients to call a number unaffiliated with the robocalling campaign "to be removed from future calls." *Ibid.* None of the Plaintiffs believed that the call was authentic by the time they hung up. *Id.* ¶¶ 37–40.

Lingo played no role in this scheme. Lingo is a voice and broadband provider. *Id.* ¶ 17. Lingo and its various affiliates[2] have been providing these services for more than a decade. Lingo has no relationship with Kramer. It is not a political organization. It does not commission robocalling campaigns. It does not review or sign off on the content of calls that transit its network. It instead acts as a neutral intermediary: Lingo's customers place calls, and Lingo's network connects the customer with the recipient of the calls. Lingo also implements the STIR/SHAKEN

RETRIEVED FROM DEMOCRACYDOCKET.COM

[2] Plaintiffs imply that Lingo's use of various corporate names to provide voice service is somehow nefarious. *See* Compl. ¶ 17. Like many companies providing voice service to end users, Lingo has built its business over the years through a series of targeted acquisitions. It is common practice for such companies to retain former business names for both business and regulatory reasons.

call-authentication standard and other measures to mitigate illegal traffic on its network, as required by the Federal Communications Commission ("FCC"). *See, e.g.*, 47 C.F.R. § 64.6301(a). Plaintiffs allege that Lingo's STIR/SHAKEN attestations for the New Hampshire Robocalls were incorrect. Compl. ¶¶ 32, 69. They do not allege any facts suggesting that Lingo was aware of the calls' contents. At bottom, Plaintiffs allege that Lingo did what telephone companies do: it allowed one party to call another. *See id.* ¶ 32 (alleging "*Life Corp* relied on Lingo's services to disseminate the robocalls") (emphasis added).

Plaintiffs filed suit against Kramer, Life Corp, and Lingo. Plaintiffs say that the Defendants violated the Telephone Consumer Protection Act ("TCPA"), the Voting Rights Act ("VRA"), and two state-law provisions. Compl. ¶¶ 64–104.

RETRIEVED FROM DEMOCRACYDOCKET.COM

STANDARD OF REVIEW

Lingo moves to dismiss for failure to state a claim under Rule 12(b)(6). In this posture, "all facts are taken from the complaint and accepted as true," but the court "disregard[s] any conclusory allegations." *In re Fin. Oversight & Mgmt. Bd. for Puerto Rico*, 54 F.4th 42, 48 (1st Cir. 2022) (quotations and alterations omitted). "To survive a 12(b)(6) motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 52 (quotations and alterations omitted).

ARGUMENT

I. PLAINTIFFS' ELECTION-LAW CLAIMS HAVE NO MERIT AGAINST LINGO.

A. Plaintiffs Fail To Plausibly Allege That Lingo Violated The Voting Rights Act.

1. Plaintiffs Fail To Plausibly Allege That Lingo Intimidated, Threatened, Or Coerced Anyone.

The VRA provides that no person "shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person" to stop them from voting or attempting to vote. 52 U.S.C. § 10307(b). Plaintiffs do not allege that Lingo intimidated, threatened, or coerced anyone

(or attempted to do so). They instead allege that "*Kramer* orchestrated a deceptive and coercive robocall campaign." Compl. ¶ 66 (emphasis added); *see also id.* ¶ 46 (alleging Kramer was "the architect" of the campaign). They claim "*Kramer's actions* were undertaken with the purpose of intimidating, threatening, or coercing" voters through the New Hampshire Robocalls. *Id.* ¶¶ 67–68 (emphasis added). And they allege that *Life Corp* placed the allegedly coercive calls at Kramer's direction. *Id.* ¶ 32. Plaintiffs make no allegation that Lingo created the prerecorded message, reviewed the message, or dialed the Defendants' phone numbers.

