

No. _____

In the Supreme Court of the United States

RAMESS NAKHLEH,

Petitioner,

v.

UNITED STATES of AMERICA,

Respondent.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

39 C.F.R. § 232.1(e) defines disorderly conduct as follows:

[1] conduct which creates loud and unusual noise, or [2] which impedes ingress to or egress from post offices, or [3] otherwise obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or [4] which otherwise tends to impede or disturb the public employees in the performance of their duties, or [5] which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

The courts below held that 39 C.F.R. § 232.1(e) should be interpreted to require proof that the defendant spoke more loudly and unusually than the ordinary person.

Is a regulation criminalizing the creation of a “loud and unusual noise” unconstitutionally vague?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

TABLE OF CONTENTS

| | |
|--|-----|
| QUESTION PRESENTED FOR REVIEW | ii |
| PARTIES TO THE PROCEEDINGS..... | iii |
| TABLE OF AUTHORITIES | v |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW..... | 1 |
| STATEMENT OF JURISDICTION..... | 2 |
| CONSTITUTIONAL PROVISION INVOLVED | 3 |
| STATUTORY PROVISION INVOLVED..... | 3 |
| INTRODUCTION | 4 |
| BACKGROUND | 4 |
| REASONS FOR GRANTING THE WRIT..... | 5 |
| I. Numerous federal criminal regulations criminalize making “a loud and unusual noise.” A uniform interpretation of the regulation is therefore essential. | 6 |
| II. Regulations prohibiting the creation of a “loud and unusual noise” are unconstitutionally vague. | 6 |
| CONCLUSION..... | 10 |
| CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS..... | 11 |
| CERTIFICATE OF SERVICE | 12 |
| DECLARATION VERIFYING TIMELY FILING | 13 |

TABLE OF AUTHORITIES

Cases

| | |
|--|---------|
| <i>City of Chicago v. Morales</i> , 527 U.S. 41 (1999)..... | 8 |
| <i>Elonis v. United States</i> , 135 S. Ct. 2001 (2015)..... | 10 |
| Hill v. Colorado, 530 U.S. 703 (2000)..... | 8 |
| <i>Sessions v. Dimaya</i> , 138 S. Ct. 1204 (2018)..... | 4, 9 |
| Smith v. Goguen, 415 U.S. 566 (1974) | 8 |
| <i>Smith v. United States</i> , 508 U.S. 223 (1993) | 7 |
| <i>United States v. Lanning</i> , 723 F.3d 476 (4th Cir. 2013) | 9 |
| <i>United States v. Nakhleh</i> , 895 F.3d 838 (6th Cir. 2018) | 5, 9 |
| <i>United States v. Nakhleh</i> , No. 17-MC-50667, 2018 WL 388077 (E.D. Mich. Jan. 12, 2018) | 5, 8, 9 |

Statutes

| | |
|----------------------------------|---|
| 18 U.S.C. § 3231 (2012) | 2 |
| 28 U.S.C. § 1254(1) (2012) | 2 |

Other Authorities

| | |
|---|---|
| <i>Black's Law Dictionary</i> (10th ed. 2014) | 7 |
| <i>Miriam-Webster</i> defines “unusual” as “not usual, uncommon, or rare.” <i>Miriam-Webster Dictionary</i> , https://www.merriam-webster.com/dictionary/unusual (last visited Oct. 15, 2018)..... | 7 |

Regulations

| | |
|--------------------------|----|
| 32 C.F.R. § 228.13..... | 6 |
| 32 C.F.R. § 234.7..... | 11 |
| 36 C.F.R. § 1002.34..... | 11 |
| 38 C.F.R. § 1.218..... | 6 |
| 4 C.F.R. § 25.6..... | 6 |
| 44 C.F.R. §15.7..... | 6 |

PETITION FOR WRIT OF CERTIORARI

Ramess Nakhleh respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Sixth Circuit's published opinion affirming Ramess Nakhleh's conviction is reported at 895 F.3d 838 (6th Cir. 2018), and included in the Appendix at A-1. The district court order affirming Mr. Nakhleh's conviction and sentence is reported at 2018 WL 388077 (E.D. Mich. 2018) and included in the Appendix at A-2. The transcript of the trial and sentencing hearing is included in the Appendix at A-3. The judgment is included in the Appendix at A-4.

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2012) and Part III of the Rules of the Supreme Court of the United States. The United States District Court for the Eastern District of Michigan had original jurisdiction over Mr. Nakhleh's criminal case under 18 U.S.C. § 3231. The court of appeals affirmed Mr. Nakhleh's conviction and sentence on July 17, 2018. The petition for certiorari was filed on October 15, 2018. This petition is therefore timely.

CONSTITUTIONAL PROVISION INVOLVED

In pertinent part, the **Fifth Amendment of the United States Constitution** provides:

No person shall . . . be deprived of life, liberty, or property, without due process of law

STATUTORY PROVISION INVOLVED

In pertinent part, **39 C.F.R. § 232.1(e)**, provides:

Disturbances.

