

FCC 19-135

In the matter of: Kenneth Moser dba Marketing Support Systems

File No.: EB-TCD-18-00028267

NAL/Acct. No.: 202032170001

FRN: 0029043379

STATEMENT IN REPOSE TO, AND REQUEST TO RESCIND, NOTICE OF APPARENT LIABILITY FOR FORFEITURE

I. Introduction

The Notice of Apparent Liability for Forfeiture (Notice) and its related Citation and Order (Order), is a clear political prosecution. This because a political prince, Republican Assembly Candidate Philip Graham, the stepson of Pete Wilson, a former Republican United States Senator, California Governor, State Assemblyman and Mayor of San Diego, was falsely accused of a crime.¹ He was allegedly denied a win in a hotly contested election because of a message Marketing Support Systems (MSS) was hired to transmit just days before the election. A local publication, Voice of San Diego, detailed this assertion per footnote #12 in the Notice, stating that this investigation went forward “...**thanks in part to his famous stepfather’s connections.**” This also was made even more crystal clear when the Chairman of the FCC Ajit Pai, decided personally to step into the political fray admitting so much in the first paragraph of his own statement attached to the Notice; “One week before last year’s California primary election, residents of the 76th State Assembly District outside of San Diego received a robocall describing in graphic terms a sexual assault allegedly committed by one of the candidates running for an open Assembly seat. But the allegation was false. It had already been disproven by law enforcement. It was a malicious smear.”

The facts however as detailed here show that numerous assertions listed in the Notice are flatly wrong and most importantly the message regarding a criminal complaint and the candidates late night social activities, not of our making, was emailed to us on behalf of the Client (Client) and the order placed **BEFORE** Graham was exonerated regarding the alleged crime. Additionally Mr. Graham, who two years earlier lost a City Council race coming in last place out of a field of five candidates (in an ironic twist MSS had been hired to do positive calls promoting Graham independently in that race), was heavily outspent. According to documents filed with the California Secretary of State, opposing independent expenditures were \$136,242, verse \$67,940 in support. He was pummeled with flyers about the accusation in hard hitting union political mailers that had essentially the same published quotes in the message we transmitted; one by the California School Employees Association PAC (spending \$60,993.63 in three expenditures May 29 – 31) and another by the Service Employees International Union California State Council PAC. See Exhibit A. Moreover even after the exoneration, “a political action committee sponsored by the California Labor Federation, AFL-CIO, did Facebook ads and directed women to a website vaguely suggesting that Republican candidate Phil Graham was dangerous,” this again from the article in footnote #12 in the Notice. See Exhibit B. Furthermore by the time it was widely reported that he was exonerated regarding the criminal complaint, a huge amount of voters had already voted with mail-in ballots which is normal for this district. Finally it should be noted that out of 250,565 votes cast, only 82,904 were registered Republicans or 33%. See Exhibit C.

The Notice alleges that MSS had intent to cause harm by spoofing a rival’s phone number. But the FCC apparently failed to do proper due diligence and just presumed that HomeyTel Inc, whose caller ID number was used is a legitimate operating firm. However in actuality it has been a defunct suspended corporation for years! At the time of the calls detailed in the Notice, MSS honestly thought that it was out of business because the Secretary of State for California said it was. They had no physical address, their PO address was abandoned, the fax number

¹ <https://www.nbclosangeles.com/news/national-international/woman-accuses-assembly-candidate-of-battery-at-encinitas-bar/2067300/> Published May 22, 2018

turned off, they no longer had employees and their phone number is now never directly answered as it was before. We assumed based on the foregoing that it was a dead voice over internet protocol (VOIP) number. This number was used as they had a past history of making hard hitting political calls. We did this at the request of our client so as to protect her identity as she wanted to remain anonymous fearing retribution which was her right.

In its blind zeal to help politically connected Candidate Graham, seek some kind of justice for his loss, it appears that the conclusion in the FCC's Notice was the result of numerous and easily debunked bogus details. The crux of their argument comes from a highly questionable declaration provided by Conrad J. Braun, the founder and former owner of HomeyTel Inc. Braun is a two time convicted felon and con man who in addition to being incarcerated for his crimes has been institutionalized on two different occasions for his mental instabilities and has used insanity pleadings in attempts to lessen his sentencing. His defunct rogue firm had been sued successfully numerous times for illegal commercial robo dialing in violation of the Telephone Consumer Protection Act (TCPA).

Lastly the FCC completely overstretched its legal mandate and ignored both the 1st amendment protections on political speech for the Order and Notice in addition to the 5th amendment requirements for due process in issuing the Notice. In its conclusion the FCC maintains that MSS "violated the Truth in Caller ID Act by making spoofed calls with the intent to cause harm and wrongfully obtain something of value," and thus injured HomeyTel Inc by spoofing their number and gained value by messaging voters. But clearly there was no intent by MSS as you can't harm a long defunct corporation. Also calling consumers who willfully provided their phone numbers with protected political speech plainly doesn't obtain anything of commercial value.

II. Background of Parties in the FCC Notice

The Complainants

This entire matter started with a "hand delivered" complaint letter dated June 1st 2018, to California Secretary of State (SOS) Alex Padilla, by attorney Thomas W. Hiltachk for his client Philip Graham detailed in FCC footnote #14 of the Notice. See Exhibit D. Mr. Padilla, then forwarded it to the FCC and other government entities the following day.

Mr. Hiltacht, works for the law firm of Bell, McAndrews & Hiltack, LLP. This firm not only has represented former Senator Wilson, but the lead and founding partner Charles Bell, is general counsel for the **California Republican Party**.²

Marketing Support Systems & Kenneth Moser

Kenneth Moser, has a degree in marketing and has been licensed to represent financial and insurance products for over 30 years. He formed MSS in 1993, as an updated sole owner version of M & M Marketing, that was established with an ex-business partner in 1990. MSS specialized for years in legitimate live agent business to business lead generation and appointment setting mainly for agents and agencies in the health insurance industry as referenced in Footnote #2 of the Notice. MSS also does Marketing Consulting for other types of programs and during the political season MSS provides campaign consulting, surveys, email messaging and Get Out the Vote calling programs including political robo dialing. MSS sold its physical operation to a client in 2004, but continued to do consulting along with other activities. Also as detailed in Footnote #2 of the Notice, it maintains a current Fictitious Name Statement on file with the County of San Diego, in addition to the requisite Business Permit with the City of San Diego. It also has an "A" rating with the Better Business Bureau with zero complaints.³ Moser has never been arrested nor has he even been accused of a crime prior to this Notice & Order. Additionally neither he nor MSS has ever been sued or cited previously for any violations of the Telephone Consumer Protection Act (TCPA).

Mr. Moser has been a public activist for 44 years. A short version of his altruistic activities details that in 1996; he won election and served as Vice President of the San Diego Community College Board of Trustees until

² <https://www.bmhlaw.com/attorneys/>

³ <https://www.bbb.org/us/ca/san-diego/profile/telemarketing-services/marketing-support-systems-1126-1014054>.