Just as telling as what Plaintiffs have *not* said about Lingo is what little they *do* say about it. Plaintiffs allege Lingo was "aware or should have been aware of the false information reflected in the call." *Id.* ¶¶ 33, 69. That's all—no *reason* why Lingo would or should have been aware of the call contents and no *facts* implying that Lingo knew or should have known the call contents. But it is black-letter law that this kind of "bare assertion . . . will not suffice." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Douglas v. Hirshon*, 63 F.4th 49, 56–57 (1st Cir. 2023). And the allegation is implausible on its face. Under the Wiretap Act, it is illegal for Lingo to "intercept" any "electronic communication," 18 U.S.C. § 2511(1)(a), subject to only limited exceptions, such as fulfilling a court order, *see id.* § 2511(2). "Intercept" is defined as "the aural or other acquisition of the contents of any wire, electronic, or oral communication." *Id.* § 2510(4). Thus, Lingo was legally prohibited from knowing *anything* about the contents of the New Hampshire Robocalls as they were being transmitted.

Plaintiffs fare no better in their allegation that "Lingo provided certain of the calls A-level STIR/SHAKEN attestations." Compl. ¶¶ 32, 69. Even if that allegation is true, it in no way suggests that Lingo had knowledge of the contents of the New Hampshire Robocalls. "STIR/SHAKEN" is a technical standard designed to combat spoofing—a practice by which "the

RETRIEVED FROM DEMOCRACYDOCKET.COM

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) ("*FCC Call Authentication Order*"). Under STIR/SHAKEN, voice 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). Thus, if Lingo "provided false attestations for the calls," Compl. ¶ 69, it means only that Lingo was incorrect that Kramer and Life Corp had the legal right to use the number from which they called. But because "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*"), there is no plausible allegation that Lingo made an assessment about whether the calls were legal or desirable. Nor could it have made such an assessment because, again, Lingo is prohibited from reviewing the contents of its customers' calls.

RETRIEVED FROM DEMOCRACYDOCKET.COM

So, at bottom, Plaintiffs can only prevail by holding Lingo liable for the contents of calls placed by third parties on its network. The argument is as specious as it sounds. Start with the text of the statute. When a case "turns on the meaning of an undefined statutory term," courts "draw on [their] awareness of ordinary usage, as Congress would have understood it." *K.L. v. Rhode Island Bd. of Educ.*, 907 F.3d 639, 642 (1st Cir. 2018). The relevant terms here are "intimidate, threaten, or coerce." 52 U.S.C. § 10307(b). Congress would not have understood these terms to encompass the provision of a neutral phone service. 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."). Thus, when Congress used "intimidate, threaten, or coerce," it would not have understood those terms to make telephone companies vicariously liable for third-party communications.

That ordinary understanding of "intimidate, threaten, or coerce" is 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). When Congress enacted the VRA in 1965, it was understood at "common law" that third-party communications 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."[3] *See, e.g.*, *O'Brien v. W. U. Tel. Co.*, 113 F.2d 539, 541–43 (1st Cir. 1940) (affirming telegraph company held privilege that insulated it from liability in libel suit). Courts found that 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.

RETRIEVED FROM DEMOCRACYDOCKET.COM

That commonsense rationale is even more true today. Shortly after the 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. 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.*,

[3] Indeed, a court that recently assessed intermediary liability under Section 11(b) relied heavily on allegations establishing that the company that placed the messages—akin to Life Corp, not the voice provider—was "aware of the robocall message's contents or purpose." *Nat'l Coal. on Black Civic Participation v. Wohl*, 2021 WL 4254802, at *5 (S.D.N.Y. Sept. 17, 2021) (citing calls, alleged in complaint, where robocall creator and company "discuss[ed] broadcasting a robocall . . . intended to discourage mail-in voting"). Plaintiffs make no such allegations about Lingo.

Lunney v. Prodigy Servs. Co., 94 N.Y.2d 242, 249–51 (1999) (holding email service not liable for defamation or negligence because "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. For example, 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," 52

RETRIEVED FROM DEMOCRACYDOCKET.COM

U.S.C. § 10307(b), 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. 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 (imposing "duty" to "furnish" service and prohibiting "unreasonable discrimination" in carrying traffic); Lingo Telecom, LLC, Tariff FCC No. 1 (Aug. 2, 2022) ("*Lingo FCC Tariff*"), *available at* https://tinyurl.com/5n6px997; Lingo Telecom, LLC, New Hampshire Rate Schedule (May 6, 2022), *available at* https://tinyurl.com/44m64ccu.[4] That outcome is absurd on its face. Such a construction 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").

