

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VICTOR GRESHAM and CONQUEST
COMMUNICATIONS GROUP, LLC,

Plaintiffs,

v.

MICHAEL PICKER, MIKE FLORIO,
CARLA PETERMAN, LIANE
RANDOLPH, and CATHERINE
SANDOVAL, in their official
capacity as Commissioners of
the California Public
Utilities Commission,

Defendants.

No. 2:16-cv-01848-JAM-CKD

**ORDER DENYING DEFENDANTS' MOTION
FOR PRELIMINARY INJUNCTION**

This matter is before the Court on Plaintiffs' Motion for Preliminary Injunction to prohibit Defendants from enforcing California's automatic dialing-announcing device prohibition against Plaintiffs on the grounds that the statute violates the First Amendment. For the following reasons, Plaintiffs' motion is denied.

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I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

Plaintiff Victor Gresham is a political consultant who engages in political communications through Plaintiff Conquest Communications Group, LLC, a Virginia based company of which he is a principal. Declaration of Victor Gresham in Support of Plaintiffs' Motion for Preliminary Injunction ("Gresham Decl.") ¶ 2. Gresham and his company want to conduct politically related, automated telephone calls in California during the 2016 election cycle. Id. ¶ 3.

Plaintiffs have refrained from conducting politically related automated telephone calls in California, at least since late Spring 2016, due to California Public Utility Code §§ 2872, 2874(a), and 2876 ("ADAD Statute"). Gresham Decl. ¶ 3. Plaintiffs have declined to place automated telephone communications for clients and have lost potential business opportunities and revenue as a result. Id. ¶ 4. Without the ban, Plaintiffs would make calls such as automated surveys and messages related to political campaigns, automated scripted calls on behalf of political clients, and telephone town hall calls that allow the answerer to join a live, town hall style forum conducted with a politician or officeholder. Id. ¶ 3.

Defendants admit that they, as Commissioners of the California Public Utilities Commission, have the authority to enforce California's ADAD Statute when there is no express or implied consent to the call. Ans. ¶ 3. Under the statute, they may enforce penalties against violators, including a fine not to exceed five hundred dollars for each violation and/or disconnection of telephone service to the automatic dialing-

1 announcing device for a period of time specified by the
2 commission. Cal. Pub. Util. Code § 2876.

3 Plaintiffs filed their complaint at the beginning of August
4 2016. ECF No. 1. The complaint contains two causes of action
5 under 42 U.S.C. § 1983. The first cause of action alleges that
6 Cal. Pub. Util. Code §§ 2872 and 2874 violate Plaintiffs' free
7 speech rights guaranteed by the First and Fourteenth Amendments
8 both on their face and as applied. Compl. ¶ 22. The second
9 cause of action alleges that those sections impose impermissible
10 prior restraints on constitutionally-protected speech and that
11 they are unconstitutional for failing to contain adequate
12 standards or guidelines to control the discretion of the
13 decision-maker. Compl. ¶¶ 35, 36.

14 Plaintiffs filed their Motion for Preliminary Injunction and
15 Request for Advance Hearing on the Motion on August 17, 2016.
16 ECF Nos. 7, 9. Defendants timely filed their opposition and the
17 Court denied Plaintiffs' request to advance the hearing. ECF
18 Nos. 17, 18. The Court heard arguments on October 4, 2016, and
19 took this motion under submission with an order to follow.

20 II. OPINION

21 A. Legal Standard

22 A preliminary injunction is "an extraordinary remedy that
23 may only be awarded upon a clear showing that the plaintiff is
24 entitled to such relief." Winter v. Natural Res. Def. Council,
25 Inc., 555 U.S. 7, 22 (2008). To obtain a preliminary injunction,
26 a plaintiff must demonstrate that: (1) she is likely to succeed
27 on the merits, (2) she is likely to suffer irreparable harm in
28 the absence of preliminary relief, (3) the balance of equities

1 tips in her favor, and (4) an injunction is in the public
2 interest. Boardman v. Pac. Seafood Grp., 822 F.3d 1011, 1020
3 (9th Cir. 2016) (quoting Winter, 555 U.S. at 20). The last two
4 factors merge when the government is a party. Drakes Bay Oyster
5 Co. v. Jewell, 747 F.3d 1073, 1092 (9th Cir. 2013). In the Ninth
6 Circuit, a preliminary injunction may be appropriate “when a
7 plaintiff demonstrates that serious questions going to the merits
8 were raised and the balance of hardships tips sharply in the
9 plaintiff’s favor,” as long as the other two Winter factors are
10 also satisfied. Alliance for the Wild Rockies v. Cottrell, 632
11 F.3d 1127, 1131–35 (2011).