2000. He was honored by San Diego Junior Achievement as their Volunteer of the Year in 2002, providing JA with over 20 years of service helping educate disadvantaged youth. Additionally he has served on the boards of educational non-profits and currently volunteers as Executive Director for a senior citizen focused 501c3 non-profit. As an activist he has also filed numerous suits in the public interest EG he is four for four winning Public Records Lawsuits exposing misuse of public funds and facilities. More recently last August, in a case that was referenced in the FCC Notice at Footnote #32, he was certified as the class representative by Federal Judge William Hayes, in a class action lawsuit he brought against Health Insurance Innovations Inc et al (HII), for allegedly being behind a scheme of making millions of illegal commercial robo dials promoting junk health plans. Moser documented over 300 to himself alone. Acting as their Third Party Administrator, HII is the same firm that provided products and collected money for the firm Simple Health, which the FTC is currently prosecuting for selling HII sham products.⁴

FCC Declarant Conrad Braun

Conrad J. Braun is a twice convicted felon. His long and notorious history in scam business ventures, illegal robo dialing and attempting to scam court systems throughout the United States began with Gold Standard Corporation, a company that theoretically purchased and stored precious metal coins for its customers, but which really operated as a piggy bank full of stolen money for Mr. Braun throughout the 1980's. Braun pled guilty in 1994 in federal district court in Missouri to five counts of wire fraud and five counts of interstate transportation of funds obtained by fraud. He was sentenced to ninety months in prison and noticed to pay almost two million dollars in restitution. See *United States v. Braun*, 60 F.3d 451 (8th Cir. 1995).⁵ Twenty six years later he still owes the entire restitution to the 550 victims of his gold coin scam in addition to multiple unsatisfied judgments in the San Diego Courts for his own violations of the TCPA and related matters of approximately \$100,000.

Mr. Braun also has also engaged in physical criminality, pleading or being found guilty of battery in 1989, criminal trespass in 1990, and two instances of making a criminal threat in 1990 and 1991 (Johnson County (Kansas) District Court, Case No's: K0061261(1990), K0064438 (1990), K0064956(1990), K0067532(1991);. More recently Mr. Braun was again found guilty of criminal trespass in 2003 (Case No.: K0067315 (2003) Later Mr. Braun was re-arrested for violation of parole restrictions after moving to San Diego on 09/21/00, USDC Case 3:00-mj-02775-JAH. See Exhibit E.

Braun is mentally unstable and has been institutionalized twice. **CNN reported that he showed up to court once in a killer bee outfit.** See Exhibit F. In one of his many episodes he attacked a state attorney general elect using his robo dialing firm who had years earlier successfully prosecuted him and put him behind bars again. See Youtube TV interview titled "Bumble Bee Demands Paul Morrison Resignation at Inauguration," where his instabilities can clearly be seen on display.⁶

HomeyTel Inc

According to the California Secretary of State (SOS), HomeyTel Inc is a defunct California Corporation originally established on 3/22/2006, with its last filing submitted on 1/05/2015. The paperwork filed with the SOS details that it was founded by Conrad J. Braun, and he has always been listed as the firms Agent for Service (Agent). Its current listed status with the SOS is; "**Status: SOS/FTB [Franchise Tax Board] SUSPENDED.**"⁷

What this status means is that not only did it stop filing the requisite annual paperwork but is also in default for failing to pay California corporate taxes and presumably Federal ones as well. Furthermore the last legitimate HomeyTel Inc bank account with Bank of America was closed in January 2017. See Exhibit G.

However even prior to this period it was operating outside the law because Braun, as the Agent, was required to be an individual who resides in California and has a legitimate address where the corporation can be served. Specifically per Cal. Corp. Code §8212; "If a natural person who has been designated agent for service...no

⁴ <https://www.ftc.gov/news-events/press-releases/2019/07/consumers-still-paying-sham-insurance-products-sold-simple-health>.

⁵ <https://www.courtlistener.com/opinion/699603/united-states-v-conrad-jules-braun/>

⁶ <http://www.youtube.com/watch?v=U8xeWipGm64>

⁷ <https://businesssearch.sos.ca.gov/CBS/SearchResults?filing=&SearchType=CORP&SearchCriteria=homeytel&SearchSubType=Keyword>

longer resides in the state...the corporation shall forthwith file a designation of a new agent conforming to the requirements of Section 8210.”⁸ But the last two addresses listed for HomeyTel Inc since 2013, with Braun as the Agent, was an unattended closet suite mail drop within a suite and the later a PO Box just north of the Mexican border. The later address used by Braun, his wife and HomeyTel Inc hasn’t been active since 2017. Braun however has lived in Mexico for years. He requested and received a legal residency there on February 14, 2014, and stated in a case declaration that he moved there “for the primary reason” to avoid law suits against he and HomeyTel Inc for TCPA violations that he asserts aren’t valid via one of his many legal conspiracy theories. See Exhibit H.

A quick review of the San Diego Superior Court (SDSC) Register of Actions,⁹ details that HomeyTel Inc and its founder Conrad Braun along with their clients, have been sued multiple times successfully by various individuals for illegal commercial robo dialing in violation of the TCPA. In one such case Sapan vs. HomeyTel Inc & Braun, SDSC Case # 37-2011-00087692 filed 6/13/2011, for promoting on behalf of his clients “various financial products such as insurance, debt relief, etc.” and detailing “database entries of myriad FCC complaints submitted by other HomeyTel/Braun victims.” See Exhibit I. Because of the illegitimate addresses listed above, Sapan had to petition the court to do a Service by Publication. Later the court entered judgment against HomeyTel Inc and Braun on 12/08/2014. HomeyTel/Braun later lost an appeal after the court pointed out that in his own admissions of bad conduct he admitted knowledge of the suit and was evading service of process, knowingly allowing the matter to go to default. Braun then frivolously petitioned the Supreme Court of California for review, which they predictably denied. He has yet to pay the judgment which now totals approximately \$47,000. In every case plead HomeyTel/Braun attempts to assert falsely that business to business robo dialing is legal when in fact it is banned under California Law per California Civil Code § 1770(a)22(A).¹⁰ Section E of the TCPA validates this stating “... nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits— the use of artificial or prerecorded voice messages.” Additionally HomeyTel Inc and Braun together have 94 TCPA complaints filed with the FCC through 2015 alleging illegal robo dialing as well. See Exhibit J. Interestingly the FCC hasn’t pursued any of those complaints which apparently weren’t made by politically connected people.

MSS Client for the Philip Graham Calling Campaign

MSS was referred and introduced to a new client who wanted to do an independent expenditure political calling campaign in support of a relative competing on the ballot along with Philip Graham. She is a single young local woman in her twenties and apparently a political novice. It was stressed that she wanted to remain anonymous as she feared reprisal. We received a professionally done prerecorded message for her campaign and had nothing to do with its creation, recording or editing in any way shape or form. It was broadcast within hours of us receiving it and we were paid \$800 by her for our services shortly thereafter.