RETRIEVED FROM DEMOCRACYDOCKET.COM

Because Lingo's carriage of the New Hampshire Robocalls does not fall within the prohibition on intimidation, threats, or coercion, Plaintiffs have failed to plausibly allege that Lingo violated the VRA.

---

[4] *Brandenburg Tel. Co. v. Sprint Commc'ns Co.*, 658 F. Supp. 3d 427, 447 (W.D. Ky. 2023) (explaining that courts "may take judicial notice" of tariffs "because they are public documents filed on record with the FCC").

2. Plaintiffs Fail To Plausibly Allege 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 allege, at most, that the calls attempted to *deceive* voters. *See* Compl. at page 11 (heading reading, "The New Hampshire Robocalls Deceived Voters"); *see id.* ¶¶ 66, 69 (alleging robocalls were "deceptive"). 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*, 144 S. Ct. 945, 955 (2024) (quotations omitted). Thus, Congress's prohibition on intimidation, threats, and coercion does not also prohibit deception.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Because Plaintiffs fail to plausibly allege that the New Hampshire Robocalls were intimidating, threatening, or coercive, their VRA claim should be dismissed.

B. Plaintiffs Fail To Plausibly Allege That Lingo Violated New Hampshire Election Law.

Plaintiffs' claims fare no better under state election law. To state a claim under NH RSA 664:14-b, I, Plaintiffs must plausibly allege that Lingo "knowingly misrepresent[ed] the origin of a telephone call." To meet this hurdle, Plaintiffs plead that "Defendants"—lumped together—spoofed caller ID information and used a deepfake to impersonate President Joe Biden. Compl.

¶¶ 101–02. But Plaintiffs fail to plausibly allege facts to suggest Lingo had *anything* to do with either alleged misrepresentation. 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. Indeed, Plaintiffs allege that "*Kramer*" admitted to "spoof[ing] the New Hampshire robocalls." Compl. ¶ 36 (emphasis added). Plaintiffs do not allege any facts suggesting that Lingo initiated or knew about the spoofing. They in fact plead the opposite: Lingo gave the calls "A-level STIR/SHAKEN attestations," indicating that Lingo believed (allegedly mistakenly) that the calls came "from the number displayed on Caller ID." Compl. ¶ 32 & n.19; *accord Lingo FCC Tariff* § 2.3.3(A) (prohibiting customers from spoofing).[5] Likewise, Plaintiffs allege that *Kramer* created the deepfake, *id.* ¶¶ 30–32, and they fail to allege that Lingo had any knowledge of its existence—much less a role in shaping its content. Thus, Plaintiffs fail to indicate that Lingo took any action that violated NH RSA 664:14-b, I.

The same is true for Plaintiffs' claim under NH RSA 664:14-a, I. To state a claim under that provision, Plaintiffs must plausibly allege that Lingo "deliver[ed] or knowingly cause[d] to be delivered a prerecorded political message" that does not disclose the entity "the person is calling on behalf of," the entity "paying for the delivery of the message," and "the name of the fiscal agent, if applicable." But again, Plaintiffs fail to allege 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 fail to allege a violation of NH RSA 664:14-a, II.

RETRIEVED FROM DEMOCRACYDOCKET.COM

[5] And by assigning an attestation to the New Hampshire Robocalls, Lingo correctly identified itself as the originating carrier to all downstream carriers (i.e., carriers further down the chain that passed the call on to the customer). *See FCC Call Authentication Order* ¶ 6.

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 the plain meaning of these words also avoids the absurd and constitutionally dubious outcome that would otherwise result: imposing liability on telephone companies for the contents of messages that they are unable to review or edit. Thus, Plaintiffs cannot use the actions of Kramer and Life Corp to plausibly allege 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.

