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 THE AMENDED COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This suit arises from an allegedly illegal robocalling scheme conceived and executed by Steve Kramer and the companies he retained during the New Hampshire presidential primary. Plaintiffs sued Kramer, the scheme's mastermind, who allegedly used artificial intelligence ("AI") to mimic President Biden's voice and convey incorrect information about the primary. Plaintiffs also sued the entity Kramer hired to place those calls—Life Corporation ("Life Corp")—and a related company—Voice Broadcasting—that allegedly provided a platform allowing Kramer to spoof caller ID information.

But Plaintiffs go even further: They ask this Court to take the unprecedented and unsupportable step of holding a passive third party, *the phone company*—Lingo Telecom, LLC ("Lingo") across whose network some of the calls merely transited—liable for Kramer's scheme. Lingo was a *victim* of, not a participant in, that scheme. Lingo offers voice-calling and broadband services. It does not initiate calls; it is barred by federal law from reviewing the content of calls moving across its network; and it is not alleged to have had *any knowledge* of Kramer's alleged misconduct. All Plaintiffs can allege about Lingo is that the robocalls transited Lingo's network. If that were enough to hold Lingo liable for the asserted statutory violations, then every phone company could be vicariously liable for their customer's misdeeds. That is not—and cannot be—the law.

To get around this fundamental flaw, Plaintiffs assert that Lingo failed to comply with technical standards enforced by the Federal Communications Commission ("FCC") for caller ID authentication between carriers. Those technical standards are irrelevant to Plaintiffs' statutory claims, and compliance is enforced by regulators, not private plaintiffs. Finding Lingo liable on this basis would be like holding the Postal Service liable for mail fraud because its delivery truck ran a stop sign on the way to delivering letters containing false statements.

Neither the Voting Rights Act ("VRA") nor the state election-law statutes Plaintiffs invoke can be read to hold phone companies liable for calls made by their customers. That is most evident from the ordinary usage of the statutory words: If Person A "threatens" Person B over the phone, nobody would say that the phone company "threatened" Person B. The common-law understanding—that communications intermediaries are generally not liable for their customers' messages—reinforces that plain meaning. Adhering to plain meaning avoids the absurd result of holding telephone companies liable for their customers' calls even where, as here, they cannot lawfully monitor, review, or alter the contents of those calls. And if all that were not enough, Plaintiffs fail to show proximate cause with respect to Lingo, lack causes of action, and cannot overcome Lingo's statutory immunity under Section 230 of the Communications Decency Act.

Plaintiffs Telephone Consumer Protection Act ("TCPA") claim against Lingo fails for similar reasons. That statute authorizes relief against parties that "initiate" robocalls that are illegal under the statute and specified regulations governing notice and consent. But under the TCPA's plain meaning and a mountain of judicial and FCC precedent, a telephone company does not "initiate" calls absent some showing that it was actively involved in illegal conduct. Plaintiffs do not plausibly allege any facts suggesting that Lingo was even *aware* of Kramer's illegal robocalling scheme, much less actively involved in it. Because it was not.

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. Kramer is the one that thought up and carried out, with the assistance of Life Corp and Voice Broadcasting, this crackpot scheme. Plaintiffs' amended claims against Lingo should be dismissed, and dismissal should be with prejudice because Plaintiffs cannot remedy these flaws with additional allegations.

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." ECF No. 65 ("Am. Compl.") ¶ 23. He is a veteran of political robocall campaigns featuring AI-generated voices, which Plaintiffs refer to as "deepfakes." *Id.* ¶¶ 2, 28, 48.

Kramer was "the architect of" the robocalling "scheme" at issue in this case. Am. Compl. ¶ 68; *see id.* ¶¶ 69 (Kramer "orchestrated the scheme"), 93–95 (same). Kramer "commissioned [a third party] to create a deepfake recording impersonating the voice of President Joe Biden." *Id.* ¶ 48. Kramer hired Defendants Life Corp and Voice Broadcasting to place the robocalls he commissioned. *Id.* ¶¶ 17–18, 50. Then, on January 21, 2024—two days before the 2024 New Hampshire Primary Election—Voice Broadcasting, using equipment provided by Life Corp and at Kramer's direction, placed thousands of robocalls to New Hampshire residents. *Id.* ¶¶ 53–54. Kramer and Voice Broadcasting "spoofed" the calls, meaning that they misrepresented the telephone number from which the calls originated. *Id.* ¶¶ 2, 51–55. The amended complaint refers to these calls as the "New Hampshire Robocalls." *Id.* ¶ 2.