III. Facts of the Political Calling Campaign that was the Subject of the Order and Notice

The Details Regarding Implementation of the Calling Campaign

On Tuesday, May 29, 2018 at 6:50:32 PM, MSS received an initial communication via email with an attached pre-recorded audio message from Mark Muir, who was a long-time political client and former Encinitas City Councilman. See Exhibit K. He was assisting the Client, a relative also a recipient on the email, who wanted to do political calls to a group of Voters in the California 76th Assembly district. The message highlighted the criminal accusation by simply quoting published stories stating that; “ABC and NBC news are reporting that San Diego Assembly Candidate Philip Graham is being investigated by the San Diego Sheriff’s department for alleged sexual harassment of a woman...” It went on with specifics of the accusation that was widely reported with lurid details for the proceeding several days by all forms of local media. Lastly at the end of the message it also begged the question of why he was out so late at a bar stating ...“shouldn’t he have been at home sleeping?” A fact confirmed

⁸ <https://law.justia.com/codes/california/2005/corp/8210-8217.html>

⁹ <https://roa.sdscourt.ca.gov/roa/>

¹⁰ <https://codes.findlaw.com/ca/civil-code/civ-sect-1770.html>

and reported by the local Coast News newspaper on May 24th, 2018, that Candidate Graham never denied; “Reporters spoke to bar employees and a person who was in the bar that Sunday who confirmed that Graham was at the bar Sunday night into the early hours on Monday. One security guard said that Graham frequents the bar.”¹¹

Wanting to remain anonymous, she chose to take advantage of a loop hole in California campaign disclosure laws for independent expenditures of less than \$1,000 and recent Federal rulings regarding message content and disclosure. She chose not to reveal her identity in her message and we were directed not to use any identifying caller ID, presumably because the hard hitting but accurate message was directed at a well-connected political candidate endorsed by the local Republican Party and she feared repercussions.

Early the following morning on May 30, MSS launched the Campaign programming it to begin at approximately 11am PST, so as not to begin too early which is our policy. As the call report details, the vast majority of the calls, approximately 77%, were done on the 30th with follow-up calls to no answers, busies etc. the following day, which is MSS’s standard procedure. Lastly we’re not sure why our vendor report records show that we made 31,086 attempted calls, which contradicts the FCC’s statement that we made over 47,000. See Exhibit L.

The Voter Phone List Used

The calling list used in the campaign was obtained directly from the San Diego County Registrar of Voters (SDROV). They provide the list of registered voters to anyone who desires to do voter contact and outreach etc. The SDROV requires that you sign an affidavit that it will only be used for strictly political purposes. The phone numbers on this list were provided by the voters themselves when they registered to vote and the list was not enhanced in any form EG to add more numbers. Based on the specifications from our client who had a limited budget, we extracted from the County file a list of 27,510 voters with phone numbers for the campaign. This number was then automatically reduced in a deduplication process once uploaded to our vendor Voice Broadcasting Inc EG eliminating multiple registrations using the same phone number - husband wife etc.

News and Press Coverage Regarding Battery Allegation Being Unfounded

As detailed in the Notice, the San Diego Sheriff’s department issued a press release on May 29, 2018, for the “Subject: Encinitas Battery Allegation.” It concludes after reviewing video and speaking to witnesses that “...this case is being closed as unfounded...” However it didn’t refute that Philip Graham was at the bar Sunday night into the early hours on Monday as reported. Furthermore it should be noted that the Sheriff’s release came out long after business hours at **7:05pm, a critical detail purposefully left out of the FCC’s Notice in footnote #13** – 15 minutes **AFTER** MSS received the order. See Exhibit M.

MSS is not on the Sheriff’s press release list and thus we were not privy to it. By our research the news of Graham’s exoneration was only reported initially online by two local TV news channels, the first beginning 45 minutes later at 7:50pm on one web site and approximately an hour later on the other. The local newspaper didn’t post it on their site until 2:20pm the next day and thus we assume it wouldn’t have made the print edition until the following day on the 31st.¹²

Identification and disclosure of Client

As stated the Client for this campaign was emphatic that her identity would be kept anonymous as she feared the exact type of political retribution MSS has now received and potentially worse. Thus to protect our Client, we choose to use what we honestly thought was an old phone number of a now long defunct California Corporation HomeyTel Inc, that had a past history as detailed of making similar political calls.

Since this was a state campaign California disclosure laws applied, specifically the California Political Reform Act (CPRA), Government Code (CGC), §§ 1090 et seq. Per the CPRA candidate campaign committees and political action committees are required to disclose who paid for the call in the message of the call. However

¹¹ <https://www.thecoastnews.com/investigation-into-candidate-continues-accusers-credibility-in-question/>

¹² <https://www.sandiegouniontribune.com/news/politics/sd-no-graham-exonerated-20180530-story.html>

contrary to what Graham Attorney Thomas W. Hiltachk stated in his complaint letter (footnote #14 of the Notice our Exhibit D) regarding disclosures in phone messages, there is an exemption in that no disclosure in the message is required for independent expenditures. "This section does not apply to a telephone call that is paid for by an independent expenditure." See California Government Code (CGC) - § 84310(d).¹³ Additionally when an individual spends less than \$1,000, there is no obligation to file any campaign disclosure reports.¹⁴

Furthermore the Clients fears of retribution and attacks on her rights were born out as Graham's complaint letter then went much further demanding of the Secretary of State "**...that your office immediately interrupt the call program,**" in a fascist like attempt to squelch her free political speech. Graham's attorneys also attempted to stop the Democrats, political PACs and labor unions from using the charges in campaign materials before the exoneration. In a May 18, 2018, letter to the Political Action for Classified Employees (PACE) Committee, they warned: "Any such material distributed by you would constitute actionable defamatory speech, and unequivocally would not enjoy any First Amendment protection." They also according to a recent article called for another branch of the federal government to do their bidding. Asking "...the Public Integrity Unit at the U.S. Department of Justice to launch their own investigation to determine if other individuals and/or groups were involved in this fraud and election tampering. We stand ready to assist the USDOJ in any way necessary."¹⁵

While not attorneys, as a vendor MSS advises clients of disclosure and regulatory responsibilities for doing political robo calls as we understand them. The clients however make the final decision regarding these matters and are ultimately responsible for identification and disclosure per the CPRA or the TCPA.

III. The FCC Investigation Is Fatally Flawed

According to the FCC Notice, this politically motivated investigation as previously referenced started with a unique "hand delivered" complaint letter as previously stated to Secretary Of State Alex Padilla, by attorney Thomas W. Hiltachk for his client Philip Graham.

The Order states that MSS knew that the phone number used in the campaign, 619-223-1022, was known to us from a lawsuit we filed and won against HomeyTel et al in 2012, which is true. See FCC Footnote #37 of the Notice. Furthermore in ¶18 of the Notice, it states that "The Bureau's investigation uncovered significant evidence that Moser apparently intended to harm HomeyTel and Braun." However as we will show here, the FCC apparently accepted blindly from con man Braun that HomeyTel Inc at the time of the calls in 2018, was still a functioning legal entity which wasn't true.

The Order itemizes legal disputes dating back to 2008, between MSS and HomeyTel Inc/Conrad Braun, but makes numerous errors of their conclusions in the footnotes that we've listed below. Additionally the legal history detailed between MSS and HomeyTel/Braun reads as if it was taken directly out of Braun's failed lawsuit he filed in 2013, with his rants against MSS, which was ultimately dismissed completely because of its own numerous flaws. As have his many other harassment lawsuits against others with the same diatribe.