RETRIEVED FROM DEMOCRACYDOCKET.COM

C. Plaintiffs Fail To Plausibly Allege That Lingo Proximately Caused Any Injury From The Election-Law Violations.

Plaintiffs' VRA and state-law claims fail for another independent reason: they have failed to plausibly allege that Lingo proximately caused any injury from the election-law violations. 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); *see also Minuteman, LLC v. Microsoft Corp.*, 2000 WL 33187307, at *3–*5 (N.H. Super. Dec. 3, 2000) (employing proximate-cause analysis to cause of action in state statute), *aff'd*, 147 N.H. 634, 795 A.2d 833 (2002). Although Plaintiffs do not identify a cause of action to bring their VRA claim, *see infra* Section I.D.1, courts have employed proximate-cause principles "in the voting rights context," *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1200 (N.D. Ga. 2022). The "proximate-cause requirement generally bars suits for alleged harm that is 'too remote' from the defendant's unlawful conduct." *Lexmark*, 572 U.S. at 133.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Plaintiffs fail to plausibly allege that Lingo proximately caused any harm to them from the election-law violations. 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 did not sue the third party but instead 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 of SpoofCard where there were "illegitimate and legitimate uses of the Spoofcard service." *Id.* at 163–64.

Just like the provider of SpoofCard did not proximately cause the delivery of harmful content by one of its users, Lingo did not proximately cause the delivery of harmful content by Kramer or Life Corp. Indeed, the risk of wrongdoing from the SpoofCard service was, if anything, *more* foreseeable than the risk of wrongdoing from Lingo's voice service. The company offering the SpoofCard service published "promotional material" expressly highlighting "illegitimate" uses of the service. *Id.* at 163–64. Here, by contrast, Lingo merely offers a neutral voice-calling service, and there is no allegation that Lingo promoted any "illegitimate" use of that service. To the contrary, it prohibits such unlawful uses. *See Lingo FCC Tariff* § 2.2.1.

Thus, Plaintiffs fail to plausibly allege that Lingo proximately caused any injury stemming from Kramer and Life Corp's alleged misdeeds. *See, e.g.*, *Sterling Suffolk Racecourse, LLC v. Wynn Resorts, Ltd.*, 990 F.3d 31, 35–37 (1st Cir. 2021) (affirming dismissal for failure to plausibly allege facts supporting proximate causation under statutory cause of action).

RETRIEVED FROM DEMOCRACYDOCKET.COM

D. Plaintiffs Lack A Cause Of Action For Their Election-Law Claims.

Even if Plaintiffs could plausibly allege violations of the election laws or proximate causation by Lingo (they cannot), they lack causes of action to bring such claims.

1. Plaintiffs' Lack A Cause Of Action For Violations Of Section 11(b) Of The Voting Rights Act.

Plaintiffs allege "Defendants' conduct violates Section 11(b) of the Voting Rights Act." Compl. ¶ 70. But "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).

The "power to create a private right of action, like the power to create positive federal law itself, 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). "Accordingly, a private right of action may be conceived only by a statute that clearly evinces congressional intent to bestow such a right." *Iverson*, 452 F.3d at 100. If Congress "has not explicitly provided for private enforcement," then any 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" in a statute may "preclude[ ] a finding of congressional intent to create 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); *see also id.* § 10310(e). 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.

RETRIEVED FROM DEMOCRACYDOCKET.COM

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—including Section 11(a)—the Attorney General may also seek monetary and criminal penalties. *Id.* § 10308(a)–(c). And, as explained, the statute's text supports a cause of action for provisions of the VRA other than Section 11. *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.

Even if those other express enforcement provisions were not dispositive, Plaintiffs cannot satisfy the "uphill battle" of identifying an implied cause of action, in the face of this enforcement scheme. *Id.* at 70. As a court recently explained, "there is no identifiable link between the rights created under Section 11(b) of the VRA and any statutory language demonstrating congressional intent to provide a private remedy for a violation of those rights." *Andrews*, 2023 WL 6456517, at *11. Because the VRA "does not give [Plaintiffs] a private right of action against" Lingo, it should be dismissed. *Allco*, 875 F.3d at 73–74 (affirming dismissal for no implied cause of action).

2. Plaintiffs Cannot Invoke The Causes Of Action For Their State-Law Claims Because They Fail To Allege A Cognizable Injury.

Plaintiffs' claims under NH RSA 664:14-a, II and NH RSA 664:14-b, I must be dismissed because Plaintiffs fail to allege that they were "injured" for purposes of those statutes. *See* NH RSA 664:14-a, IV(b) (allowing suit only by a "person *injured* by another's violation") (emphasis added); NH RSA 664:14-b(II)(b) (same).

