

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION**

Robert C. Cahaly,	)	
	)	
Plaintiff,	)	Civil Action No. 6:13-cv-00775-JMC
	)	
v.	)	
	)	<b>ORDER AND OPINION</b>
Paul C. LaRosa, III, Reginald I. Lloyd,	)	
South Carolina Law Enforcement Division,	)	
	)	
Defendants.	)	
_____	)	

Plaintiff Robert C. Cahaly is a Republican political consultant who has engaged and seeks to continue to engage in political speech and political campaigns in the state of South Carolina. (ECF No. 1-2 at 8.) Plaintiff filed the instant action on October 31, 2012, in South Carolina state court claiming pursuant to 42 U.S.C. § 1983 that provisions of South Carolina state law enforced by Defendants Paul C. LaRosa, III, Reginald I. Lloyd, and South Carolina Law Enforcement Division (“SLED”) (collectively referred to as “Defendants”) violated his First Amendment right of free speech. (ECF No. 1-2.) Plaintiff requested declaratory relief as well as an injunction to enjoin Defendants from enforcing the relevant South Carolina Code sections. (*Id.* at 18–19.) Plaintiff also alleged state law claims of false imprisonment and malicious prosecution. (*Id.* at 19–21.)

Defendants filed a notice of removal on March 22, 2013. (ECF No. 1.) This matter is before the court on Plaintiff’s Motion for Preliminary Injunction, or in the Alternative, for Partial Summary Judgment (ECF No. 14), Defendants’ Motion for Summary Judgment (ECF No. 17), and Plaintiff’s Motion to Expedite the Decision (ECF No. 25). For the reasons set forth below, the court **GRANTS** Plaintiff’s motion for partial summary judgment and thereby **DENIES AS**

**MOOT** Plaintiff's motion in the alternative for a preliminary injunction and Plaintiff's motion to expedite the court's decision. The court further **GRANTS IN PART** and **DENIES IN PART** Defendants' motion for summary judgment.

### **RELEVANT FACTUAL AND PROCEDURAL BACKGROUND**

South Carolina Code § 16-17-446 (2003) which incorporates certain components of § 16-17-445<sup>1</sup> (2003 & Supp. 2013) is at the heart of the analysis of Plaintiff's constitutional claims. Therefore, the pertinent provisions are identified herein. Section 16-17-446, entitled "Regulation of automatically dialed announcing device (ADAD)," states as follows:

- (A) Adad means an automatically dialed announcing device which delivers a recorded message without assistance by a live operator for the purpose of making an unsolicited consumer telephone call as defined in Section 16-17-445(A)(3).<sup>2</sup> *Adad calls include automatically announced calls of a political nature including, but not limited to, calls relating to political campaigns.*
- (B) Adad calls are prohibited except:
- (1) in response to an express request of the person called;
  - (2) when primarily connected with an existing debt or contract, payment or performance of which has not been completed at the time of the call;
  - (3) in response to a person with whom the telephone solicitor has an existing business relationship or has had a previous business relationship.
- (C) Adad calls which are not prohibited under subsection (B):
- (1) are subject to Section 16-17-445(B)(1), (2), and (3);
  - (2) shall disconnect immediately when the called party hangs up;
  - (3) are prohibited after seven p.m. or before eight a.m.;
  - (4) may not ring at hospitals, police stations, fire departments, nursing homes, or vacation rental units.
- (D) A person who violates this section, upon conviction, must be punished as provided in Section 16-17-445(F).

<sup>1</sup> Where the court refers to § 16-17-446 within this opinion and order, it also refers to those portions of § 16-17-445 that are incorporated within § 16-17-446.

<sup>2</sup> While this provision references § 16-17-445(A)(3), that section defines "Prize promotion." See S.C. Code Ann. 16-17-445(A)(3). Because it is § 16-17-445(A)(4) that defines "unsolicited consumer telephone call", the court presumes that the statute's referencing of § 16-17-445(A)(3) is a scrivener's error. Accordingly, the court denies Plaintiff's request that the court declare that § 16-17-446's reference to "ADADs" only encompasses messages containing a prize promotion. (See ECF No. 14-1 at 29–31.)

S.C. Code Ann. § 16-17-446 (emphasis added). Section 16-17-445 is entitled “Regulation of unsolicited consumer telephone calls” and states, in relevant parts:

(A) As used in this section:...

(4) “Unsolicited consumer telephone call” means a consumer telephone call other than a call made:

- (a) in response to an express request of the person called;
- (b) primarily in connection with an existing debt or contract, payment, or performance of which has not been completed at the time of the call; or
- (c) to a person with whom the telephone solicitor has an existing business relationship or had a previous business relationship....

(B) A telephone solicitor who makes an unsolicited consumer telephone call must disclose promptly and in a clear conspicuous manner to the person receiving the call, the following information:

- (1) the identity of the seller;
- (2) that the purpose of the call is to sell goods or services;
- (3) the nature of the goods or services;...

