

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Scott Rhodes a.k.a. Scott David Rhodes, Scott D. Rhodes, Scott Platek, Scott P. Platek, File No.: EB-TCD-18-00028178.*

At the outset, let me be clear that the individual subject to this NAL engaged in vile discourse that should have no acceptance in American civil society.

Be that as it may, my responsibility as a Commissioner is to apply the law as written. I have previously taken a slightly different approach from my colleagues when it comes to interpreting the Truth in Caller ID Act's anti-spoofing provisions. In my opinion, the text specifically requires evidence of subjective intent to cause harm. In other words, a negligence standard does not cut it, when Congress specifically indicated that there must be "intent." And, given the "intent to harm" prong being sandwiched in between two types of harm that are economic in nature, psychological harm is not exactly the type of injury contemplated by the statute.

In the past, the Commission has brought enforcement actions under the "intent to harm" prong against individuals engaging in telemarketing and other various schemes to make money. Those actions seemed to twist the meaning of the statute to reach an intended result, and I would have approached matters differently. The inclination to strain our legal analysis may certainly indicate a problem with the underlying statute, but I believe the better and more accountable solution is to instead focus on changing the law.

The Commission's forced analysis is yet again on display here. While the item claims that Mr. Rhodes intended to harm those affected by his robocalls, from what I can tell, his motive was rather to spread his hateful ideas, and I doubt that his mere indifference to harming others can truly satisfy the statutory standard. In one eyebrow-raising example, the draft claims that since spoofing is known to harm the party assigned to the spoofed number, Rhodes intended to harm those whose numbers he spoofed. Applying that theory to its logical conclusion, every spoofed call would show an intent to harm, and every spoofed call would therefore violate the statute. That line of argument doesn't seem to make much sense, as it would render the "intent to harm" qualifier in the statute completely meaningless.

While distorting statutory text is always questionable, I would also point out that we need to be especially careful not to play fast and loose with the statute when speech intended to persuade others or influence public opinion—in other words, *political* speech—is involved. Putting aside my disagreement as to Rhodes' motive, the item at least appears to apply the statute in a content- or viewpoint-based manner. Inflammatory political speech, which is entitled to the highest order of legal protection,¹ is *by nature* psychologically distressing. If we're going to prohibit all spoofing that is likely to cause others emotional harm, by logical extension, all vitriolic political speech involving spoofing would be prohibited. Since that cannot possibly be the law, the draft seems to imply that Rhodes is being targeted based on the evil content of his ideas—something that we are constitutionally prohibited from doing under the First Amendment. And, we imply as such at our peril, since at some point, this individual or another accused party likely will find smart representation, probably on a pro bono basis, to litigate out some of our questionable decisions, and we may in turn find our "authority" curtailed.

To counter the impression that the item is not content-neutral, we also likely could have done without some of the item's more sensationalist factual sections, as well as references to the "falsity" of the information Mr. Rhodes was peddling, which I consider irrelevant to the item's legal analysis.

In the end, while I am not 100 percent on board with all of conclusions drawn, I do thank the

¹ See *Snyder v. Phelps*, 562 U.S. 443 (2011).

Chairman for agreeing to remove certain language that might be construed as content-based. Those changes were very much appreciated and gave me more comfort to approve our action at this stage of the process.

In supporting this NAL, I also humbly recognize my role in this rather unique structure is to serve as a judge and not a prosecutor. I will therefore allow the enforcement process to unfold and look forward to revisiting the question of Mr. Rhodes' liability at a future point, once he has been given a full opportunity to make his case, should a forfeiture action be forthcoming.