This FCC conclusion also contradicts Braun's own declaration in the related state investigation by the Fair Political Practices Commission (FPPC) of our Client, given on June 13, 2018, and attached to a published story dated January 2, 2019, as Footnote #12 in the Notice. Not until Moser saw this same article when it was published, did he realize that something was amiss and that the defunct corporation was apparently still operating in some other form although apparently not legally. Presumably the FCC would have read the same article in detail along with the link in it for Braun's FPPC declaration, which should have raised red flags. In Braun's declaration he perjures himself and uses a similar but different unregistered business name of "HomeyTel Network." Stating, "I was the owner of the HomeyTel Network from 2004 to 2017. My wife Eunice Verdugo, is the current owner." See Exhibit N. This clearly was false however, as the name HomeyTel Network is not the same as HomeyTel Inc. Also in his pleadings for his law suit against MSS filed in April 2013, he claimed he was an "employee" of HomeyTel Inc. He used the same phone number once again, but then in subsequent filings for his appeal, changed it to his cell phone number of 619-410-7999.

¹³ <https://codes.findlaw.com/ca/government-code/gov-sect-84310.html>

¹⁴ <http://www.fppc.ca.gov/learn/campaign-rules.html>

¹⁵ <https://californiaglobe.com/section-2/no-justice-yet-for-republican-assembly-candidate-falsely-accused-of-sexual-harassment-during-2018-election/>

While his wife as a Mexican national can own an American Corporation, based on our research no such filing was ever recorded with the SOS for HomeyTel Inc and they don't list a HomeyTel Network. Recently acquired post judgment discovery documents detail that Braun and his wife are now using a personal PO Box a ½ mile north of the border in San Diego to receive not only their personal mail but also to receive payments for both HomeyTel Inc and HomeyTel Network. See Exhibit O. Yet the San Diego County Recorder has no registration for the fictitious name HomeyTel Network as required, nor does the City of San Diego list a business permit with either name. Additionally the HomeyTel Inc website www.homeytel.com that for years used only the name HomeyTel with a San Diego address, now lists it as HomeyTel Network using the same phone of the now defunct corporation but this time with no specific address. See Exhibit P. The HomeyTel Inc BBB listing currently still details all the old corporate information. See Exhibit Q. Finally subpoenaed documents by the FCC referenced in Notice Footnote #23 of the Notice, show another missed red flag as they detail that the HomeyTel Inc phone number was transferred to Vonage as a carrier on 10/24/15, when HomeyTel Inc was apparently shutting down, but was now registered with the name HomeyTel Network as a residential number! See Exhibit R.

It is clear that felon Braun stripes unchanged, initiated his latest business scheme as a classic shell game. This so he could avoid paying California and Federal corporate taxes in addition to unsatisfied judgments both against HomeyTel Inc and himself personally in a Fraudulent Transfer of Assets. By purportedly transferring ownership of his business to his wife, he is trying to prevent an attachment of this asset(s) as allowed per California's Attachment Law, which makes both he & his wife liable for attempting to hinder, delay or defraud his creditors. See California Code of Civil Procedures (CCP) § 481.010-493.060.¹⁶ While a suit for this can be filed by any of his creditors, Braun knows that they can't be easily served in Mexico. Additionally we also found that Braun deposits these 'company checks' in their joint personal checking account at Wells Fargo Bank, using the same border PO address. See Exhibit S. Since Braun gets his social security payments electronically transferred into this same account as well, he and his 'company' funds are shielded against bank levies from his creditors or the tax man per CCP § 704.080.¹⁷

The Notice in ¶10 and ¶11 states that "Moser is well acquainted with Braun and HomeyTel" and has sued Braun/HomeyTel and its clients for violating the TCPA years ago which is true. However it clearly makes false statements EG that these cases were "dismissed" (Case #37-2008-4053-SC-SC-CTL) or in case of Braun v Moser is "ongoing" (37-2013-41628-CU-FR-CTL) per Footnote #30 of the Notice. When in actuality the results of both of these were solid judgments for Moser/MSS both initially and on appeal. In this last matter the court initially dismissed part of the case under California Anti-SLAPP provisions and then the balance later on 11/6/15, after finding that Braun individually lacked standing to even bring a suit against MSS on behalf of HomeyTel Inc. A judgment was entered against Braun for costs, which hasn't been paid that now is approximately \$50,000. See Exhibit T. Braun has filed numerous sham lawsuits Pro Per in both Federal and State court to simply harass activists and their attorneys who have successfully sued him for TCPA violations. See Exhibit U. The FCC then extrapolated from this "Moser's familiarity with the relevant law," but fails to acknowledge the huge difference between his suits for illegal commercial robo calls and junk faxes as an activist, verse this matter regarding exempt political speech.

Lastly and most importantly at no time during the investigation did any FCC employee ever contact MSS or our client to our knowledge to verify any of the facts. Instead in a flagrant disregard of our 5th amendment right to due process, the FCC blindsided MSS and without warning issued its Order, Notice and a press release during the Christmas holidays with a requirement that we had to respond in just 30 days without discovery.

Errors in the Notice

Stating that the message transmitted was done after the exoneration of a criminal charge – I. Introduction ¶2. In reality the message was created solely by a client, sent to MSS and the order for services placed before this happened.

Implying that HomeyTel Inc is currently a legitimate operating firm, when it's been suspended from operation by the California Secretary of State and the California Franchise Tax Board as it hasn't filed the requisite paperwork or paid taxes apparently since 2015 – I. Introduction ¶2

¹⁶ https://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=6.5.&part=2.&chapter=2.&article

¹⁷ http://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP§ionNum=704.080

Transmitting a prerecorded voice message that had false statements about candidate Philip Graham – 1. Introduction ¶2. MSS was not responsible for the content of the message and only acted as a vendor. However the message, not of our making, had no false statements regarding Graham as it only quoted publications.

Stating that MSS violated the TCPA by transmitting a political message to cell phones and with – I. Introduction ¶3, footnote 3. The intent of Congress when the TCPA was enacted in 1991, was to outlaw “unsolicited advertisements,” not protected political speech.

Stating that MSS violated the TCPA by transmitting a political message using a spoofed number with the intent to cause harm. II. Background ¶4. MSS used the phone number of a long defunct corporation.

Stating that; “Political campaign-related voice message calls are not exempt from these statutory protections.” II. Background ¶5, footnote 10. The 2016 FCC cell phone ban for political speech was almost immediately challenged on 1st amendment grounds and is currently in front of the Supreme Court in Barr/FCC v. American Association of Political Consultants, Inc. Stating that the allegations against Graham had been publicly announced by the Sheriff on 5/29, before the calls were made. II. Background ¶6, footnote 13. When in fact the announcement came late at night after MSS received the Notice and wasn’t widely publicized until late the next day. Furthermore the client, not MSS as a vendor, was ultimately responsible for both the content and decision to run the calling campaign.

Regarding California Court Records stating one case was dismissed and another is ongoing II. Background ¶10, footnotes 28 & 30. For #28 MSS dismissed HomeyTel because Conrad Braun, attempted to appear not only on behalf of himself but also acting as counsel for his clients in violation of California Business & Professions Code 6125. Braun apparently told his clients that they didn’t need to appear and when the Commissioner wouldn’t allow Braun to represent his clients, HomeyTel was dismissed so as to allow the court to grant judgment by default against the other defendants. For #30 this case is not ongoing it is post-judgment and has been for years. As Braun’s case was completely dismissed and judgment was entered against him on 11/6/15. Regarding Federal and California Court Records detailing pending or dismissed cases Background ¶10, footnote 31. All of these cases were either settled prior to trial or judgment was entered on behalf of Moser.

