No. 19-7544

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT M. WAGGY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Wash. Rev. Code § 9.61.230(1)(a) (2016), as incorporated under the Assimilative Crimes Act, 18 U.S.C. 13, violates the First Amendment as applied to petitioner's telephone calls.

ADDITIONAL RELATED PROCEEDING

United States District Court (E.D. Wash.):

United States v. Waggy, No. 16-po-198 (Nov. 16, 2017)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 936 F.3d 1014. A separate memorandum opinion of the court of appeals (Pet. App. 18a-21a) is not published in the Federal Reporter but is reprinted at 776 Fed. Appx. 547. The orders of the district court (Pet. App. 22a-36a) and the magistrate judge (Pet. App. 46a-48a, 52a-66a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 5, 2019. On November 22, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and

including February 2, 2020, and the petition was filed on February 3, 2020 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Washington, petitioner was convicted on two counts of telephone harassment, in violation of 18 U.S.C. 13 and Wash. Rev. Code § 9.61.230(1)(a) and (b) (2016). Pet. App. 2a, 37a-38a. The district court sentenced him to five years of probation. Id. at 40a. The court of appeals affirmed. Id. at 1a-17a, 18a-21a.

1. a. The Department of Veterans Affairs (VA) operates the Mann-Grandstaff Veterans Administration Medical Center in Spokane, Washington. C.A. E.R. 379. The Center sits on land reserved for the exclusive use of the United States as a hospital for the VA, id. at 380, and it provides medical services to over 30,000 veterans in the Spokane region, id. at 274.

Petitioner is a veteran of the Marine Corps. Pet. App. 2a. For a number of years, petitioner received treatment at the Center for medical issues related to his military service. Id. at 23a. Over time, however, petitioner's conduct toward the Center and its employees became disruptive. Id. at 2a, 23a. In 2005, for example, he was convicted of harassment after he threatened to kill a Center employee and go on a shooting spree at a nearby school. Presentence Investigation Report (PSR) ¶¶ 62, 67. And in

2008, he was again convicted of harassment after threatening to "cause a large confrontation" and stating that he would be "justified in using deadly force" at the Center. PSR ¶ 76; see PSR ¶ 71.

Because of petitioner's "disruptive behavior and frequent threats," the Center barred petitioner from coming onto the premises altogether. Pet. App. 2a; see C.A. E.R. 218, 277-278. The Center authorized petitioner to receive medical care through private physicians in the community, rather than through VA physicians at the Center. C.A. E.R. 214-215. In addition, the Center generally prohibited petitioner from contacting anyone at the Center other than his designated point of contact, Juli Summerlin, the supervisor of the VA's Care in the Community Department. Id. at 211-212, 217. And the Center established a special phone line for petitioner to use in communicating with Summerlin. Id. at 218-219.

Petitioner frequently called Summerlin, making "angry" demands that the VA pay him millions of dollars. C.A. E.R. 222. Petitioner claimed that the VA had failed to reimburse him for certain medical expenses and that it had failed to honor a purported agreement to pay him $3 million when he did not complete his law degree. Id. at 438; see id. at 434; Pet. App. 23a. Charging a 72% annual interest rate -- which he claimed to have calculated based on the interest rate that he owed on his own credit card -- petitioner asserted that the VA owed him as much as

$197 million. C.A. E.R. 220, 433. He also asserted that the outstanding debt made him the legal owner of the Center's campus, authorizing him to seize the Center's property just as a bank may foreclose on a home. Id. at 440-441, 452. When Summerlin told petitioner that she had no authority to pay him such money, petitioner threatened to "come out to the VA" and warned that the VA would "not be happy with the outcome." Id. at 222.

b. Despite instructions to call only Summerlin, petitioner frequently called the Center and demanded to speak with its director. C.A. E.R. 292, 294. Those calls would be routed to the executive secretaries in the Center's front office. Id. at 291-292, 294-295, 324-326. One of those secretaries was Sandra Payne. Id. at 320-321. When she first started work as a secretary in January 2016, Payne was shown pictures of petitioner, told "to be on the lookout for him," and instructed to "immediately contact the police" using "a duress button in the office" if "he ever showed up." Id. at 326-327; see id. at 321.

In March 2016, petitioner called the Center and told one of the other secretaries in the front office that he was coming to the campus. C.A. E.R. 298-299, 428. The secretary contacted the police and warned others, including Payne, that petitioner was on his way. Id. at 336. Concerned that petitioner might resort to violence, Payne brought her daughter, who was visiting her at work that day, to a back room. Id. at 336-337. With a police officer guarding the clear glass door to the front office, Payne watched

as officers apprehended petitioner down the hall. Id. at 338. Petitioner was issued a citation for trespassing, PSR ¶ 86, and later admitted that he had intended to seize the campus, C.A. E.R. 442.

c. The next month, on April 19, 2016, petitioner again called the Center multiple times, asking to speak with the director. Pet. App. 3a; C.A. E.R. 338. Each call was transferred to the front office, where Payne was stationed. Pet. App. 3a.