Disorderly conduct, or conduct which creates loud and unusual noise, or which impedes ingress to or egress from post offices, or otherwise obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

INTRODUCTION

“Vague laws invite arbitrary power.” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1223 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). 39 C.F.R. § 232.1(e), like other similarly worded federal criminal regulations, “invites the exercise of arbitrary power . . . by leaving the people in the dark about what the law demands and allowing prosecutors and courts to make it up.” *Id.* at 1223–24. It defines “disorderly conduct” to include any “conduct which creates loud and unusual noise.” 39 C.F.R. § 232.1(e). Mr. Nakhleh was convicted of violating 39 C.F.R. § 232.1(e). This Court should grant certiorari to address whether this regulation is unconstitutionally vague.

BACKGROUND

On July 8, 2016, Ramess Nakhleh was cited for disorderly conduct in a post office in violation of 39 C.F.R. § 232.1(e). That criminal regulation provides five definitions of “disorderly conduct.” The magistrate judge concluded that Mr. Nakhleh’s conduct impeded the public’s use of the post office, that Mr. Nakhleh made a “loud and unusual noise,” and interfered with postal employees’ ability to perform their duties. The magistrate judge sentenced Mr. Nakhleh to pay a \$1,000 fine, to attend anger management classes, and to report to probation for six months. At trial, Mr. Nakhleh presented evidence that he has a difficult time hearing and speaks more loudly than other people. But the magistrate judge refused to consider this evidence, holding that the statute does not permit this sort of subjective inquiry.

At each appellate stage, Mr. Nakhleh argued that the magistrate judge's interpretation of 39 C.F.R. § 232.1(e) was contrary to the plain meaning of "loud and unusual," and that to avoid an unconstitutionally vague interpretation, factfinders must consider whether the noise made is loud and unusual for the speaker. The district court rejected this contention, interpreting 'unusual' to mean a noise that is unusual for the environment, rather than unusual for the speaker. *United States v. Nakhleh*, No. 17-MC-50667, 2018 WL 388077, at *3 (E.D. Mich. Jan. 12, 2018). The district court refused to employ the rule of constitutional avoidance and the rule of lenity "because an objective interpretation of 'loud and unusual noise' would not lead to arbitrary and discriminatory enforcement." *Id.* at *4.

On appeal to the Sixth Circuit Court of Appeals, Mr. Nakhleh again argued that the plain text of the statute and the canon of constitutional avoidance requires the government to show that the speaker was making a noise that was loud and unusual for him. But the Sixth Circuit held that the regulation requires only an objective inquiry and does not permit consideration of whether the defendant usually speaks loudly. *United States v. Nakhleh*, 895 F.3d 838, 840 (6th Cir. 2018).

REASONS FOR GRANTING THE WRIT

This Court's review is essential will clarify the meaning of "loud and unusual noise" in various criminal contexts. Without correction, the Sixth Circuit's interpretation of the 39 C.F.R. § 232.1(e) exposes people who naturally speak loudly to criminal punishment.

I. Numerous federal criminal regulations criminalize making “a loud and unusual noise.” A uniform interpretation of the regulation is therefore essential.

The Code of Federal Regulations contains numerous regulations prohibiting “disorderly conduct.” These criminal regulations define “disorderly conduct” to include, among other things, “conduct which creates a loud and unusual noise.” *E.g.*, 39 C.F.R. § 232.1(e); 38 C.F.R. § 1.218(b)(11) (prohibiting “loud and unusual noises” on Veterans Affairs property); 32 C.F.R. § 228.13 (prohibiting “loud and unusual noises” on Department of Defense property); 41 C.F.R. § 102-74.390(a) (prohibiting conduct that “creates loud or unusual noise” in facilities managed by GSA); 44 C.F.R. §15.7 (prohibiting conduct that “creates loud or unusual noise” at Mt. Weather and NETC); 4 C.F.R. § 25.6 (prohibiting behavior that “creates loud or unusual noise” on the property of the Government Accountability Office). An authoritative interpretation of this phrase from this Court will thus clarify when a person is subject to criminal prosecution for disorderly conduct on various federal properties.

II. Regulations prohibiting the creation of a “loud and unusual noise” are unconstitutionally vague.

The plain text of the regulation reveals there are two components of such conduct; it must be (1) loud *and* (2) unusual. “Unusual” is undefined, and so it must be “construe[d] in accord with its ordinary or natural meaning.” *Smith v. United States*, 508 U.S. 223, 228 (1993). *Miriam-Webster* defines “unusual” as “not usual, uncommon, or rare.” *Miriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/unusual> (last visited Oct. 15, 2018). *Black’s Law Dictionary*

offers two definitions: (1) “[e]xtraordinary; abnormal”; and (2) “[d]ifferent from what is reasonably expected.” Unusual, *Black’s Law Dictionary* (10th ed. 2014). For comparison, *Black’s* cross-references the definition of “usual,” which it defines as (1) “[o]rdinary; customary”; and (2) [e]xpected based on previous experience, or on a pattern or course of conduct to date.” *Id.* In other words, a person cannot be convicted for speaking in his or her normal tone of voice. This is so even if the person speaks loudly; the statute requires proof of both elements.