The New Hampshire Robocalls reminded voters that the New Hampshire primary was on Tuesday and encouraged "nonpartisan and Democratic Voters" to not vote in the presidential primary because it would "only enable[ ] the Republicans in their quest to elect Donald Trump again." Am. Compl. ¶ 55. 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,

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[1] Because Lingo is seeking dismissal, it recites the facts as alleged in the amended 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.

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.* ¶¶ 59–62.

Lingo played no role in this scheme. Lingo is a voice and broadband provider. Am. Compl. ¶¶ 39–40. 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 call-authentication standard and other measures to mitigate illegal traffic on its network, as required by the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act ("TRACED Act") and the FCC's implementing regulations. *See* Pub. L. No. 116-105, 133 Stat. 3274 (2019); 47 C.F.R. §§ 64.6300 *et seq*. Plaintiffs allege that Lingo's STIR/SHAKEN attestations for the New Hampshire Robocalls were incorrect. Am. Compl. ¶¶ 54, 98. 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—allowed one party to call another. *See id.* ¶ 54 (alleging "*Life Corp* routed a portion of the calls to Lingo") (emphasis added).

Plaintiffs filed suit against Kramer, Life Corp, and Lingo, and named Voice Broadcasting in the amended complaint. Plaintiffs claim the Defendants violated the TCPA, the VRA, and two state-law provisions. Am. Compl. ¶¶ 91–132.

STANDARD OF REVIEW

On a motion to dismiss under Rule 12(b)(6), "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 P.R.*, 54 F.4th 42, 48 (1st Cir. 2022) (cleaned up). "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 (cleaned up).

ARGUMENT

I. PLAINTIFFS HAVE NOT PLEADED PLAUSIBLE ELECTION-LAW CLAIMS AGAINST LINGO.

A. Plaintiffs Do Not Plausibly Allege That Lingo Violated The Voting Rights Act.

Section 11(b) of the VRA provides that "[n]o person . . . shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). Plaintiffs do not allege that Lingo intimidated, threatened, or coerced anybody—instead, they allege that Lingo "fail[ed] to implement an adequate STIR/SHAKEN framework," thus "ma[king] it less likely that providers could detect [Kramer's] calls as potentially spoofed." Am. Compl. ¶ 98. Even if true, that alleged failure is irrelevant under the VRA.

1. Plaintiffs Do Not Plausibly Allege That Lingo Intimidated, Threatened, Or Coerced Anyone.

Plaintiffs do not allege that Lingo took any action covered by Section 11(b). They allege that "*Kramer* orchestrated a deceptive and coercive robocall campaign." Am. Compl. ¶ 93 (emphasis added); *see also id.* ¶ 68 (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.* ¶¶ 94–95 (emphasis added). And they allege that *Life Corp* and *Voice Broadcasting* placed the allegedly coercive calls at Kramer's direction. *Id.* ¶ 53–54. Plaintiffs make no allegation that Lingo created the prerecorded message, reviewed the message, or dialed the phone numbers of the call recipients.

Plaintiffs allege only that Lingo did not take enough action "to implement an adequate STIR/SHAKEN framework" and thus provided improper "'A-level' attestation[s]" to other phone providers for the spoofed caller ID allegedly used in connection with the robocalls. Am. Compl. ¶ 98; *id.* ¶ 54. "STIR/SHAKEN" is a technical standard designed to combat spoofing—a practice

by which "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, 3241–42 ¶¶ 1–2 (2020) ("*FCC Call Authentication Order*"). In the TRACED Act, Congress instructed the FCC to promulgate rules requiring voice providers to implement the STIR/SHAKEN framework, under which providers "attes[t]" to their level of confidence that calls are coming from the number that appears on the caller ID, with A being the highest confidence and C being the lowest. *Id.* at 3245 ¶ 8; *see* 47 U.S.C. § 227b(b)(1); 47 C.F.R. § 64.6301(a). Thus, if Lingo provided incorrect attestations, it means only that Lingo was incorrect that Kramer, Life Corp, and Voice Broadcasting had the legal right to use the number from which they called.