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 of this section," 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

RETRIEVED FROM DEMOCRACYDOCKET.COM

the legitimacy of the message," which "did not make sense to" her.[6] *Id.* at 145 (quotations omitted). The court 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 of NH RSA 664:14-a, II or NH RSA 664:14-b, I stemming from a violation of either statute. To begin, the complaint does not allege *any* "injury" to the plaintiffs within the meaning of the statutes. Under the statutory "injury" requirement, the plaintiff must establish "a 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.[7] *See id.* at 145 (assessing voter confusion to analyze statutory standing). But all of the individual plaintiffs allege that they knew "the call was not legitimate." Compl. ¶¶ 38–40. The organizational plaintiffs also make no allegation that they were confused. Because Plaintiffs were not deceived, they were not "injured" for purposes of either state statute.

RETRIEVED FROM DEMOCRACYDOCKET.COM

---

[6] Plaintiffs attempt to downplay the New Hampshire Supreme Court's analysis as "dicta." Pls.' Mem. ISO Mot. For Prelim. Inj. at 19, ECF No. 47-1 ("Pl. PI Mot."). 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").

[7] 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. Pl. 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 simply 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'").

But even if Plaintiffs alleged a cognizable statutory injury, they fail to establish that it comes "from the alleged absence of the required disclosure." *O'Brien*, 166 N.H. at 145. The crux of the Complaint is that the calls told voters "that if they participated in the New Hampshire Primary, they would lose their ability to participate in the General Election." Compl. ¶ 66. 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 would not lose their ability to participate in the General Election if they voted in the primary. *Ibid.* Any "confusion would have persisted." *Ibid.*

Thus, because Plaintiffs do "not allege an injury flowing from the alleged statutory violation," they lack statutory standing. *Id.* at 146.

E. Plaintiffs Fail To Overcome Lingo's Statutory Immunity Against Their Election-Law Claims.

Even if Plaintiffs plausibly alleged that Lingo violated the VRA or New Hampshire election law (they did not), even if they plausibly alleged that Lingo proximately caused their injuries (they did not), and even if they had proper causes of action to remedy those alleged violations (they do not), those claims would still fail because Lingo is statutorily immune from those claims under Section 230 of the Communications Act. In this context, Section 230 codifies and reinforces the limitations on intermediary liability that existed at common law, and as shown above, independently operate to bar Plaintiffs' claims.

Section 230 provides in relevant part: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Under Section 230, "a defendant is shielded from liability" where "(1) the defendant is a provider or user of an interactive computer service;

RETRIEVED FROM DEMOCRACYDOCKET.COM

(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). The First Circuit has "explained that immunity under section 230 should be broadly construed." *Ibid.* (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 immunity in this case. *First*, Lingo provides an "interactive computer service." That term is defined as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server." 47 U.S.C. § 230(f)(2). Because the calls were given STIR/SHAKEN attestations, Compl. ¶ 69, they were necessarily "carried over Internet Protocol (IP) networks." FCC, *Combating Spoofed Robocalls with Caller ID Authentication*, https://tinyurl.com/yc6kecav (last visited May 6, 2024) ("the STIR/SHAKEN framework is only operational on IP networks"); *accord* Compl. ¶ 32 n.19. The FCC has explained that Voice over Internet Protocol ("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) (holding that videoconferencing service was interactive computer service).

RETRIEVED FROM DEMOCRACYDOCKET.COM

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). An "information content provider" is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service." 47 U.S.C. § 230(f)(3). Kramer easily satisfies this "broad definition," *Lycos*, 478 F.3d at 419, because Plaintiffs allege he wrote the "script for the" New Hampshire Robocalls and "commissioned" a third party for their creation, Compl. ¶ 30. Life Corp, at Kramer's direction, delivered the resulting content using "Lingo's services." *Id.* ¶ 32. Plaintiffs do not allege that Lingo played any role in creating or developing the content of the calls. Thus, "[b]ased on the pleadings, 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).