IV. The Case Law Cited By The FCC Is Not On Point

The Notice in ¶16. “The Commission has held that the elements of “harm” in the Truth in Caller ID Act is broad and “encompasses financial, physical, and emotional harm.” Courts have recognized that direct evidence of specific intent is rarely available. Therefore, it is reasonable and often necessary to look at a party’s actions to determine the party’s intent regarding a wrongful action.”

In support of the above proposition the FCC cites to United States v. Dearing, 504 F.3d 897, 2007 U.S. App. LEXIS 22678; and United States v. Marabellas, 724 F.2d 1374, 1984 U.S. App. LEXIS 25913, 84-1 U.S. Tax Case. (CCH) P9189, 53 A.F.T.R.2d (RIA) 692, 14 Fed. R. Evid. Serv. (Callaghan) 1551.

However, Dearing involved a criminal Defendant who was convicted in the United States District Court for the District of Idaho of 32 counts of aiding and abetting health care fraud, in violation of 18 U.S.C.S. § 1347, arising from a scheme to defraud Idaho Medicaid by submitting false billings from a mental health clinic that defendant owned and operated with his brother. Marabellas involved a criminal defendant who sought review of a decision of the United States District Court for the District of Hawaii, which convicted him under 26 U.S.C.S. § 7201 of two counts of attempted tax evasion for the years 1977 and 1978, and under and 26 U.S.C.S. § 7206(1) of one count of willfully filing a false tax return for the year 1977.

The FCC fares no better with General Cigar Co. v. CR Carriers, 948 F. Supp. 1030, 1996 U.S. Dist. LEXIS 17282, as that case involved Defendants, a carrier corporation and three individuals, who filed motions to dismiss a suit brought by plaintiff corporation alleging that defendants engaged in a pattern of racketeering activity under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq. The court denied defendants’ motions to dismiss because it held that plaintiff corporation had adequately stated a claim for both mail fraud and money laundering as predicate offenses for its action asserting defendants violated the Racketeer Influenced and Corrupt Organizations Act.

The FCC also cites to United States v. Davis, 490 F.3d 541, 549 (6th Cir. 2007), and Tusa v. Omaha Auto Auction, Inc., 712 F.2d 1248, 1249, 1983 U.S. App. LEXIS 25649, for the proposition that “intent to defraud is

ordinarily proved by circumstantial evidence” However, Davis, which also involved a criminal defendant convicted of healthcare fraud, explained within that context that “[i]ntent can be inferred from efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits.” In Tusa, an automobile purchaser filed suit against an auctioning corporation alleging that the corporation violated the odometer disclosure provisions of the Motor Vehicle Information and Cost Saving Act (Act), 15 U.S.C.S. § 1981 et seq. The court affirmed the district court’s judgment finding that appellant auctioning corporation had violated the odometer disclosure provisions of the Motor Vehicle Information and Cost Saving Act and the district court properly found the corporation intended to defraud appellee purchaser.

The FCC cites to *United States v. Sullivan*, 522 F.3d 967, 971, 2008 U.S. App. LEXIS 7831, for the propositions that “the scheme itself may be probative circumstantial evidence of an intent to defraud” and “It is settled law that intent to defraud may be established by circumstantial evidence” In *Sullivan*, three defendants appealed the decisions entered by the United States District Court for the Central District of California that convicted and sentenced all three for mail, 18 U.S.C.S. § 1341, wire, 18 U.S.C.S. § 1343, and bankruptcy fraud, 18 U.S.C.S. § 152, money laundering, 18 U.S.C.S. § 1957, and conspiracy to commit fraud and money laundering. The appellate court held that as to two defendants, the evidence was sufficient to support the mail and wire fraud convictions based on the presentation of evidence that they failed to pay media outlets for two organizations’ receivable for their personal use.

As for the proposition that “Because it is abstract and private, intent is revealed only by its connection to with words and conduct” FCC cites to *General Analytics Corp. v. CNA Ins. Cos.*, 86 F.3d 51, 52, 1996 U.S. App. LEXIS 13573. Here, Appellant insurer sought review of a summary judgment by the United States District Court for the Eastern District of Virginia, at Alexandria, which was granted to appellee insured in its action to recover on its claim under an employee dishonesty insurance policy. Appellant argued that whether the employee intended to benefit a third party by her dishonest act was an issue of material fact. The court vacated the summary judgment, which was granted to appellee insured in an action to recover on a claim under its employee dishonesty policy issued by appellant insurer. Remanding the case for further proceedings, the court concluded that whether the employee suspected of altering purchase orders intended to benefit herself or a supplier, as required by the policy, or acted out of revenge was a genuine issue of material fact.

The FCC cites to *Federal Deposit Ins. Corp. v. St. Paul Fire & Marine Ins. Co.*, 942 F.2d 1032, 1032, 1991 U.S. App. LEXIS 19843, for the proposition that “intent...is thought to refer to a subjective phenomenon that takes place inside people’s heads...[The law is concerned only with] the external behavior ordinarily thought to manifest internal mental states ...” (citations omitted)). In *FDIC v. St. Paul* the Appellant, Federal Deposit Insurance Corporation (FDIC), challenged the judgment of the United States District Court for the Middle District of Tennessee, in favor of appellee insurer, on bankers blanket bond claims resulting from bad loans approved by the former president of a failed federal savings bank without following proper procedures, and a guarantee on a forged promissory note. The court affirmed the judgment in favor of the insurer on bankers blanket bond claims resulting from bad loans approved by the former president as he did not have the manifest intent to cause a significant injury to the bank, but vacated the ruling on the forgery clause as the trial court was bound by the parties’ stipulation that the signature was not authentic, and remanded for further consideration in light of this opinion.

In sum, none of the cases cited by the FCC support its findings that “Moser apparently met the intent requirement”, as not one case cited by the FCC specifically relates in any way to The Truth in Caller ID Act’s prohibition on caller ID spoofing with intent to defraud, cause harm, or wrongfully obtain anything of value.

