No. 19-7544

In the Supreme Court of the United States

ROBERT M. WAGGY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Brief of *Amici Curiae* Pennsylvania Center for the First Amendment and Professor Eugene Volokh in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

The Pennsylvania Center for the First Amendment is an educational, advocacy, and research organization dedicated to advancing the freedoms of speech and the press in the United States. For over fifteen years, the Center has provided educational programs, sponsored speakers, published books and articles in the popular and academic press, and served as a media resource on a wide array of First Amendment topics.

Eugene Volokh is the Gary T. Schwartz Professor of Law at UCLA School of Law, where he writes about and teaches First Amendment law. He is the author of a textbook and over 40 law review articles on First Amendment law, and has extensively studied criminal harassment law. *See* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw. U. L. Rev. 731 (2013).

SUMMARY OF ARGUMENT

This case merits the Court's attention for three related reasons.

1. The Ninth Circuit upheld a prosecution for offensive speech to a government official on the job, contrary to the decisions of other courts.

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties received notice at least 10 days before the deadline and have given express consent to this brief.

2. The Ninth Circuit treated a direct, facially content-based restriction on supposedly "harassing" speech as merely a prohibition on conduct. In this, it agreed with the views of some courts, but disagreed with others (as the petition explains).

3. The logic of the Ninth Circuit decision cannot be reconciled with this Court's precedents on what constitutes a content-based restriction.

Waggy was convicted of violating Wash. Rev. Code § 9.61.230(1)(a) (applicable in federal court via the Assimilative Crimes Act, 18 U.S.C. § 13), for using offensive language during telephone calls to Veterans Administration officials in their offices. Though this subsection is a content-based ban on "lewd, lascivious, profane, indecent, or obscene words or language," *id.*, the Ninth Circuit upheld Waggy's conviction on the basis that the statute required a specific intent and thus supposedly prohibited conduct, not speech.

In this, the Ninth Circuit departed from other courts' decisions that have set aside convictions for saying offensive things to government officials on the job. And the Ninth Circuit erred: Neither the legislature's intent to regulate conduct nor the inclusion of a specific intent element renders such statutes content-neutral, or justifies content-based restrictions on speech to government officials.

To be clear, not all telephone harassment statutes violate the First Amendment. Some may, for instance, be permissible, content-neutral laws that protect people from real annoyances or distractions, such as being woken up in the middle of the night or having their phone lines tied up. Examples of such stat-

utes include part of Wash. Rev. Code § 9.61.230(1)(b), which makes it a misdemeanor for a person to make a telephone call "with intent to harass, intimidate, torment, or embarrass any other person * * * at an extremely inconvenient hour, whether or not a conversation ensues." Others may ban categorically unprotected speech, like true threats. For instance, Wash. Rev. Code § 9.61.230(1)(c) prohibits "threatening to inflict injury to the person or property of the person called or any member of his or her family or household."

But as a content-based ban on speech with no exception for speech made to government officials in their offices, § 9.61.230(1)(a) is not a permissible statute. While Waggy's choice of words was undoubtedly vulgar, intemperate, and counterproductive, his words were spoken to communicate with Veterans Administration officials while they were on the job. Waggy thus had a constitutionally protected right to criticize the officials, even with offensive words that conveyed strong emotion or caused discomfort.

ARGUMENT

I. Even offensive speech to government officials on the job is constitutionally protected

The First Amendment protects verbal criticism, challenges, and profanity directed at police officers. *Lewis* v. *City of New Orleans,* 415 U.S. 130, 133-34 (1974); *City of Houston* v. *Hill*, 482 U.S. 451, 461 (1987). Indeed, "the freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics

by which we distinguish a free nation from a police state. *Id.* at 462-63.

Likewise, lower courts have held that the First Amendment protects even profane and sharply critical speech to government officials. The Iowa Supreme Court overturned a harassment conviction after the defendant wrote a letter calling a state highway patrolman a "red-necked m*th*r-f*ck*r," because "[o]ur Constitution does not permit government officials to put their critics, no matter how annoying, in jail." *State* v. *Fratzke*, 446 N.W.2d 781, 782, 785 (Iowa 1989).