12 A preliminary injunction can be prohibitory or mandatory.
13 See Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571
14 F.3d 873, 878 (9th Cir. 2009). “A prohibitory injunction
15 prohibits a party from taking action and ‘preserves the status
16 quo pending a determination of the action on the merits.’” Id.
17 (quoting Chalk v. U.S. Dist. Court, 840 F.2d 701, 704 (9th Cir.
18 1988)). The “status quo” is “the last, uncontested status which
19 preceded the pending controversy.” Id. (quoting Regents of the
20 Univ. of Cal. v. Am. Broad. Cos., 747 F.2d 511, 514 (9th Cir.
21 1984)). A mandatory injunction, on the other hand, “orders a
22 responsible party to take action.” Id. (quoting Meghrig v. KFC
23 W., Inc., 516 U.S. 479, 484 (1996)) (internal quotation marks
24 omitted). Mandatory injunctions are particularly disfavored and
25 generally “are not granted unless extreme or various serious
26 damage will result[;] they are not issued in doubtful cases or
27 where the injury complained of is capable of compensation in
28 damages.” Id. (quoting Anderson v. United States, 612 F.2d 1112,

1 1115 (9th Cir. 1980)).

2 Plaintiffs seek to change the status quo and thus seek a
3 disfavored, mandatory injunction. As the Ninth Circuit explained
4 in Doe v. Harris, this standard can be difficult to apply in the
5 First Amendment context:

6 [A]pplication of this standard in First Amendment cases
7 involves an inherent tension: the moving party bears
8 the burden of showing likely success on the merits—a
9 high burden if the injunction changes the status quo
10 before trial—and yet within that merits determination
11 the government bears the burden of justifying its
12 speech-restrictive law. Accordingly, in the First
Amendment context, the moving party bears the initial
burden of making a colorable claim that its First
Amendment rights have been infringed, or are threatened
with infringement, at which point the burden shifts to
the government to justify the restriction.

13 772 F.3d 563, 570 (9th Cir. 2014) (quoting Thalheimer v. City of
14 San Diego, 645 F.3d 1109, 1115–16 (9th Cir. 2011) (internal
15 quotation marks and citations omitted).

16 B. Analysis

17 1. Likelihood Of Success On The Merits

18 The merits of Plaintiffs' case depend on whether the Ninth
19 Circuit's decision upholding the constitutionality of the ADAD
20 Statute, Bland v. Fessler, 88 F.3d 729 (1996), was overruled by
21 the Supreme Court's more recent decisions regarding First
22 Amendment analysis in Reed v. Town of Gilbert, Ariz., 135 S.Ct.
23 2218 (2015), and Citizens United v. Fed. Election Comm'n, 558
24 U.S. 310 (2010).¹ The Bland holding binds this Court unless that

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26 ¹ At the hearing, Plaintiffs raised the possibility that portions
27 of the statute may be unconstitutionally vague. Plaintiffs did
28 not make a void for vagueness argument in either their Motion or
Reply and thus the Court will not address it at the preliminary
injunction stage.

1 decision is clearly irreconcilable with intervening Supreme Court
2 precedent. See Biggs v. Sec’y of Cal. Dep’t of Corr. & Rehab.,
3 717 F.3d 678, 689 (9th Cir. 2013). If the Reed or Citizens
4 United decision effectively overruled Bland, this Court will need
5 to reevaluate the statute in light of the more recent precedent.

6 a. Statute At Issue

7 Any person operating an automatic dialing announcing device
8 in California is subject to the ADAD Statute. Cal. Pub. Util.
9 Code § 2872 (b).² An “automatic dialing-announcing device” is
10 “any automatic equipment which incorporates a storage capability
11 of telephone numbers to be called or a random or sequential
12 number generator capable of producing numbers to be called and
13 the capability, working alone or in conjunction with other
14 equipment, to disseminate a prerecorded message to the telephone
15 number called.” § 2871.