(F) The department<sup>3</sup> shall investigate any complaints received concerning violations of this section. If the department has reason to believe that there has been a violation of this section, it may request a contested case hearing before the Administrative Law Court to impose a civil penalty...The department may also bring a civil action in the Court of Common Pleas seeking other relief, including injunctive relief, as the court considers appropriate against the telephone solicitor. *In addition, a person who violates provisions of this section is guilty of a misdemeanor* and, upon conviction for a first or second offense, must be fined not more than two hundred dollars or imprisoned for not more than thirty days.... Each violation constitutes a separate offense for purposes of the civil and criminal penalties in this section.

S.C. Code Ann. § 16-17-445 (emphasis added).

Collectively, §§ 16-17-446 and 16-17-445 have the impact of prohibiting consumer and politically-related unsolicited calls made by ADADs, also referred to as “robocalls,” with some exceptions. *See* S.C. Code Ann. §§ 16-17-446 and 16-17-445. Excepted from § 16-17-446’s general ban on political and commercial robocalls are calls that are based on some form of

<sup>3</sup> “Department” refers to the Department of Consumer Affairs. S.C. Code Ann. § 16-17-445(A)(6).

consent by the person called or some existing relationship between the person called and the caller. *See* S.C. Code Ann. § 16-17-446(B). Even where a political or commercial robocall meets the exception criteria, the statute requires that the caller announce certain identifying information about the source of the call and the call's purpose. S.C. Code Ann. §§ 16-17-446(C), 16-17-445(B). Where a robocaller violates the provisions of the statute, he may be punished by civil penalty, injunctive relief, or criminal misdemeanor conviction. S.C. Code Ann. §§ 16-17-446(D), 16-17-445(F).

On September 17, 2010,<sup>4</sup> at Plaintiff's request, a state representative sought an opinion from the state attorney general on the legality of certain political phone calls. (ECF No. 14-2 at 10.) Specifically, the state representative inquired whether under South Carolina law it was acceptable to make political calls to answering machines but not to live answers. (*Id.*) The representative also asked whether it was legal for organizations such as Survey USA to conduct automated survey calls that require a recipient's response via phone key. (*Id.*)

The state attorney general responded in an official opinion on September 22, 2010. (ECF No. 14-2 at 11–12; S.C. Att'y. Gen. Op. dated Sept. 22, 2010 (2010 WL 3896174).) In that opinion, the state attorney general stated his belief that it was legal for a person to make political phone calls with a recorded telephone message delivered to an answering machine and not a live person. (ECF No. 14-2 at 11–12; S.C. Att'y. Gen. Op. dated Sept. 22, 2010 (2010 WL 3896174).) The state attorney general further opined that the purpose of § 16-17-446 was to “prohibit the unwarranted invasion by automated dialing devices in order to promote the advocacy of a ‘product’ including a particular candidate.” (ECF No. 14-2 at 11–12; S.C. Att'y.

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<sup>4</sup> Although the letter is dated September 17, 2009, Plaintiff alleges it was written September 17, 2010. (*Compare* ECF No. 14-2 at 10 to ECF No. 14-1 at 5.) The record does not resolve this conflict; however, this fact is not material to the issues of the case.

Gen. Op. dated Sept. 22, 2010 (2010 WL 3896174).) As such, the state attorney general concluded that organizations such as Survey USA were allowed to conduct political ADADs that require the recipient's responses via phone key. (ECF No. 14-2 at 11–12; S.C. Att'y. Gen. Op. dated Sept. 22, 2010 (2010 WL 3896174).) However, the state attorney general cautioned that those political ADADs could not advocate for a particular political candidate but could instead obtain a simple snapshot opinion of a voter. (ECF No. 14-2 at 11–12; S.C. Att'y. Gen. Op. dated Sept. 22, 2010 (2010 WL 3896174).) Thus, the state attorney general interpreted § 16-17-446 to allow political ADADS that were either delivered to an answering machine or that obtained a voter's opinion by phone key.

In late September 2010, State Representative Anne Peterson Hutto formally requested that Defendant SLED investigate robocalls made in reference to her electoral race. (ECF No. 17-3 at 2–3.) Representative Hutto asked that Defendant SLED investigate because her electoral opponent was an assistant solicitor and as a result, Representative Hutto felt local law enforcement would have a conflict of interest in handling the matter. (*Id.* at 2.) Defendant SLED's investigation revealed that political robocalls had been made in reference to the races of six female Democratic candidates for the South Carolina House of Representatives (collectively referred to as “the female Democratic candidates” or “the FDCs”). (ECF No. 17-1 at 2; ECF No. 17-2 at 2.) In early October, Defendant SLED received voluntary statements from each of the female Democratic candidates. (ECF No. 17-4 at 2–9.) The FDCs complained that robocalls were made, without their authorization or consent, which the FDCs believed were intended to adversely impact their campaigns. (*Id.*)

Defendant LaRosa asserted in a sworn affidavit that Representative Hutto, one of the female Democratic candidates, provided Defendant LaRosa an electronic recording of one of the

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