The Nebraska Supreme Court similarly overturned a breach of the peace conviction for sending emails "laced with provocative and insulting rhetoric" to a candidate for state legislature. *State* v. *Drahota*, 788 N.W.2d 796, 798, 804 (Neb. 2010). The Massachusetts Supreme Judicial Court applied the First Amendment to reverse a criminal harassment conviction for sending expletive-filled letters to a town selectman, which called the official "the biggest fucking loser" and a "fucking asshole." *Commonwealth* v. *Bigelow*, 59 N.E.3d 1105, 1108, 1112 (Mass. 2016). And, as the dissent below noted, the D.C. Circuit reversed a conviction for leaving multiple racist messages on the voice-mail of a U.S. Attorney. *United States* v. *Popa,* 187 F.3d 672, 673 (D.C. Cir. 1999).

II. The Ninth Circuit opinion and those of some other courts wrongly recharacterize content-based speech restrictions as regulations of conduct, based either on the speaker's or the legislature's purpose

Waggy was convicted of violating a content-based portion of Washington's telephone harassment statute, Wash. Rev. Code § 9.61.230(1)(a), which criminalizes making telephone calls "with intent to harass, intimidate, torment, or embarrass any other person * * * using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act."[2] The Ninth Circuit panel took the view that the statute regulates conduct, even though it clearly targets certain "words or language." Pet. 9a. To rationalize this, the panel majority mistakenly held that the existence of a specific intent requirement "ensures that Defendant was convicted for his conduct, not for speech protected by the First Amendment." *Id.* Other courts have taken the same view, *see, e.g.*, *State* v. *Alphonse*, 197 P.3d

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[2] The jury instructions for Counts Three and Four, under which Waggy was found guilty, permitted Waggy to be convicted if he used prohibited "words or language" under subsection (1)(a) and if he engaged in "repeated calling" under subsection (1)(b). Pet. App. 5a, 26a. The jury found Waggy not guilty of Count Five, which involved only a set of unanswered calls. Pet. App. 5a. Therefore, the conviction seems to have been based on the content of Waggy's speech; but even if Waggy could have been convicted both for his words and other features of the speech (such as its repeated nature), this Court is "still bound to reverse if the conviction could have been based upon both his words and his act." *Street* v. *New York*, 392 U.S. 576, 586-87 (1969).

1211, 1218 (Wash. Ct. App. 2008); *State* v. *Alexander*, 888 P.2d 175, 179 (Wash. Ct. App. 1995); *Gormley* v. *Director*, 632 F.2d 938, 943 (2d Cir. 1980); *Thorne* v. *Bailey,* 846 F.2d 241, 243 (4th Cir. 1988), though others disagree, *see* Pet. 17-23.

But while a *mens rea* element narrows the speech the statute reaches, it cannot render a content-based law content-neutral. The law targets speech with a certain content (e.g., "lewd" or "indecent" speech) when said with a certain purpose, but not speech with a different content when said with the same purpose; it therefore discriminates based on content.

Indeed, including a purpose element may sometimes make an otherwise content-neutral law content-based: "Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, *defining regulated speech by its function or purpose*. Both are distinctions based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Reed* v. *Town of Gilbert,* 135 S. Ct. 2218, 2227 (2015) (emphasis added). Including such a purpose element certainly cannot make an otherwise content-based law content-neutral.

The law is thus content-based on its face; but it also satisfies the *McCullen* test for content discrimination—it requires enforcement authorities "to 'examine the content of the message that is conveyed to determine whether' a violation has occurred," *McCullen* v. *Coakley,* 573 U.S. 464, 479 (2014) (quoting *FCC* v. *League of Women Voters of Cal.,* 468 U.S. 364, 383 (1984)). To determine whether speech is "lewd" or "indecent," enforcement authorities must examine its

content, whatever purpose requirements may be present.

Beyond this, "under well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC* v. *Wis. Right to Life, Inc.,* 551 U.S. 449, 468 (2007) (lead opinion) (citation omitted); *id.* at 495 (Scalia, J., concurring in the judgment) (agreeing that tests that turn "on intent of the speaker" unconstitutionally "pu[t] the speaker * * * wholly at the mercy of the varied understanding of his hearers" (internal quotation marks and citations omitted)). In *Wis. Right to Life*, this Court rejected the use of an intent-based test, reasoning that "[a]n intent-based standard 'blankets with uncertainty whatever may be said,' and 'offers no security for free discussion.'" *Id.* at 468 (lead opinion) (citations omitted); *id.* at 495 (Scalia, J., concurring in the judgment). The same is true of a law that can be used to punish offensive speech said to government officials, even when the law is limited to speech said with a supposedly improper motive.