16 The ADAD Statute’s general provision proscribes use of ADADs
17 to place calls over telephone lines unless “pursuant to a prior
18 agreement between the persons involved, whereby the person called
19 has agreed that he or she consents to receive such calls from the
20 person calling, or as specified in Section 2874.” § 2873.
21 Section 2874 requires ADAD calls to be preceded by unrecorded,
22 natural voice that provides certain information and requests
23 consent from the caller to play the prerecorded message. § 2874.
24 The ADAD must disconnect from the line upon termination of the
25 call. Id.

26 Section 2872 lists a number of exemptions to the article’s

27 ² All further section citations are to the California Public
28 Utility Code unless otherwise noted.

prohibitions, which are the subject of Plaintiffs' complaint.

(d) This article does not prohibit the use of an automatic dialing-announcing device by any person exclusively on behalf of any of the following:

(1) A school for purposes of contacting parents or guardians of pupils regarding attendance.

(2) An exempt organization under the Bank and Corporation Tax Law (Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code) for purposes of contacting its members.

(3) A privately owned or publicly owned cable television system for purposes of contacting customers or subscribers regarding the previously arranged installation of facilities on the premises of the customer or subscriber.

(4) A privately owned or publicly owned public utility for purposes of contacting customers or subscribers regarding the previously arranged installation of facilities on the premises of the customer or subscriber or for purposes of contacting employees for emergency actions or repairs required for public safety or to restore services.

(5) A petroleum refinery, chemical processing plant, or nuclear powerplant for purposes of advising residents, public service agencies, and the news media in its vicinity of an actual or potential life-threatening emergency.

(e) This article does not prohibit law enforcement agencies, fire protection agencies, public health agencies, public environmental health agencies, city or county emergency services planning agencies, or any private for-profit agency operating under contract with, and at the direction of, one or more of these agencies, from placing calls through automatic dialing-announcing devices, if those devices are used for any of the following purposes:

(1) Providing public service information relating to public safety.

(2) Providing information concerning police or fire emergencies.

(3) Providing warnings of impending or threatened emergencies.

1 These calls shall not be subject to Section 2874.

2 (f) This article does not apply to any automatic
3 dialing-announcing device that is not used to randomly
4 or sequentially dial telephone numbers but that is used
5 solely to transmit a message to an established business
6 associate, customer, or other person having an
7 established relationship with the person using the
8 automatic dialing-announcing device to transmit the
9 message, or to any call generated at the request of the
10 recipient.

11 b. Standard Of Review For Speech Regulation

12 The ADAD Statute's constitutionality depends on whether the
13 statute is content-based or content neutral.

14 Under the First Amendment, "the government has no power to
15 restrict expression because of its message, its ideas, its
16 subject matter, or its content." Police Dep't of City of Chi. v.
17 Mosley, 408 U.S. 92, 95 (1972). "Content-based laws—those that
18 target speech based on its communicative content—are
19 presumptively unconstitutional and may be justified only if the
20 government proves that they are narrowly tailored to serve
21 compelling state interests." Reed, 135 S.Ct. at 2226. When a
22 distinction is drawn based on the message a speaker conveys, the
23 distinction is subject to strict scrutiny. Id. at 2227.
24 Content-based regulations that burden speech are treated the same
25 way as content-based bans on speech and are thus subject to
26 strict scrutiny as well. Sorrell v. IMS Health Inc., 564 U.S.
27 552, 555–56 (2011) (quoting United States v. Playboy Entm't Grp.,
28 Inc., 529 U.S. 803, 812 (2000)). Strict scrutiny "requires the
Government to prove that the restriction furthers a compelling
interest and is narrowly tailored to achieve that interest."
Reed, 135 S.Ct. at 2231. "[I]t is the rare case in which a
speech restriction withstands strict scrutiny." Reed, 135 S.Ct.

1 at 2236 (Kagan, J., concurring in the judgment) (citing Williams-
2 Yulee v. Fla. Bar, 135 S.Ct. 1656, 1666 (2015)).

3 In contrast, a reasonable time, place or manner restriction
4 on speech may be valid under the First Amendment. Clark v. Cmty
5 for Creative Non-Violence, 468 U.S. 288, 293 (1984). Such
6 regulations will be upheld “provided they are justified without
7 reference to the content of the regulated speech, that they are
8 narrowly tailored to serve a significant governmental interest,
9 and that they leave open ample alternative channels for
10 communication of the information.” Id.; Moser v. FCC, 46 F.3d
11 970, 973 (1995).