But incorrect STIR/SHAKEN attestations cannot render Lingo liable for the *content* of the calls. The alleged Section 11(b) violation is concerned *exclusively* with the content of the robocalls. That is, Plaintiffs object to the message delivered in the calls. But they do not allege that the purported STIR/SHAKEN deficiencies had anything to do with that message. Nor do Plaintiffs plausibly allege that Lingo assessed whether the calls were intimidating, threatening, or coercive, or that Lingo was aware (or could have been aware) of the false information reflected in the calls. For good reason: Lingo is *prohibited by federal law* from reviewing the contents of its customers' calls. Under the Wiretap Act, it is illegal for Lingo to "intercep[t]" 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" means "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 New Hampshire Robocalls' contents during transmission.

So, at bottom, Plaintiffs can prevail under the VRA only by holding Lingo liable for the unknown and unknowable contents of calls placed by third parties on its network. That 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. R.I. 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). When the VRA was enacted in 1965, intimidation was understood as "[u]nlawful coercion," "duress," or "putting in fear"; a threat was "[a] declaration of intention or determination to inflict punishment, loss, or pain on another, or to injure another by the commission of some unlawful act"; and coercion was defined as "[c]ompulsion," "constraint," or to "compel[ ] by force." Black's Law Dictionary (Rev. 4th ed. 1968); *accord* Webster's Third New Int'l Dictionary (1961) (similar). Neither Congress nor an ordinary citizen in 1965 would have understood these terms to encompass the provision of a neutral phone service.

Common sense reinforces this understanding: If person A threatens person B over the telephone, nobody 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." (quotations omitted)). Thus, when Congress used "intimidate, threaten, or coerce," the ordinary meaning of those terms would not have allowed holding telephone companies vicariously liable for third-party communications.

That ordinary meaning 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). At common law, 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." *See*, *e.g.*, *O'Brien v. W. Union 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.[2]

Courts have continued to adhere to this common-law principle. *See*, *e.g.*, *Lunney v. Prodigy Servs. Co.*, 723 N.E.2d 539, 542 (N.Y. 1999) (email service not liable 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"); *Anderson v. N.Y. Tel. Co.*, 320 N.E.2d 647, 649 (N.Y. 1974) (phone 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"); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018), *aff'd*, 765 F. App'x 586 (2d Cir. 2019) (dating application not liable for spoofed messages sent by a user).

And that principle guides the interpretation of federal statutes. For example, the Seventh Circuit has held that web-hosting providers did not "disclose any communication" under the Wiretap Act where their customers posted information on a website. *See Doe v. GTE Corp.*, 347 F.3d 655, 658–59 (7th Cir. 2003). "Just 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, in

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[2] Congress has consistently adhered to the common-law understanding that communications intermediaries are not responsible for the content of messages transmitted through their networks. Shortly after the passage of the VRA, Congress made it generally illegal under the Wiretap Act for intermediaries to review their customers' messages. *See* Pub. L. No. 90-351, § 802, 82 Stat. 197, 213–14 (1968) (codified at 18 U.S.C. §§ 2510 *et seq.*). Decades later, Congress amended the Communications Act to confer broad immunity on service providers for third-party content, *see* Pub. L. No. 104-104, § 509, 110 Stat. 56, 138 (1996) (codified at 47 U.S.C. § 230(c)), and further immunized service providers under the Digital Millennium Copyright Act from infringement liability based on conduct initiated by their customers, Pub. L. No. 105-304, § 202(a), 112 Stat. 2860, 2877 (1998) (codified at 17 U.S.C. § 512).

the obscenity context, communications providers "will not generally be liable for illegal transmissions" in a "communication" "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, 2820 ¶¶ 8–9 (1987). Just like the statutory terms "disclose" and "communication" do not impute liability to intermediaries, the statutory terms "intimidate, threaten, or coerce," 52 U.S.C. § 10307(b), do not impute liability to the intermediaries through which those intimidations, threats, or coercions are made.[3]

"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 content. Lingo would have risked liability under the Wiretap Act and its tariffs if it had failed to carry the calls for content-based reasons. *See* 18 U.S.C. § 2511; 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*"), https://tinyurl.com/5n6px997; Lingo Telecom, LLC, New Hampshire Rate Schedule (May 6, 2022), https://tinyurl.com/44m64ccu.[4] That outcome is absurd on its face and would run afoul of the principle that courts must "interpret Congress's statutes as a harmonious whole rather