RETRIEVED FROM DEMOCRACYDOCKET.COM

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). Courts employ "a capacious conception of what it means to treat [an interactive computer service] as the publisher or speaker of information provided by a third party." *Backpage.com*, 817 F.3d at 19. "Thus, courts have invoked the prophylaxis of section 230(c)(1) in connection with a wide variety of causes of action, including housing discrimination, negligence, and securities fraud and cyberstalking." *Ibid.* (citations omitted). Plaintiffs "treat [a defendant] as the publisher or speaker of the content of" third-party content where "there would be no harm to them but for the content." *Id.* at 19–20.

Plaintiffs' VRA and state-law claims necessarily stem from the content of the robocalls. Plaintiffs' VRA claim alleges "an effort to intimidate, threaten, or coerce" voters. Compl. ¶ 68. Plaintiffs' claim under NH RSA 664:14-a alleges that the calls "did not state" and

"misrepresented" information required under that statute. Compl. ¶¶ 95–96. And Plaintiffs' claim under NH RSA 664:14-b alleges that the calls "displayed" misleading "caller identification information" and used a "deepfake" that "impersonated President Biden's voice." Compl. ¶¶ 101–02. Plainly, "any liability against [Lingo] must be premised on imputing to it the" content of these calls—"that is, on treating it as the publisher [or speaker] of that information." *Lycos*, 478 F.3d at 422. After all, "there would be no harm to [the Plaintiffs] but for the content of the" calls. *Backpage.com*, 817 F.3d at 19–20. But holding Lingo "liable for 'harmful content' on [its] network treat[s]" it "as the publisher." *Stratics*, 2024 WL 966380, at *14. This Plaintiffs cannot do.

Because Lingo is immune from Plaintiffs' VRA and state-law claims, dismissal is appropriate. *See, e.g.*, *Monsarrat*, 28 F.4th at 318–20 (affirming district court's grant of motion to dismiss after finding defendant "entitled to immunity under section 230"); *Lycos*, 478 F.3d at 422 (same); *Backpage.com*, 817 F.3d at 24 (same).

RETRIEVED FROM DEMOCRACYDOCKET.COM

II. PLAINTIFFS FAIL TO STATE A TCPA CLAIM AGAINST LINGO.

Plaintiffs fail to plausibly allege that Lingo "initiated" the New Hampshire Robocalls, as required to establish a violation of the Section 227(b)(1)(B) of the TCPA. Compl. ¶¶ 76–77; *see* 47 U.S.C. § 227(b)(1)(B) (making it unlawful "to initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party").

Offering a voice-calling service does not "initiate" a call. This term must be "interpret[ed] . . . according to its 'plain meaning at the time of enactment.'" *United States v. Winczuk*, 67 F.4th 11, 16 (1st Cir. 2023); *accord Bais Yaakov of Spring Valley v. ACT, Inc.*, 12 F.4th 81, 86 (1st Cir. 2021) (interpreting TCPA in accordance with "the text of the statute"). "Initiate" is undefined in the statute, but contemporary dictionaries define it as "[t]o cause to begin." *See Initiate*, American

Heritage Dictionary 662 (2d College ed. 1991); *Initiate*, Merriam-Webster 622 (Ninth New Collegiate 1990) ("to cause or facilitate the beginning of : set going").[8] Under the plain meaning of the term then, Lingo did not "initiate any telephone call." Rather, Life Corp—at Kramer's direction—initiated the phone calls when it input the recipients' numbers and clicked "call." At that point, the calls had begun. Although the calls traversed Lingo's network, that is of no relevance because the calls had already been "set going" and "caused to begin" by Life Corp.

The FCC has interpreted the statute consistent with this plain meaning. That agency has explained that a person does not "initiate" a call merely because it is the "'but for' cause" of it. *Joint Petition Filed by Dish Network, LLC, et al.*, Declaratory Ruling, 28 FCC Rcd. 6574, ¶ 26, 2013 WL 1934349 (2013). Rather, one "initiates" a call "when it takes the steps necessary to physically place a telephone call, and generally does not include persons or entities . . . that might merely have some role, however minor, in the causal chain that results in the making of a telephone call." *Ibid.* Thus, a communications service like Lingo will not be held liable where it merely "sends" communications "in response to" an input from "the user." *Rules & Reguls. Implementing the Tel. Consumer Prot. Act of 1991*, Declaratory Ruling and Order, 30 FCC Rcd. 7961, ¶ 32, 2015 WL 4387780 (2015) ("*2015 Declaratory Ruling*"). Under such circumstances, the user—not the service provider—initiates the call because the provider "does not control the recipients, timing, or content, but instead merely has some role, however minor, in the causal chain that results in the making of a telephone call." *Id.* ¶ 33 (cleaned up).