12 The Ninth Circuit has held that the ADAD Statute is a
13 content neutral, reasonable time, place, and manner regulation.
14 Bland, 88 F.3d at 732–36, 739. That holding binds this Court
15 unless intervening precedent dictates otherwise.

16 c. The Law-of-the-Circuit Rule

17 Under this circuit’s law-of-the-circuit rule, courts are
18 bound by a prior circuit decision unless that decision is
19 “clearly irreconcilable with intervening Supreme Court
20 precedent.” Biggs v. Sec’y of Cal. Dep’t of Corr. & Rehab., 717
21 F.3d 678, 689 (9th Cir. 2013) (citing Miller v. Gammie, 335 F.3d
22 889, 899–900 (9th Cir. 2003)). “Circuit precedent . . . can be
23 effectively overruled by subsequent Supreme Court decisions that
24 are ‘closely on point’ even though those decisions do not
25 expressly overrule the prior circuit precedent.” Miller, 335
26 F.3d at 899 (citing Galbraith v. Cnty of Santa Clara, 307 F.3d
27 1119 (9th Cir. 2002)). The issues need not be identical;
28 “[r]ather, the relevant court of last resort must have undercut

1 the theory or reasoning underlying the prior circuit precedent in
2 such a way that the cases are clearly irreconcilable.” Id. at
3 900. In such circumstances, the three-judge panel or district
4 court “should consider itself bound by the later and controlling
5 authority, and should reject the prior circuit opinion as having
6 been effectively overruled,” at least “to the extent [the prior
7 opinion] is inconsistent with the [later authority.]” Id. at
8 893.

9 “This is a high standard.” Lair v. Bullock, 697 F.3d 1200,
10 1207 (9th Cir. 2012).

11 Although [the court] should consider the intervening
12 authority’s reasoning and analysis, as long as [it] can
13 apply our prior circuit precedent without running afoul
14 of the intervening authority, [it] must do so. It is
15 not enough for there to be some tension between the
16 intervening higher authority and prior circuit
17 precedent or for the intervening higher authority to
18 cast doubt on the prior circuit precedent.

16 Id. at 1207 (internal citations and quotation marks omitted).
17 Thus, this Court must follow Bland unless Bland is clearly
18 irreconcilable with intervening Supreme Court precedent.

19 d. Ninth Circuit Precedent: Bland v. Fessler

20 In Bland, the Ninth Circuit subjected the California ADAD
21 Statute to intermediate scrutiny and held that it does not
22 violate the First Amendment. First, the court analyzed whether
23 the statute is content-based or content neutral. It divided the
24 statute into its central prohibitory provision (§ 2873) and its
25 exemptions (§ 2872(d)–(f)). It concluded that the central
26 provision prescribes a *method* of communication, not the content
27 of communication. Bland, 88 F.3d at 733 (emphasis in original).

28 Next, the court concluded that the exemptions in the statute

1 are also content neutral. It found that the global exemption for
2 parties with an existing relationship, § 2872 (f), and the
3 exemption for nonprofit organizations calling their members,
4 § 2872(d)(2), rest “not on the content of the message, but on
5 existing relationships implying consent to the receipt of ADAD
6 calls.” Id. (noting the Eighth Circuit’s similar analysis of
7 Minnesota’s ADAD statute in Van Bergen v. Minn., 59 F.3d 1541
8 (8th Cir. 1995)). The court reached the same conclusion for the
9 other exemptions, but noted that the others “do relate to
10 content, some involving existing relationships, others not.”

11 Bland, 88 F.3d at 733–34. The Bland court stated:

12 Although regulating content, all of these exemptions
13 are based on relationships implying consent to receive
14 ADAD calls, or messages the recipient wants to hear, or
15 both: parents want to know of their children’s
16 attendance, consumers of cable and utility services
17 want installation information, and everyone wants
18 information concerning public safety and emergencies.

19 Id., at 734. The court rejected the plaintiffs’ argument that
20 the exemptions privilege some relationships over others, noting
21 that the statute exempts communications between *all* persons and
22 entities with *established relationships*. Id. (emphasis added).