[3] Tellingly, recent cases involving claims that robocalls violated Section 11(b) have been allowed to proceed against consultants and parties that knowingly worked with them to place the calls—akin to Life Corp and Voice Broadcasting, not a phone provider like Lingo. *See Nat'l Coal. on Black Civic Participation v. Wohl*, 2021 WL 4254802, at *5 (S.D.N.Y. Sept. 17, 2021) (denying motion to dismiss where complaint alleged that robocall creator and robocall initiator "discuss[ed] broadcasting a robocall . . . intended to discourage mail-in voting" (quotations omitted)). Here, Plaintiffs do not allege that Lingo participated in the scheme or knew of the content of the calls.

[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).

than at war with one another." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 502 (2018).

Because Lingo's carriage of the New Hampshire Robocalls does not fall within the prohibition on intimidation, threats, or coercion, Plaintiffs do not plausibly allege that Lingo violated the Section 11(b) of the VRA.

2. Plaintiffs Do Not Plausibly Allege That The Calls Were Intimidating, Threatening, Or Coercive.

Even if the content of the New Hampshire Robocalls could be imputed to Lingo, the calls contained no intimidation, threats, or coercion that violate VRA Section 11(b). Plaintiffs allege, at most, that the calls attempted to *deceive* voters. *See* Am. Compl. at 17 (heading reading, "The New Hampshire Robocalls Deceived Voters"); *id.* ¶ 93 (alleging robocalls were "deceptive"). But Section 11(b) says nothing about deception. It prohibits actions that "intimidate, threaten, or coerce" voters, meaning communications that a reasonable person would "view as a threat of injury." *Nat'l Coal. on Black Civic Participation v. Wohl*, 661 F. Supp. 3d 78, 113 (S.D.N.Y. 2023). Plaintiffs do not allege that the calls threatened voters with injury, only that the calls told voters that "[i]t's important that you save your vote for the November election." Am. Compl. ¶ 55.

Statutory structure reinforces the conclusion that Section 11(b) liability requires a threat of injury, not mere deception. The very next subsection 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, Section 11(b) does not prohibit deception.

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

B. Plaintiffs Do Not Plausibly Allege That Lingo Violated New Hampshire 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. Am. Compl. ¶¶ 129–30. 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*, 35 FCC Rcd at 3241 ¶ 1 (emphasis added), and Lingo was not the caller. Rather, Plaintiffs allege that "*Kramer*" admitted to "spoof[ing] the New Hampshire robocalls." Am. Compl. ¶ 58 (emphasis added). Plaintiffs also 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." *Id.* ¶ 54 & n.16; *accord Lingo FCC Tariff* § 2.3.3(A) (prohibiting customers from spoofing). Likewise, Plaintiffs allege that *Kramer* commissioned the deepfake, Am. Compl. ¶¶ 48–49, and they fail to allege that Lingo had any knowledge of its existence—much less a role in shaping its content. Thus, Plaintiffs do not allege that *Lingo* violated NH RSA 664:14-b, I.

The same is true for Plaintiffs' claim under NH RSA 664:14-a, II. 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.

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. N.H. 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) (quotations omitted). And they avoid "absurd" results. *Coffey*, 957 F.3d at 50. The same limitations on intermediary liability that apply under federal law therefore apply to 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 would say that a telephone company "knowingly misrepresents" information when one of its customers makes a misrepresentation in a phone call. 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 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 other Defendants to plausibly allege that *Lingo* "knowingly

misrepresent[ed]" information, NH RSA 664:14-b, I, or "deliver[ed]" calls, NH RSA 664:14-a, II.

C. Plaintiffs Do Not Plausibly Allege That Lingo Proximately Caused Any Injury From The Election-Law Violations.

Plaintiffs' VRA and state-law claims fail for another independent reason: Plaintiffs do not plausibly allege that Lingo proximately caused any injury. 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 (2002). 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.

Plaintiffs do not plausibly allege proximate cause here. 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 162–64.