VI. Legal Argument

A) Political Robo Dials to Cell Phones Are Not Illegal Nor Banned By The TCPA

The Notice and Order references the intent of Congress in passing the TCPA in 1991; in addition it further cites numerous published court opinions regarding the harm of “commercial robo dialing.” See Notice footnotes #5 & #10. However none of these are on point for political calls which Congress never intended to ban for 1st Amendment concerns which is why it’s currently perfectly legal to robo dial residential numbers. Additionally the FCC chose to ignore recent court decisions and legal challenges that uphold the right of free speech and bans against or restrictions on political speech via robo dialing or the content of the message. MSS does no commercial

robo dialing as it's completely illegal in California, contrary to the FCC assertions in comparisons to purported rival firms that do. MSS only does non-profit or not for profit political messages which are protected 1st Amendment speech and exempt from the TCPA per §227(a)(4).¹⁸

In passing the TCPA, Congress identified that "unwanted commercial calls are a far bigger problem than unsolicited calls from political or charitable organizations." H.R. Rep. 102-317 at 16, 102nd Cong. (1st Sess. 1991).¹⁹ More up-to-date research suggests that robocall scams pose one of the biggest threats to consumers, constituting 40% of all robocalls. See Fazzini, *supra*; The FCC's Push to Combat Robocalls & Spoofing, Fed. Comm'n Comm'n (last visited June 1, 2019).²⁰ Robocalls related to political campaigns, by contrast, have not been shown to pose a threat to individual privacy. *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226, 2019 U.S. App.²¹

Many of our clients choose to ignore restrictions and rules regarding calls that they believe only apply to commercial versus political speech. This especially in light of the fact that the TCPA specifically only applies to commercial telephone solicitations and exempts noncommercial calls. Again per United States Code (USC) § 227 (a)(4); "The term 'telephone solicitation' means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message...by a tax exempt nonprofit organization." A political campaign is clearly not for profit as it offers no commercial products or services.

Furthermore the FCC at the urging of the law firm representing Mr. Graham, his stepfather a former U.S. Senator and the California Republican Party appears to be trying to regulate the content of political speech by stomping on vendors or MSS in this case. This is a slippery slope for Chairman Pai and the FCC. The level of scrutiny we apply to laws regulating speech varies depending on whether the law is content-based or content-neutral. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226, 192 L. Ed. 2d 236 (2015).²² Content-neutral laws, on the other hand, are subject to lesser scrutiny and can be justified as time, place, and manner restrictions. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).²³

A law can be content based in one of two ways. *Reed*, 135 S. Ct. at 2227. The most commonsense way a law can be content based is if it distinguishes particular speech based on the topic discussed, viewpoint or idea expressed, or, more subtly, the function or purpose of the speech. *Id.* at 2227. Such a law is content based because it explicitly draws distinctions based on the message a speaker conveys. *Id.* The law's purpose will not alter the level of scrutiny: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228.

A law need not draw explicit distinctions to be content based, however. *Id.* at 2227. Even a law that appears "facially content neutral" may be content-based if it cannot be justified without reference to the content of the regulated speech or if it was adopted because the government disagreed with the message the regulated speech conveyed. *Id.* For example, in *United States v. Swisher*, we found a statute that criminalized wearing unauthorized military medals to be content-based not because it explicitly distinguished between types of speech, but rather because it could not be justified without reference to the message communicated by the regulated conduct. 811 F.3d 299, 312-13 (9th Cir. 2016). *Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1226, 2019 U.S. App. LEXIS 27230, 11-12, 2019 WL 4264718 (9th Cir. Mont. September 10, 2019). See footnote 20.

Currently before the United States Supreme Court, is the case of *Barr & FCC v. American Association of Political Consultants Inc.*,²⁴ specifically challenging the FCC's interpretation of the TCPA and its ban of political robo calls to cell phones that are cited in both the Order and the Notice. Additionally just last year, the Federal 9th Circuit Court of Appeals which covers California, struck down a Wyoming Law that placed restrictions on political calls regarding content. The conclusion was "that regulating robocalls based on the content of their messaging presents a more severe threat to First Amendment freedoms than regulating their time, place, and manner.

¹⁸ <https://www.law.cornell.edu/uscode/text/47/227>

¹⁹ <http://tcpablog.com/wp-content/uploads/2015/09/H.R.-Rep.-102-317-1991.pdf>

²⁰ <http://www.fcc.gov/about-fcc/fcc-initiatives/fccs-push-combat-robocalls-spoofing>

²¹ <https://law.justia.com/cases/federal/appellate-courts/ca9/18-35163/18-35163-2019-09-10.html>

²² <https://casetext.com/case/reed-v-town-of-gilbert-4>

²³ <https://www.courtlistener.com/opinion/111245/clark-v-community-for-creative-non-violence/>

²⁴ <https://www.supremecourt.gov/docket/docketfiles/html/public/19-631.html>

Furthermore, prohibiting political robocalls strikes at the heart of the First Amendment, as well as disproportionately disadvantages political candidates with fewer resources.” See *Victory Processing, LLC v. Fox*, No. 18-35163 (9th Cir. 2019). See footnote 20.

Also per other Federal rulings, state laws as falsely claimed by Attorney Hiltachk in his letter, cannot preempt the TCPA. In a case regarding Indiana’s Automated Dialing Machine Statute (IADMS), Ind. Code 24-5-14-1 et seq. The court granted Plaintiffs injunction against enforcement of IADMS with regard to interstate calls made to express political messages ruling that it is preempted by 47 USCS § 227, as it applies to interstate use of automatic telephone dialing systems. See *Patriotic Veterans, Inc. v Indiana ex rel. Zoeller* (2011, SD Ind) 821 F Supp 2d 1074.²⁵

B) MSS Did Not Violate The Truth In Caller ID Act With Intent To Harm Or Injure

In the Notice, the FCC emphasizes that Mr. Moser knowingly placed calls with inaccurate caller ID information. While Mr. Moser was aware of the specific caller ID that was used in the case, he instead went to great lengths to ensure that the caller ID information displayed would be legal. Specifically, although Mr. Moser, as stated in ¶15 of the Notice, indeed was aware that the phone number used belonged to the company formerly known as HomeyTel Inc, he honestly and reasonably believed this phone number to be a ‘dead’ corporate VOIP phone number, as it belonged to a defunct corporation. It is no longer answered by an employee as it was previously because it apparently it no longer employs anyone and now just goes straight to voicemail. Also the associated published HomeyTel Inc fax number of (619) 564-4408 is disconnected and the corporation has no existing physical or mailing address. Lastly a document from FCC Notice footnote 13, details that the number apparently is no longer even registered to HomeyTel Inc as of 10/24/15.

Based on information freely available in the public domain, Mr. Moser had known before placing the calls that HomeyTel Inc had been suspended by the California Secretary of State. This company has not filed any of the legally requisite annual corporate paperwork or paid taxes since January 2015. Thus, MSS counters the notion that there is evidence supporting that we knew that we were transmitting misleading or inaccurate caller ID information, as this information belonged a long defunct company. As such, the use of this particular phone number is no more misleading or inaccurate than the practice of phone number recycling. Being aware that a phone number has been used for other purposes in the past is in no way overwhelming evidence of malicious intent on MSS’s part.

Moreover, as per the Notice, the “harm” that MSS supposedly intended to cause was aimed both at HomeyTel INC and at the consumers who received his calls. We accept it is necessary and reasonable to look at a party’s actions to determine the party’s intent regarding a wrongful action.

1. The Alleged “Harm” Directed at HomeyTel Inc

Primarily, the FCC is thereby wrongly implying that HomeyTel Inc is currently a legitimate operating firm. The FCC further emphasizes the long history between HomeyTel Inc, its owner Braun, and Moser, yet fails to recognize that precisely due to this longstanding relationship, albeit not on the best terms. Moser was aware that HomeyTel Inc had been suspended by the California Secretary of State and the California Franchise Tax Board, as it has not filed any paperwork with the relevant authorities nor paid taxes since 2015. The former owner Braun has plead that he moved to Mexico so as to avoid TCPA lawsuits and vowing not to pay “not one dime” of approximately \$100,000 in unsatisfied judgments and presumable also his \$2,000,000 in criminal restitution orders as well.