23 Finally, the court rejected plaintiffs’ argument that “the
24 group-based exemptions improperly contain content-based
25 restrictions,” as there was no indication that the government
26 adopted the regulation because of disagreement with the message
27 conveyed. Id. (Citing Ward v. Rock Against Racism, 491 U.S. 781,
28 791 (1989)) It observed:

Not a scintilla of evidence suggests that the State of
California disapproves of parent-teacher communication
regarding student grades, as opposed to the
communication about student attendance that the statute
permits. Nor do the restrictions on the content of the

1 messages the other exempted groups may convey—cable
2 companies may call only regarding previously arranged
3 service installation, and dangerous facilities may call
only regarding disasters—carry the scent of government
favoritism in the free market of ideas.

4 Id. The court determined that the exemptions, and thus the
5 statute, were content neutral and went on to apply intermediate
6 scrutiny.

7 e. Intervening Precedent: Reed v. Town of
8 Gilbert, Ariz.

9 In 2015, the Supreme Court held that a sign ordinance
10 exempting and regulating signs of certain categories—imposing
11 different restrictions on temporary directional signs as compared
12 to political and ideological signs—was a content-based regulation
13 of speech that could not survive strict scrutiny. Reed v. Town
14 of Gilbert, Ariz., 135 S.Ct. 2218 (2015). In doing so, the Court
15 reversed the Ninth Circuit’s holding that the town’s Sign Code
16 was content neutral. Id. at 2226. The Court primarily took
17 issue with the Ninth Circuits’ reasoning that the Sign Code was
18 content neutral because the town “did not adopt its regulation of
19 speech based on disagreement with the message conveyed and its
20 justifications for regulating temporary directional signs were
21 unrelated to the content of the sign.” Id. at 2227 (paraphrasing
22 the appellate court). Justice Thomas wrote:

23 But this analysis skips the crucial first step in the
24 content-neutrality analysis: determining whether the
25 law is content neutral on its face. A law that is
26 content based on its face is subject to strict scrutiny
27 regardless of the government’s benign motive, content-
28 neutral justification, or lack of animus toward the
ideas contained in the regulated speech. . . . Although
a content-based purpose may be sufficient in certain
circumstances to show that a regulation is content
based, it is not necessary. In other words, an
innocuous justification cannot transform a facially

1 content-based law into one that is content neutral.

2 That is why we have repeatedly considered whether a law
3 is content neutral on its face before turning to the
law's justification or purpose.

4 Id. at 2228. Correcting the Ninth Circuit's reliance on Ward,
5 Justice Thomas explained that "Ward's framework applies only if a
6 statute is content neutral." Id. at 2229.

7 The Court next rejected the Ninth Circuit's reasoning that
8 "the Sign Code was content neutral because it does not mention
9 any idea or viewpoint, let alone single one out for differential
10 treatment." Justice Thomas clarified that "[t]he First
11 Amendment's hostility to content-based regulation extends . . .
12 to prohibition of public discussion of an entire topic." Id. at
13 2230. "A speech regulation targeted at specific subject matter
14 is content based even if it does not discriminate among
15 viewpoints within that subject matter." Id.

16 Finally, the Reed Court rejected the Ninth Circuit's
17 characterization of the Sign Code's distinctions as content
18 neutral because they are speaker and event-based. According to
19 the Court, the distinctions were not speaker-based, and even if
20 they were, that would not necessarily make the distinctions
21 content neutral: laws favoring some speakers over others demand
22 strict scrutiny when the legislature's speaker preference
23 reflects a content preference. Id. at 2230 (citing Citizens
24 United, 558 U.S. at 340, and Turner Broad. Sys., Inc. v. FCC, 512
25 U.S. 622, 658 (1994)).

26 Concluding that the Sign Code imposed content-based
27 restrictions on speech, the Court subjected the code to strict
28 scrutiny and found that the town could not show that the

1 ordinance was narrowly tailored to further a compelling
2 government interest. Id. at 2232. In closing, Justice Thomas
3 opined that “a sign ordinance narrowly tailored to the challenges
4 of protecting the safety of pedestrians, drivers, and passengers—
5 such as warning signs marking hazards on private property, signs
6 directing traffic, or street numbers associated with private
7 houses—well might survive strict scrutiny.” Id. at 2233.

8 f. Bland Is Not Clearly Irreconcilable With
9 Reed

10 As Plaintiffs argue, and the Ninth Circuit has recognized,
11 Reed “provided authoritative direction for differentiating
12 between content neutral and content-based enactments. United
13 States v. Swisher, 811 F.3d 299, 313 (9th Cir. 2016). Reed’s
14 holding, however, is not so clearly irreconcilable with Bland to
15 excuse this Court from following Bland’s binding authority.