So too here. Lingo did not proximately cause the delivery of harmful content by Kramer, Life Corp, or Voice Broadcasting. 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. *Walsh*, 821 F.3d at 163–64. Here, by contrast, Lingo merely offers a neutral voice-calling service, and there is no allegation that Lingo promoted "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 the other Defendants' 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).

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 lack causes of action to bring such claims.

1. Plaintiffs' Lack A Cause Of Action For Violations Of VRA Section 11(b).

Plaintiffs allege that "Defendants' conduct violates Section 11(b) of the Voting Rights Act." Am. Compl. ¶ 99. 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); *see also Schilling v. Washburne*, 592 F. Supp. 3d 492, 497–99 (W.D. Va. 2022) (same).

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. Mass. Elec. Co.*, 875 F.3d 64, 69 (1st Cir. 2017)

(quotations omitted). 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 (quotations omitted).

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. 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 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.

Plaintiffs cannot satisfy the "uphill battle" of identifying an implied cause of action, in the face of this enforcement scheme. *Allco*, 875 F.3d at 70. Section 11(b) does not use "rights-creating

language," *Schilling*, 592 F. Supp. at 497–99 (quotations omitted), and, even if it did, the provision demonstrates no "congressional intent to provide a private remedy for a violation," *Andrews*, 2023 WL 6456517, at *11; *Schilling*, 592 F. Supp. at 499 & n.1. 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 Part*y, 166 N.H. 138 (2014), compels dismissal. 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. 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. *Id.* at 145 (quotations omitted).[5] The court explained that the voter could not establish that her injury was "caused by" the statutory violation

[5] Plaintiffs attempt to downplay the New Hampshire Supreme Court's analysis as dicta. Pls.' Mem. ISO Mot. for Prelim. Inj., ECF No. 71-1, at 22 ("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) (quotations omitted).

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 amended complaint does not allege *any* "injury" to Plaintiffs. 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 (quotations omitted). The statutes at issue here are designed to protect against voter confusion. *See id.* at 145 (assessing voter confusion to analyze statutory standing).[6] But all of the individual plaintiffs allege that they knew "the call was not legitimate." Am. Compl. ¶¶ 59–62. 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.

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 amended 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." Am. Compl. ¶ 93. Thus, any injury necessarily "flowed from the political content of the message, rather

[6] 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. 23. 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 a "construction" that "would render meaningless the word 'injured.'" 166 N.H. at 143–45.

than from the alleged absence of the required 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 vote 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. *O'Brien*, 166 N.H. at 146.

E. Plaintiffs Cannot Overcome Lingo's Statutory Immunity.

Even if Plaintiffs plausibly alleged that Lingo violated the VRA or New Hampshire election law and that Lingo proximately caused their injuries, *and* even if they had proper causes of action to remedy those alleged violations, those claims would still fail because Lingo is statutorily immune under Section 230 of the Communications Decency 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; (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) and *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, Am. Compl. ¶ 98, they were necessarily "carried over Internet Protocol (IP) networks." FCC, *Combating Spoofed Robocalls with Caller ID Authentication*, https://tinyurl.com/yc6kecav (last visited June 9, 2024) ("the STIR/SHAKEN framework is only operational on IP networks"); *accord* Am. Compl. ¶¶ 40 n.16, 54 & n.34. 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, 22425 ¶ 34 n.115 (2004); *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 Commc'ns Inc. Privacy Litig.*, 525 F. Supp. 3d 1017, 1029 (N.D. Cal. 2021) (holding that videoconferencing service was interactive computer service).

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." 47 U.S.C. § 230(f)(3). Kramer easily satisfies this "broad definition," *Lycos*, 478 F.3d at 419, because he allegedly wrote the "script for the" New Hampshire Robocalls and "commissioned" a third party for their creation, Am. Compl. ¶ 48. Voice Broadcasting, at Kramer's direction, delivered the resulting content, and "Life Corp routed a portion of the calls to Lingo." *Id.* ¶¶ 50–54. 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*, 2024 WL 966380, at *14; *see also Monsarrat*, 28 F.4th at 319 ("'downstream distribution'" of third-party content does not make entity responsible for creation or development of content).

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. Am. Compl. ¶ 95. Plaintiffs' claim under NH RSA 664:14-a alleges that the calls "did not state" and "misrepresented" information required under that statute. *Id.* ¶ 124. 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." *Id.* ¶¶ 129–30. 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); *Herrick*, 306 F. Supp. 3d at 584 (same).