The cases following this commonsense reasoning are legion. In *Adzhikosyan v. Callfire, Inc.*, 2019 WL 7856759 (C.D. Cal. Nov. 20, 2019), the Central District of California held that a

[8] The TCPA was enacted on December 20, 1991. *See* Pub. L. No. 102-243, 105 Stat. 2394 (1991).

RETRIEVED FROM DEMOCRACYDOCKET.COM

defendant offering "a mass SMS messaging system" did not send messages where the plaintiff did "not allege that Defendant decided whether, when, or to whom to send the messages." *Id.* at *2–*4 (alterations omitted). In *Meeks v. Buffalo Wild Wings, Inc.*, 2018 WL 1524067 (N.D. Cal. Mar. 28, 2018), the Northern District of California held that the app, Yelp, did not "initiate" text messages where the allegations indicated that its "users . . . initiated the text messages because they, and not Yelp, decided whether, when, and to whom to send the text messages." *Id.* at *3–*5. In *Kauffman v. CallFire, Inc.*, 141 F. Supp. 3d 1044 (S.D. Cal. 2015), the Southern District of California held that a third-party communications service did not initiate messages when "its users . . . determine[d] whether, when, and to whom they would send text messages." *Id.* at 1048–49. In *Smith v. Securus Technologies, Inc.*, 120 F. Supp. 3d 976 (D. Minn. 2015), the District of Minnesota held that a third-party inmate-calling service did not "make" calls because the "inmate" "select[ed] and dial[ed] Plaintiffs' telephone numbers." *Id.* at 981–83.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Courts have allowed TCPA claims to proceed against service providers only where plaintiffs are able "to show *more* than [the] normal operation" of a neutral service. *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") (emphasis added); *see Hurley v. Messer*, 2018 WL 4854082, at *4 (S.D.W. Va. Oct. 4, 2018) (not dismissing where plaintiffs plausibly alleged providers had "direct knowledge of and the right of control over the illegal conduct" and used "their own assigned telephone numbers" to make illegal calls).

Plaintiffs fail to plausibly allege that Lingo "initiated" the New Hampshire Robocalls. As explained above, Plaintiffs allege that Life Corp, at Kramer's direction, initiated the calls. Compl. ¶ 32. Although Plaintiffs make a cursory reference to the use of "Lingo's services," *ibid.*, they make no allegation that Lingo "decided whether, when, or to whom to" call, *Adzhikosyan*, 2019

WL 7856759, at *3. Because Kramer and Life Corp controlled these decisions, they, not Lingo, are "the maker or initiator of" the call. *2015 Declaratory Ruling* ¶ 33.

Indeed, Plaintiffs offer nothing "to show more than [the] normal operation" of a neutral voice-calling service. *Cunningham*, 378 F. Supp. at 749. As explained above, Plaintiffs cannot rely on the bare assertion that Lingo was "aware or should have been aware of the false information reflected in the call," Compl. ¶ 33, particularly where Lingo is legally prohibited from accessing the contents of its users' calls, 18 U.S.C. § 2511(1)(a). Absent knowledge, Plaintiffs lack any basis to plausibly allege that Lingo "*willfully* enable[d]" Kramer and Life Corp's illegal conduct, as would be required to make Lingo the initiator. *2015 Declaratory Ruling* ¶ 30 (emphasis added).

Plaintiffs' allegations that Lingo "provided certain of the calls A-level STIR/SHAKEN attestations," Compl. ¶¶ 32, 69, also do not somehow transform Lingo into the initiator of the call. Federal telecommunications regulations *require* Lingo to "implement the STIR/SHAKEN authentication framework." 47 C.F.R. § 64.6301(a). And even if Lingo was allegedly incorrect in its assessment that the New Hampshire Robocalls warranted A-level attestations, "STIR/SHAKEN does not distinguish legal calls from illegal ones." *FCC Unlawful Robocalls Order* ¶ 48. So, again, that error would not imply that Lingo knew the calls were illegal.