16 Reed’s prescription that courts apply strict scrutiny to
17 facially content-based statutes regardless of governmental motive
18 is in tension with some of the Ninth Circuit’s language in Bland.
19 The Bland court noted that certain exemptions to the ADAD Statute
20 are “related to content” and cited “Ward’s framework” to reject
21 the plaintiffs’ argument “that the group-based exemptions
22 improperly contain content-based restrictions.” Bland, 88 F.3d
23 at 734. A few of the exemptions do relate to content: schools
24 may call parents and guardians regarding student attendance;
25 certain companies may call customers about previously arranged
26 services; certain agencies may contact the public regarding
27 public safety and emergencies.

28 But, “some tension” is not enough to make the decisions

1 clearly irreconcilable. See Lair, 697 F.3d at 1207. The Bland
2 court found that all of the ADAD Statute exemptions were based
3 “on existing relationships implying consent to the receipt of
4 ADAD calls” or messages—like public safety and emergency
5 information—the recipient wants to hear. Bland, 88 F.3d at 733–
6 34. In fact, each and every exemption involves an existing
7 relationship except for the exemptions for emergencies and public
8 safety, which Plaintiffs say they do not contest the government’s
9 interest in making. Although the exemption for schools regarding
10 attendance and certain entities regarding prearranged services
11 relate to content, these callers have an established relationship
12 with the call recipients that would otherwise exempt direct calls
13 to those recipients under § 2872(f). Subsection (d) merely
14 extends that relationship-based exemption to intermediaries
15 working solely on behalf of those callers to convey information
16 the recipient already expects to receive. § 2872(d)(1),(3), &
17 (4). This Court would be reading too far beyond the holding in
18 Reed to find that the decision reaches relationship-based,
19 consent-based, or emergency-based distinctions.

20 In addition to the analytical distinctions between Reed and
21 Bland, the factual distinctions caution against finding circuit
22 precedent overruled.³ The Sign Code in Reed exempted certain
23 signs from a general prohibition and imposed different

24
25 ³ Defendants further distinguish the cases on the fact that the
26 Sign Code regulated outdoor signs while the ADAD Statute
27 regulates intrusions into the private home. Although courts have
28 recognized that residential privacy is an important or
significant government interests, Defendants do not point the
Court to any case where a private channel of communication
triggered a lower standard of scrutiny.

1 restrictions on "Ideological Signs," "Political Signs," and
2 "Temporary Directional Signs Relating to a Qualifying Event."
3 Reed, 135 S.Ct. at 2224-25. In contrast, the ADAD Statute
4 requires consent for all ADAD calls and makes exemptions to the
5 express consent requirement only for those with existing
6 relationships that imply consent and for emergencies. The
7 statute does not single out political subject matter or other
8 subject matter for differential treatment. A call from a
9 nonprofit to a member or from a business to an established
10 customer may contain a political message, a commercial message,
11 or a message on another subject matter, and that message will not
12 determine whether the caller violated the statute; the
13 relationship between the parties will. In support of their
14 position, Plaintiffs direct the Court to a post-Reed, Fourth
15 Circuit decision striking down a South Carolina ADAD Statute for
16 its content-based restrictions; however, that statute, like the
17 Sign Code in Reed, singled out "calls with a consumer or
18 political message but [did] not reach calls made for any other
19 purpose." Cahaly v. Larosa, 796 F.3d 399, 405 (4th Cir. 2015).
20 More significant to this Court are two post-Reed district court
21 decisions that each upheld a state ADAD statute that also exempts
22 certain ADAD calls placed to recipients with a preexisting
23 relationship with the caller. See Gresham v. Swanson, No. 16-
24 1420, 2016 WL 4027767 (D. Minn. July 27, 2016); Patriotic
25 Veterans, Inc. v. Ind., No. 10-723, 2016 WL 1382137 (S.D. Ind.
26 Apr. 7, 2016). Neither of those courts read Reed to require
27 strict scrutiny for relationship-based distinctions.