Indeed, *Popa,* the closely analogous D.C. Circuit precedent that the Ninth Circuit attempts to distinguish, set aside a conviction under a federal telephone harassment statute even though that statute likewise required proof of an "intent to annoy, abuse, threaten, or harass any person at the called number." 47 U.S.C. § 223(a)(1)(C). Speech remains protected, the D.C. Circuit held, even if the speaker "intends both to communicate his political message and to annoy his auditor." *Popa*, 187 F.3d at 678. Here too, Waggy could have been unconstitutionally convicted even though he intended both to communicate his

message of disapproval of the VA's actions and to annoy his audience.

And just as a speaker's offensive purpose cannot justify a content-based speech restriction, neither can a legislature's benign purpose. The Ninth Circuit concluded that subsection (1)(b)—the restriction on anonymous calls, repeated calls, and calls at an extremely inconvenient hour—"underscores the legislature's intention to target conduct, not speech." Pet. 9a. But whatever subsection (1)(b) may reveal about the legislature's intent cannot negate the facial content discrimination in subsection (1)(a): "[A]n innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, 135 S. Ct. at 2228.

III. Government officials might be protected from some speech—but not from all "lewd" or "indecent" speech intended to offend

A. Speech to government officials at their homes

Of course, even government officials might enjoy some protection from unsolicited communications, particularly in the privacy of their own homes. In *Rowan* v. *U.S. Post Office Dept.*, 397 U.S. 728, 738 (1970), this Court "reject[ed] the argument that a vendor has a right under the Constitution or otherwise to send unwanted material"—including speech—"into the home of another." Lower courts have relied on *Rowan* to uphold telephone harassment statutes that restrict unwanted calls to people's private homes. *See State* v. *Elder*, 382 So. 2d 687, 692-93 (Fla. 1980) (reversing the finding that a telephone

harassment statute was unconstitutional because the plaintiff's privacy interest "within the sanctum of the home" was strong enough to warrant a restriction on unsolicited calls).

Likewise, in *Hagedorn* v. *Cattani*, 715 F. App'x 499, 507 (6th Cir. 2017), the Sixth Circuit concluded that, while the First Amendment protects verbal criticism directed at public officials, it does not afford people "an uninhibited right to do so to an official's private email account," which the court viewed as "the functional equivalent of a home mailbox." And in *U.S. Postal Service* v. *Hustler Magazine, Inc.*, 630 F. Supp. 867, 871 (D.D.C. 1986), the court held that defendants had a right to send pornographic magazines to members of Congress in their offices, but only because "by seeking to mail their magazine to the Member's office," the defendants did not "threaten the unique privacy interests that attach in the home." *But see Bigelow*, 59 N.E.3d at 1113 (finding that critical letters were protected by the First Amendment even when they were mailed to a town selectman's home).

B. Content-neutral laws

Likewise, content-neutral laws can protect everyone—including government officials—from calls that unduly tie up phone lines or wake them needlessly in the middle of the night. Such laws (such as subsection 1(b) of the Washington statute) do punish the noncommunicative conduct components of telephone calls, and not their communicative content, and are therefore subject to lower scrutiny. *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791-92 (1989).

C. True threats

While content-based speech restrictions are "presumptively invalid," this Court has recognized a few well-defined and intentionally narrow exceptions to this principle, such as for "true threats." *Virginia* v. *Black*, 538 U.S. 343, 363 (2003). Wash. Rev. Code § 9.61.230(1)(c) falls into this category, banning telephone call made "with intent to harass, intimidate, torment, or embarrass any other person * * * threatening to inflict injury on the person or property of the person called or any member of his or her family or household." But, though Waggy was prosecuted under this provision as well as under the ban on lewd and indecent speech, both of the threat counts were voluntarily dismissed by the Government before trial. Pet. 3a-4a n.2.

CONCLUSION

Waggy was convicted—under a broad, content-based statute—for his offensive speech to government officials at their offices. Yet such speech is presumptively protected, at least unless it is threatening, it is restricted through a suitable content-neutral statute, or the restriction can pass strict scrutiny. The speech ought not be restricted simply by relabeling it as conduct, or pointing to the speaker's intent to, among other things, "embarrass" or "harass."

Respectfully submitted,

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