II. PLAINTIFFS DO NOT PLAUSIBLY ALLEGE A TCPA CLAIM AGAINST LINGO.

Plaintiffs do not plausibly allege that Lingo "initiated" the New Hampshire Robocalls as required to bring a claim under TCPA Section 227(b). *See* Am. Compl. ¶ 106. That subsection makes 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." 47 U.S.C. § 227(b)(1)(B). The cause of action for initiating calls extends only to that "subsection," *id.* § 227(b)(3), while violations of technical standards are enforced by regulators, *id.* § 227(b)(4). Plaintiffs do not allege that Lingo violated Section 227(b) or its implementing regulations.

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" means "[t]o cause to begin," *see Initiate*, Am. Heritage Dictionary 662 (2d College ed. 1991), or "set going," *Initiate*, Merriam-Webster 622 (Ninth New Collegiate 1990). Under the plain meaning of the term then, Lingo did not "initiate" any telephone call. Rather, Life Corp and Voice Broadcasting—at Kramer's direction—initiated the calls when they input the recipients' numbers and clicked "call." Although the calls traversed Lingo's network once initiated, that is of no relevance because the calls had already been "set going" and "caused to begin" by Life Corp and Voice Broadcasting.

The FCC has interpreted the statute consistent with this plain meaning, explaining 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, 6583 ¶ 26 (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." *Id.* Thus, a phone service provider like Lingo will not be held liable where it merely "sends" communications "in response to" an input from "the user." *Rules & Reguls. Implementing the TCPA*, Declaratory Ruling and Order, 30 FCC Rcd 7961, 7981 ¶ 32 (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." *Id.* at 7982 ¶ 33.

The cases following this commonsense reasoning are legion. In *Adzhikosyan v. Callfire, Inc.*, 2019 WL 7856759 (C.D. Cal. Nov. 20, 2019), a 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 (cleaned up). In *Meeks v. Buffalo Wild Wings, Inc.*, 2018 WL 1524067 (N.D. Cal. Mar. 28, 2018), Yelp did not "initiate" text messages where its users, "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), a 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. And in *Smith v. Securus Techs., Inc.*, 120 F. Supp. 3d 976 (D. Minn. 2015), an inmate-calling service did not "make" calls because the "inmate" "select[ed] and dial[ed] Plaintiffs' telephone numbers." *Id.* at 981–83.

Here, Plaintiffs do not plausibly allege that Lingo "initiated" the New Hampshire Robocalls. As explained above, Plaintiffs allege that Life Corp and Voice Broadcasting, at Kramer's direction, initiated the calls, Am. Compl. ¶¶ 50–54, and make no claim that Lingo "decided whether, when, or to whom to" call. *Adzhikosyan*, 2019 WL 7856759, at *3. Rather,

Plaintiffs allege that "Life Corp routed a portion of the calls to Lingo." Am. Compl. ¶ 54. Because Kramer and Life Corp controlled these decisions, they, not Lingo, are "the maker or initiator of" the calls. *2015 Declaratory Ruling*, 30 FCC Rcd at 7982 ¶ 33.

Nor do Plaintiffs plausibly allege that Lingo can somehow be deemed to have initiated the calls through indirect participation. Courts and the FCC have contemplated TCPA Section 227(b) liability against service providers only where the complaint alleges a "high degree of involvement or actual notice of an illegal use" on the part of the provider. *Off. of Att'y Gen. of Fla. v. Smartbiz Telecom LLC*, 688 F. Supp. 3d 1230, 1237 (S.D. Fla. 2023) (quoting *Rules & Reguls. Implementing the TCPA*, Report and Order, 7 FCC Rcd 8752, 8780 ¶ 54 (1992)). In other words, a TCPA plaintiff must "show *more* than [the] normal operation" of a neutral service to bring TCPA claims against service providers. *Cunningham v. Montes*, 378 F. Supp. 3d 741, 749 (W.D. Wis. 2019).