The cases inaccurately cited and emphasized by the FCC in the Notice all stem from this relationship preceding 2015. Given that the Notice repeatedly states that the FCC’s decision is not based on the content of the calls that were placed, but on Moser’s intent to harm a purported ‘competitor’, the obvious non-existence of this competitor seems to be vital evidence missed by the FCC.

2. The Alleged “Harm” Directed at Consumers for Obtaining Something of Value

²⁵ <https://www.courtlistener.com/opinion/2146483/patriotic-veterans-inc-v-indiana-ex-rel-zoeller/>

With regard to the supposed harm to the consumers who received MSS's Clients calls, the FCC holds that the lack of consent given by the consumers to receive these calls amounts to these calls forming part of an 'unlawful robo calling campaign'. However, the calling list obtained by MSS was obtained directly from the San Diego County Registrar of Voters. The Registrar provides lists of registered voters to anyone who desires to do voter contact and outreach for political purposes. The phone numbers on this list were provided by the voters themselves when they registered to vote, and MSS did not enhance or add to this list in any way. The 44 individuals contacted by the FCC regarding the calls detailed in footnote #50 of the Notice, willfully and knowingly gave their phone numbers to the SDR0V – which they were not obliged to do. Given that the FCC bases its finding of the presence of an intent to cause harm on their determination that Moser's calling campaign was of an illegal nature, the apparent lawfulness of the campaign as presented in this section negates the existence of this intent to cause harm. In conclusion these were voters not consumers being offered a commercial product or service.

3. Client Confidentiality

Our client was insistent that her identity be kept confidential, as she feared reprisal from a politically connected individual. Since this was a state campaign, the California Political Reform Act of 1974 applied, which details how candidate campaign committees and political action committees are required to disclose who paid for the call in the message of the call. Yet, contrary to what attorney Thomas W. Hiltachk stated in his letter launching this investigation, independent expenditures are exempted from the rules regarding disclosures – See CGC: GOV §84310(d) as previous footnote 13. Also individuals who spend less than \$1,000 as an independent expenditure have no reporting requirements per the PRA. See as previous footnote 14. In a consequent attempt to quell free political speech, Mr. Hiltachk then demanded government agencies to “interrupt the call program”, which has ultimately led to the present political prosecution. See again Exhibit D.

Our client made a conscious decision to spend less than \$1,000 for this specific reason. Before the U.S. Supreme Court In *Buckley v. Valeo*, 424 U.S. 1, 45 (1976),²⁶ it was expressed that independent expenditures present a “substantially diminished potential for abuse”, because the very fact that they are not coordinated in any way with candidates means that such expenditures “may well provide little assistance to the candidate's campaign and indeed may provide counterproductive”. The freedom to keep these types of contributions anonymous is not just about the political and practical reasons that motivated our client's desire to keep her actions private. The rights to associate privately and conduct a campaign, within the statutorily laid down monetary limits, are also intrinsic to effective exercise of the First Amendment.

4. Valuable Shield Against Culpability and Lawsuits

The FCC implies that MSS spoofed the number to hide itself from liability for violations of the TCPA. But the provisions for private right of actions in the TCPA do not apply to exempt non-profit political calls and clearly the case law they cite doesn't apply to these calls as “anything of value.” The costs today of contacting voters via cell phones are negligible as all cell phone plans we're familiar with come with unlimited calls for a low fixed monthly flat rate. Furthermore we have clearly demonstrated here that our only intent was to fulfil our clients need and desire to remain anonymous. Applying the factors in previous rulings by the FCC,²⁷ MSS is not liable as we were not “directly involved in creation of the content” and did nothing to assist our clients in the “proper structuring of a message.”

5. Rights under the First Amendment

The calls placed had a political purpose and therefore are protected by and covered under the First Amendment of our Constitution. As previously stated we only do non-profit or political messages and therefore let clients have the discretion to disregard restrictions and rules regarding calls that they believe apply to political speech as does our own vendor Voice Broadcasting Corporation for MSS campaigns. Moreover, the TCPA

²⁶ <https://supreme.justia.com/cases/federal/us/424/1/>

²⁷ <https://www.insideprivacy.com/united-states/federal-communications-commission/fcc-fines-calling-platform-2-88-million-for-tcpa-violations/>

specifically exempts non-commercial speech as previously detailed in footnote 19. In addition, all the information broadcasted through the call originated from several news outlets and had also previously been detailed by Graham's opponents and independent political action committees. They spent well over \$100,000, as compared to the \$800 our client spent on the calls. Again the calls simply repeated existing reports previously published in print or on television.

As evidenced previously, MSS did not place the calls misleadingly or inaccurately, since he was in fact very much aware of the opposite, namely that the number that was displayed in the calls was a defunct business number that we honestly thought was no longer in use. Nor did MSS as a vendor intend any harm to the consumers who received the calls, as we merely were following our contractual obligations and legally extracted the phone numbers used from the SDR0V where those numbers were provided for this exact purpose.

Lastly, the FCC itself has failed to remain impartial as to the content of the phone calls, and this political persecution is a violation of the First Amendment. The FCC repeatedly stated in the Notice that the Order is not based on the content of the call, but on other factors discussed above. However, the FCC also refers to the political calling campaign as "egregious", "smear[ing] a political candidate", and "factually baseless". Among these, the supposed egregious nature of the calls has contributed to the sum of the Order and therefore the FCC itself has nevertheless brought the content of the call into the scope of the Notice.

Therefore, and in light of the case currently before the United States' Supreme Court (See *Barr & FCC v American Association of Political Consultants Inc.* as footnote 18), it is argued that pending a decision on the constitutionality of the FCC's interpretation to ban this form of free speech. The nature of the calls placed by MSS were entirely political, and MSS stood to gain nothing from their result, as we were merely fulfilling our obligations under our contract with a client as a vendor. The restrictions placed by the TCPA and the FCC's application thereof are over-inclusive and pose too great a threat to the freedom of speech.

Finally as previously plead above, the U.S. 9th Circuit Court of Appeals, which covers California, just last year struck down a Wyoming law that placed restrictions on political calls regarding content. The conclusion was that "regulating robo calls based on the content of their messaging presents a more severe threat to First Amendment freedoms than regulating their time, place, and manner. Furthermore, prohibiting political robocalls strikes at the heart of the First Amendment, as well as disproportionately disadvantages political candidates with fewer resources." See footnote 21.

6. Due Process Rights Afforded By The Fifth Amendment Were Completely Ignored

Fifth Amendment: An Overview

The Fifth Amendment of the U.S. Constitution provides, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, **without due process of law**; nor shall private property be taken for public use, without just compensation."

The clauses incorporated within the Fifth Amendment outline basic constitutional limits on police procedure. The Framers derived the Grand Juries Clause and the Due Process Clause from the Magna Carta, dating back to 1215. Scholars consider the Fifth Amendment as capable of breaking down into the following five distinct constitutional rights: 1) right to indictment by the grand jury before any criminal charges for felonious crimes, 2) a prohibition on double jeopardy, 3) a right against forced self-incrimination, 4) a guarantee that all criminal defendants have a fair trial, and 5) a guarantee that government cannot seize private property without making a due compensation at the market value of the property.