Plaintiffs are also statutorily prohibited from parlaying an alleged STIR/SHAKEN issue into a cause of action. Unlike with other provisions in the TCPA, Congress did not provide a private cause of action for violations of "technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone." 47 U.S.C. § 227(d)(3). Congress also did not include a private cause of action when it mandated compliance with the STIR/SHAKEN framework—again choosing to leave enforcement to the FCC. *See id.* § 227b. Because Congress made some provisions of the TCPA privately enforceable—but not

RETRIEVED FROM DEMOCRACYDOCKET.COM

STIR/SHAKEN compliance—Plaintiffs cannot shoehorn a STIR/SHAKEN violation into a separate cause of action for "initiating" robocalls. *See U.S. ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 35 (1st Cir. 2013) ("when Congress includes language in one section of a statute but omits it in another, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

Finally, Plaintiffs fail to plausibly allege—or even try to allege—that Lingo violated any of the TCPA's implementing regulations. Plaintiffs instead use the undifferentiated term "Defendants" and say they all (i) "spoofed" the calls, Compl. ¶ 74, (ii) did not disclose the identity of the caller, *id.* ¶¶ 86–87, (iii) did not offer an appropriate op-out mechanism, *id.* ¶ 88, (iv) did not maintain an opt-out list, *id.* ¶ 89, and (v) did not qualify for an exemption, *id.* ¶ 90. However, none of these regulatory violations apply if Lingo did not initiate the calls, decide the number from which they would be called, or control their recipients, timing, or content. Plaintiffs fail to plausibly allege that Lingo did any of this.

Because Plaintiffs have failed to plausibly allege that Lingo violated the TCPA or its implementing regulations, their TCPA claim against Lingo should be dismissed.

RETRIEVED FROM DEMOCRACYDOCKET.COM

CONCLUSION

For the foregoing reasons, Lingo respectfully requests that the Court dismiss all claims against it.

May 6, 2024

Respectfully submitted,

/s/ Michele E. Kenney
Michele E. Kenney (NH Bar No. 19333)
PIERCE ATWOOD LLP
One New Hampshire Avenue, Suite 350
Portsmouth, NH 03801
(603) 433-6300
mkenney@pierceatwood.com

/s/ Thomas M. Johnson, Jr.
Thomas M. Johnson, Jr.* (D.C. Bar # 976185)
Frank Scaduto* (D.C. Bar # 1020550)
Boyd Garriott* (D.C. Bar # 1617468)
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
Tel: 202.719.7000
Fax: 202.719.7049
TMJohnson@wiley.law

Counsel for Lingo Telecom, LLC
**Admitted Pro Hac Vice*

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 6, 2024, the foregoing was electronically filed with the Court and served upon the following:

William C. Saturley
Nathan R. Fennessy
Preti Flaherty, PLLP
57 N. Main Street
PO Box 1318
Concord, NH 03302-1318
Counsel for Plaintiffs
Via ECF System

Mark R. Herring
Matthew R. Nicely
Caroline L. Wolverton
Amanda S. McGinn
Joseph T. DiPiero
Maria Julia Hershey
Sara M. Hanna
Akin Gump Strauss Hauer & Feld
Robert S. Strauss Tower
2001 K Street, N.W.
Washington, DC 20006-1037
Counsel for Plaintiffs
Via ECF System

Courtney Hostetler
John Bonifaz
Ronald Fein
Amira Mattar
Free Speech For People
1320 Centre St. #405
Newton, MA 02459
Counsel for Plaintiffs
Via ECF System

Steve Kramer
2100 Napoleon Ave.,
New Orleans, LA 70115
Via US Mail

Wayne E. George
Morgan Lewis & Bockius LLP
One Federal St
Boston, MA 02110-4104
Counsel for Defendant Life Corporation
Via ECF System

Benjamin T. King
Douglas Leonard & Garvey PC
14 South St, Ste 5
Concord, NH 03301
Counsel for Defendant Life Corporation
Via ECF System

/s/ Thomas M. Johnson, Jr.
Thomas M. Johnson, Jr. (D.C. Bar # 976185)

RETRIEVED FROM DEMOCRACYDOCKET.COM