28 Furthermore, Plaintiffs' principal issue with the ADAD

1 Statute is that it exempts nonprofits for calls to their members
2 but does not exempt Plaintiffs' activity. See § 2872(d)(2). But
3 the Bland court, without considering governmental motives, easily
4 determined that the exemption for nonprofits was content neutral
5 and that the exemption "rests on existing relationships implying
6 consent." Bland, 88 F.3d at 733. The critical point is that
7 nonprofits are only exempt from the prohibition when making calls
8 to their members; the Legislature did not write them a blank
9 check. Of the exemptions that may be in tension with Reed, this
10 is not one of them.

11 For all of these reasons, this Court finds that the Ninth
12 Circuit's holding in Bland is not clearly irreconcilable with
13 Reed and that decision cannot justify departure from this
14 circuit's precedent.

15 g. Bland Is Not Clearly Irreconcilable With
16 Citizens United

17 Plaintiffs also argue that the ADAD statute discriminates on
18 the basis of the speaker's identity in violation of the First
19 Amendment. Rep. at 3; Mot. at 10. At the hearing, Plaintiffs
20 argued that the exemptions are speaker-based distinctions that
21 are impermissible under Reed and Citizens United.

22 However, neither decision meets the law-of-the-circuit
23 rule's high threshold to overcome Bland. The Reed court
24 determined that the Sign Code at issue was not speaker-based, and
25 the dicta accompanying that conclusion do not provide this Court
26 with a clear rule for determining when a speaker-based statute
27 would trigger strict scrutiny. Reed, 135 S.Ct. at 2230-31. The
28 Reed court merely points out that a speaker-based distinction is

1 not necessarily content neutral; rather, the distinction
2 “begin[s] [] the inquiry.” Reed, 135 S.Ct. at 2230–31.

3 Citizens United speaks more to Plaintiffs’ point, but is not
4 irreconcilable with Bland. In the majority opinion, the Supreme
5 Court stated that “speech restrictions based on the identity of
6 the speaker are too often simply a means to control content.
7 . . . [T]he Government may commit a constitutional wrong when by
8 law it identifies certain preferred speakers.” Citizens United
9 v. Fed. Election Comm’n, 558 U.S. 310, 340 (2010). The law at
10 issue in Citizens United was both content-based—specifically
11 applying to electioneering and speech advocating for or against
12 political candidates—and speaker-based—singling out corporations
13 and unions. Id. at 310. The Court held that the government
14 cannot suppress political speech on the basis of the speaker’s
15 corporate identity. Id. at 365.

16 The Citizens United decision does not say, or even strongly
17 imply, that a distinction based on relationship or consent is
18 subject to strict scrutiny. Certainly, relationship-based
19 statutes will requires some inquiry into a speaker’s identity,
20 but only in order to determine the existence of a relationship
21 between the speaker and the listener. The statute does not make
22 blanket exemptions for certain speakers. For instance, a
23 nonprofit would be exempted under § 2872(d)(2) when calling
24 members, but not if it canvassed all phone numbers in a certain
25 geographic region.

26 Furthermore, even if the statute were speaker-based, the
27 Ninth Circuit has not interpreted Citizens United to hold that
28 speaker-based laws automatically trigger strict scrutiny. Doe v.

1 Harris, 772 F.3d 563, 575–76 (9th Cir. 2014) (analyzing a statute
2 that singles out registered sex offenders under intermediate
3 scrutiny after distinguishing the case from Citizens United).
4 Bland is not clearly irreconcilable with Citizens United and thus
5 Bland remains binding on this Court.

6 Under controlling Ninth Circuit precedent, the California
7 ADAD Statute does not violate the First Amendment and Plaintiffs
8 are thus not likely to succeed on the merits of their claim.

9 2. The Remaining Factors

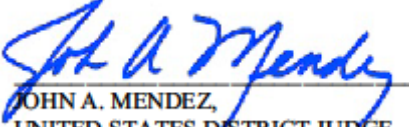
10 As described above, courts consider the four factors
11 outlined in Winter to determine whether a preliminary injunction
12 should issue. However, in the First Amendment context, the
13 irreparable harm, balance of the equities, and public interest
14 analysis are heavily informed by the merits determination. Bland
15 binds this Court and Plaintiffs are unlikely to succeed on the
16 merits. The Court thus finds against Plaintiffs on the remaining
17 factors as well.

18
19 III. ORDER

20 Plaintiffs' Motion for Preliminary Injunction is DENIED.

21
22 IT IS SO ORDERED.

23 Dated: October 6, 2016

24
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26 JOHN A. MENDEZ,
27 UNITED STATES DISTRICT JUDGE
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