Plaintiffs do not allege anything close to the high degree of involvement or actual notice required to show that Lingo "*willfully* enable[d]" Kramer and Life Corp's illegal conduct, as would be required to deem Lingo the initiator of the calls. *2015 Declaratory Ruling*, 30 FCC Rcd at 7982 ¶ 30 (emphasis added).[7] There are no allegations that Lingo was on notice of the New Hampshire Robocalls *before* their transmission ceased on January 21. *See id.* ¶ 65 (alleging that the FCC issued a notice of suspected illegal traffic "[o]n February 6" that noted "Lingo had previously responded to [an industry group's] investigation of the calls"). That glaring flaw distinguishes this case from those in which courts have allowed claims to proceed based on direct involvement by phone service providers. *See Smartbiz Telecom*, 688 F. Supp. 3d at 1237 (provider "was notified

[7] Plaintiffs say the "FCC found that Lingo willfully . . . violated FCC rules." Am. Compl. ¶¶ 71, 98. But in the enforcement context, the FCC uses a specialized definition of "willful" that "does not require a showing that the party knew he was acting wrongfully." *See AT&T Inc.*, FCC 24-40, File No. EB-TCD-18-00027704, ¶ 64, 2024 WL 1905227 (rel. Apr. 29, 2024) (cleaned up).

approximately 250 times" but took no action to stop the robocall scheme); *Cunningham*, 378 F. Supp. 3d at 749 (telemarketing platform "set up and ran some of [its] clients' campaigns from start to finish"); *Hurley v. Messer*, 2018 WL 4854082, at *4 (S.D. W. Va. Oct. 4, 2018) (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 (quotations omitted)).

That leaves Plaintiffs with the allegation that Lingo "provid[ed] each call" with an "A-level" caller ID attestation because Lingo insufficiently implemented the STIR/SHAKEN framework. Am. Compl. ¶ 54. That allegation fails to state a TCPA claim for multiple reasons.

First, Plaintiffs lack a private right of action to enforce any failure to implement the STIR/SHAKEN framework. The FCC promulgated its STIR/SHAKEN rules under the TRACED Act, which vests enforcement authority in regulators. *See* 47 U.S.C. § 227b. And, 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." *Id.* § 227(d)(3). Because Congress made some TCPA provisions—but not STIR/SHAKEN compliance—privately enforceable, 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) ("[W]hen 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." (quotations omitted)).

Second, providing an attestation under the STIR/SHAKEN framework does not *initiate* anything. Plaintiffs allege only that Lingo's attestation "made it less likely that providers could detect the calls as potentially spoofed." Am. Compl. ¶ 98. Even if that were true, making it less

likely that calls will be detected as potentially spoofed is not the same thing as causing the calls to be set going in the first instance, as would be required to show that Lingo "initiated" the calls.[8]

Finally, Plaintiffs do not even try to allege that Lingo violated any of the TCPA's implementing regulations covered by the Section 227(b) cause of action. Plaintiffs use the undifferentiated term "Defendants" and say they all (i) "spoofed" the calls, Am. Compl. ¶ 103, did not (ii) disclose the identity of the caller, *id.* ¶¶ 115–16, (iii) offer an appropriate op-out mechanism, *id.* ¶ 117, (iv) maintain an opt-out list, *id.* ¶ 118, or (v) qualify for an exemption, *id.* ¶ 119. None of these requirements apply if Lingo did not initiate the calls (it did not). And Plaintiffs do not allege that *Lingo* did or failed to do any of this. They allege that Lingo violated STIR/SHAKEN regulations. But those regulations were not promulgated "under this subchapter [*i.e.*, Section 227(b)]," 47 U.S.C. § 227(b)(3), because they do not arise under the FCC's Section 227(b) authority, *see Robocalls Order*, 35 FCC Rcd at 7615 ¶ 1 (relying on the TRACED Act).

Because Plaintiffs have not plausibly alleged that Lingo violated the TCPA or its relevant implementing regulations, their TCPA claim against Lingo should be dismissed.

CONCLUSION

Lingo respectfully requests that the Court dismiss all claims against it with prejudice because Plaintiffs have already amended their complaint and cannot allege additional facts that would state a plausible claim for relief against Lingo.

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[8] In any event, the STIR/SHAKEN framework "does not distinguish legal calls from illegal ones" for TCPA purposes and is not a sufficient basis to block traffic. *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, 7632 ¶ 48 (2020) ("*Robocalls Order*"). Thus, an erroneous attestation does not establish even a failure to take action required by law to stop unlawful robocalls—much less affirmative initiation of them.

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Respectfully submitted,

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