Due Process Clause

The guarantee of due process for all persons requires the government to respect all rights, guarantees, and protections afforded by the U.S. Constitution and all applicable statutes before the government can deprive any person of life, liberty, or property. Due process essentially guarantees that a party will receive a fundamentally

fair, orderly, and just judicial proceeding. While the Fifth Amendment only applies to the federal government, the identical text in the Fourteenth Amendment explicitly applies this due process requirement to the states as well.

Courts have come to recognize that two aspects of due process exist: procedural due process and substantive due process. The procedural due process aims to ensure fundamental fairness by guaranteeing a party the right to be heard, ensuring that the parties receive proper notification throughout the litigation, and ensures that the adjudicating court has the appropriate jurisdiction to render a judgment. Meanwhile, substantive due process has developed during the 20th century as protecting those substantive rights so fundamental as to be "implicit in the concept of ordered liberty."²⁸

We initially requested all the material itemized in the FCC Notice which we received. We also requested and were granted extensions to respond. However later we requested everything in the investigative file. This after reviewing one of the documents provided late, where we were shocked to find that our own vendor Voice Broadcasting Corporation, who actually transmitted the calls, had submitted a timeline spreadsheet of some of our unrelated legal filings in court with a reference to other calls we had done even though they are not attorneys or licensed investigators and these cases had no relationship to this matter. We requested an explanation about this and didn't receive an answer. Because of this we asked for the entire investigative file knowing that many of the assertions in the Notice as detailed here were patently false and it appeared that they took details directly from Braun's allegations in his flawed suit. Specifically for this response, we repeatedly have asked the FCC staff directly and via a Freedom of Information Act requests, for; "Any correspondence or writings from 3rd parties such as but not limited to email communications regarding these matters [that] would be deemed a public document. Furthermore the Constitution requires that the prosecution, the FCC in this case, allow for discovery of documents as I've requested and also to disclose to the defense exculpatory evidence within its possession or control per *Brady v. Maryland*, 373 U.S. 83 (1963).²⁹ Yet Shana M. Yates, Assistant Division Chief at the FCC, has refused to comply with the request, hindering our ability to provide a proper response in a clear violation of the Brady doctrine. Additionally FOIA requests have been continually dragged out, our requests for fee waivers have all been denied and as of the date of this Response, we have yet to receive all material related to or in the investigative file.

VII. Conclusion

American history is rife with election smears dating back to the 1800 Presidential race between founding fathers Thomas Jefferson and John Adams, where the campaign was bitter and characterized by slander and personal attacks on both sides. Fast forward to present day and suddenly we're seeing the resources of the Federal Government used to prosecute vendors for alleged smears in an election campaign. For Chairman Pai, to allow both he and the FCC to get maneuvered into the business of political retribution by a political prince, representing the party in power of the executive branch, is government overreach at its worst. The founding fathers would have regarded this as abhorrent. Additionally it's clear that once that error was made, it was compounded when the FCC got hoodwinked by a mentally unstable con man, convicted felon "Bumble Bee Man" Conrad J. Braun, whose declaration and statements are rife with contradictions that were accepted on face value without proper due diligence even when their own evidence related to him had numerous red flags.

Contrary to FCC Chairman Pai's dramatic negative insinuations in the Notice, MSS clearly was not aware of any of the news reports regarding Candidate Graham's exoneration. As shown our clients campaign was requested 15 minutes **PRIOR** to the San Diego Sheriff's after hours press release and the calls were transmitted approximately at the same time that it was slowly being reported that charges were unfounded against Mr. Graham - which is simply bad timing. Consequently for MSS to be blamed for a purported political smear as a vendor that simply transmitted a client's own protected political speech is absurd. It's analogous to blaming the post man for delivering a negative mailer on the day the facts changed. Presumably our client didn't know either, however they not us would have been ultimately responsible for withdrawing the campaign.

Just six people out of 44 who the FCC spoke with stated they had not given permission to make these calls after the FCC contacted them as detailed in footnote 50 of the Notice. And it should be noted that they only complained **AFTER** being contacted by the FCC. However these people probably didn't remember that they

²⁸ <https://repository.ims.edu/cgi/viewcontent.cgi?article=2704&context=lawreview>

²⁹ [https://scholar.google.com/scholar_case?case=9550433126269674519&q=Brady+v.+Maryland,+373+U.S.+83+\(1963\)&hl=en&as_sdt=2006&as_vis=1](https://scholar.google.com/scholar_case?case=9550433126269674519&q=Brady+v.+Maryland,+373+U.S.+83+(1963)&hl=en&as_sdt=2006&as_vis=1)

willfully and knowingly provided their phone numbers to the SDROV when they registered to vote – something they were not required to do. And therefore it would be easily argued that these people gave “prior express invitation or permission” to be called. However that is only required for commercial solicitation phone calls, not exempt political non-commercial calls as was the case here.

Our clear intent was not to injure but to use an old defunct corporate number to provide anonymity to our client for all the reasons stated. We’re not so foolish in this digital age as to think that these calls could not be traced but didn’t think anyone would bother for an exempt political message. As shown the purported injured corporation in the Notice, HomeyTel Inc, whose old phone number was spoofed is defunct. It supposedly now belongs to the bogus entity HomeyTel Network. Conrad Braun stated he only works for them now as a consultant and no longer owns it, previously he claimed in legal pleadings that he was just an employee. Two courts have already ruled, Braun as an employee or consultant “does not have legal standing” to speak for the corporation. So no injury with “intent” could have occurred against either HomeyTel Inc or Braun.

Furthermore as detailed the FCC ignored every constitutional principal of due process afforded by the 5th Amendment by issuing this Notice, itself a malicious smear that made national headlines, without even contacting MSS to verify any of the facts and or to explain our actions as a vendor transmitting someone else’s political speech protected by the 1st amendment.

In sum, MSS disagrees with the Notice on the points brought forward by the FCC as indisputable evidence. Namely, while MSS was aware of the origin of the phone number he used, he did so under the assumption and knowledge that the HomeyTel Inc no longer was an operating and tax-paying company. As a consequence, MSS could not have intended any harm to HomeyTel Inc, as it seems counterproductive to harm a company that never was or is no longer a purported competitor. Nor did MSS intend any harm to the consumers who received the calls, as we legally extracted the phone numbers used from an official government SDROV list where those numbers were provided by the recipients for this exact purpose. Lastly, the FCC itself has failed to remain impartial as to the content of the phone calls, and this political persecution is a violation of the First Amendment rights of both our client and MSS as her vendor.

In closing it would be prudent for Chairman Pai in the future to steer the FCC clear of political prosecutions on behalf of political princes while taking declarations from felons like Bumble Bee Man Braun who’ve been in and out of mental institutions. To quote President John F. Kennedy; “As a wise man once said, an error doesn’t become a mistake until you refuse to correct it.” We can only hope that Chairman Pai and the FCC would show wisdom and acknowledge the plethora of their errors as detailed here and make a correction of this error by withdrawing the Notice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "K. J. Moser", with a large, stylized flourish underneath.

Kenneth J. Moser
Owner, Marketing Support Systems