But how should law enforcement officers decide whether a person’s manner of speaking is unusual? The text of the statute offers no clues. And should someone’s conduct be criminal if one person is annoyed by a person who speaks loudly?

Laws fail to meet the requirements of the Due Process Clause if they are “so vague and standardless” that the public is left guessing about what conduct is prohibited. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). “A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.” *Hill v. Colorado*, 530 U.S. 703, 732 (2000). “[P]erhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

The district court did not believe the regulation was vague because “[o]rdinary people can and do understand what conduct is usual in a post office, and thus also understand what conduct is unusual in a post office.” *Nakhleh*, 2018 WL 388077, at *4. Yet the court offered no definition of what that would be. If the court cannot articulate what noises are unusual for a post office, then members of the public will not know either. When a law leaves prohibited conduct so undefined, it “leaves judges to make it up.” *Dimaya*, 138 S. Ct. at 1232 (Gorsuch, J., concurring). And the district court’s scant analysis illustrates this point: rather than outlining the type of behavior that is or is not criminal, the court flatly insisted people just know.

The Sixth Circuit found no problem with this conclusion, believing that the text of the statute clarifies that “a customer’s simple expression of frustration to violate the regulation” because the regulations “focus on conduct that would ‘otherwise disturb or impede the general public or the postal employees in transacting business’[] further narrows the scope.” *Nakhleh*, 895 F.3d at 841 (quoting 39 C.F.R. §232.1(e)) (internal alterations omitted). Nothing about this so-called limitation removes the potential for arbitrary enforcement because an easily annoyed postal worker could initiate criminal proceedings against his least favorite customers.

Indeed, as this case illustrates that very problem. The district court found sufficient evidence that Mr. Nakhleh’s speaking tone was “unusual” because the postal worker called her manager and the police, thereby showing that the postal worker’s reaction to the conduct alone can render a person’s normal speech criminal. *Nakhleh*, 2018 WL 388077, at *5. In similar circumstances, other courts have not

permitted an employee's reaction to dictate whether conduct is criminal. In *United States v. Lanning*, 723 F.3d 476, 485 (4th Cir. 2013), the Fourth Circuit reversed a conviction for disorderly conduct under 36 C.F.R. § 2.34(a)(2) because the employee was “shocked” by the defendant’s conduct. The Fourth Circuit reasoned, that the employee’s subjective view of “physically threatening or menacing” conduct could not serve to define the meaning of that term. *Id.*

So, too, here. One of the postal workers admitted that she specifically noted that Mr. Nakhleh was Arab because that informed her view of his conduct. (See APP 048.) Without any language limiting when federal employees may cite a customer for disorderly conduct, they retain the power to initiate criminal proceedings based on their subjective belief that a customer’s normal manner of speaking is too loud, too aggressive sounding, or simply irritating. They may be more likely to call the police because a person is Arab, rather than specific behavior.

Adding to the ambiguity of this regulation is the fact that 39 C.F.R. § 232.1(e) does not include a *mens rea* requirement. Courts generally construe statutes to require proof of a particular mental state because defendants “generally must know the facts that make [their] conduct fit the definition of the offense.” *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (internal quotation marks omitted). Many criminal regulations prohibiting “disorderly conduct” limit the sweep of the statute to circumstances where the defendant’s intent elevates noisemaking from annoying to criminal. *See, .e.g.,* 32 C.F.R. § 234.7(c) (prohibiting making an “unreasonable noise” “with the intent to cause public alarm, nuisance, jeopardy, or violence, or

knowingly or recklessly creating a risk thereof"); 36 C.F.R. § 1002.34(a)(3) (same). 39 C.F.R. § 232.1(e) contains no *mens rea* requirement, thus leaving the line between criminal and non-criminal conduct to the enforcer's whim. It therefore does not comport with Due Process.

CONCLUSION

The petition for certiorari should be granted.

October 15, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

Petitioner Ramess Nakhleh, through undersigned counsel, and pursuant to Sup. Ct. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter complies with the type-volume limitation of Sup. Ct. R. 33.2(b). It contains 1,601 words. Certification is based on the word count of the word-processing program used in preparing the petition, Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I certify that on October 15, 2018, in accordance with Sup. Ct. R. 29, copies of the (1) Petition for Writ of Certiorari, (2) Motion for Leave to Proceed In Forma Pauperis, (3) Certificate of Compliance with Word Count Limitations, (4) Declaration Verifying Timely Filing, and (5) Certificate of Service were served by mail within three days upon the United States Attorney for the Eastern District of Michigan, 211 W. Fort Street, Suite 2001, Detroit, MI 48226, and upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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DECLARATION VERIFYING TIMELY FILING

Petitioner Ramess Nakhleh, through undersigned counsel, and pursuant to SUP. CT. R. 29.2 and 28 U.S.C. § 1746, declares that the **Petition for Writ of Certiorari** filed in the above-styled matter was sent through the United States Postal Service by first-class mail, postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing, addressed to the Clerk of the Supreme Court of the United States, on October 15, 2018, which is timely pursuant to the rules of this Court.

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