Payne answered the first call. C.A. E.R. 338. Petitioner demanded that the VA pay him $9.25 million and warned that if it did not, "he would show up to the property." Id. at 341; see id. at 340. After Payne stated that she would have to notify the police if he showed up, petitioner threatened to "use force to defend himself." Id. at 341. Payne "immediately became scared that he was going to come" to the VA and "hurt" her and others. Id. at 341-342. Petitioner then yelled at Payne to "do [her] fucking job," id. at 342, by which he meant, "transfer [his call] to the director," id. at 462. When Payne asked petitioner "to be respectful and to keep the call professional," petitioner called her "a fucking cunt." Id. at 342. At that point, Payne hung up because she "can't handle being called names like that." Id. at 343; see id. at 342.

Petitioner immediately called back. Pet. App. 4a. When Payne picked up, petitioner was still "screaming" and "yelling" "obscenities." C.A. E.R. 343. Petitioner was "incoherent," id.

at 369, and Payne "really couldn't understand" what he was saying, though she heard him tell her to "do [her] fucking job and to fucking listen," id. at 344. Petitioner hung up before Payne had "the opportunity to say anything." Id. at 369.

Petitioner called back right away, and Payne again answered. C.A. E.R. 344-345. Petitioner reiterated his demands for "his property" or "his money." Id. at 345. Payne responded that she would "take a message and get it to the appropriate department," but petitioner responded by again calling her "a fucking cunt." Ibid. Payne hung up. Ibid.

Petitioner called back yet again. C.A. E.R. 346. Payne knew it was petitioner from the caller ID. Ibid. This time, Payne did not answer, because she believed that "it would never end," and that "no matter what [she] said, he would continue to verbally abuse" and "try and degrade [her]." Ibid. When the phone stopped ringing, petitioner called back once more. Ibid. Feeling even "[m]ore scared," Payne again declined to answer. Ibid. She then walked away from her desk before petitioner called two more times. Ibid.; see id. at 346-347. Payne "was crying," and she felt "sick" and "nauseous." Id. at 347. The calls had made her "[s]cared to leave," ibid., and fearful that petitioner "would come to the VA and be out in the parking lot waiting for [her]," id. at 348.

2. a. The government filed an information in the Eastern District of Washington charging petitioner with one count of telephone harassment, in violation of 18 U.S.C. 13 and Wash. Rev.

Code § 9.61.230(1) (2016). C.A. Supp. E.R. 1-2. The federal Assimilative Crimes Act, 18 U.S.C. 13, provides that a person who, in an area of exclusive federal jurisdiction, commits a crime that "would be punishable if committed or omitted within the jurisdiction of the State * * * in which such place is situated, * * * shall be guilty of a like offense and subject to a like punishment." 18 U.S.C. 13(a). Section 9.61.230(1) of the Washington Revised Code provides in pertinent part:

> Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
>
> (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
>
> (b) Anonymously or repeatedly or at an extremely inconvenient hour, whether or not conversation ensues; or
>
> (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household;
>
> is guilty of a gross misdemeanor.

Wash. Rev. Code § 9.61.230(1) (2016).

After petitioner consented to proceed before a magistrate judge, C.A. Supp. E.R. 24-25, the government filed a second amended information charging petitioner with six counts of telephone harassment, in violation of 18 U.S.C. 13 and Wash. Rev. Code § 9.61.230(1) (2016). Pet. App. 67a-70a. The government subsequently dismissed two of the counts, C.A. Supp. E.R. 167,

169, leaving four counts alleging telephone harassment based on petitioner's calls to Payne on April 19, 2016. Count 2, based on the first completed call to Payne, alleged a violation of 18 U.S.C. 13 and Wash. Rev. Code § 9.61.230(1)(a) and (c) (2016). Pet. App. 68a. Counts 3 and 4, based on the second and third completed calls to Payne, respectively, each alleged a violation of 18 U.S.C. 13 and Wash. Rev. Code § 9.61.230(1)(a) and (b) (2016). Pet. App. 68a-69a. And Count 5, based on the four subsequent unanswered calls, alleged a violation of 18 U.S.C. 13 and Wash. Rev. Code § 9.61.230(1)(b) (2016). Pet. App. 69a.

b. Petitioner moved to dismiss the information. C.A. Supp. E.R. 31-40. Petitioner acknowledged that Section 9.61.230(1) "may be facially constitutional," id. at 37, and that he "could certainly be found criminally liable if he called VA employees at their homes and made harassing statements in the middle of the night," id. at 32. But petitioner argued that Section 9.61.230(1) violates the First Amendment as applied to his calls to "VA employees at the VA during normal business hours," id. at 33, because, in his view, "the government cannot show that there is a substantial privacy interest" in "being free from unwanted expression" in "workplaces or governmental agencies," id. at 38.

The magistrate judge denied petitioner's motion to dismiss. Pet. App. 52a-66a. The magistrate judge determined that the government has an "interest in regulating the speech in question" because the alleged telephone conversations were "private" and did

not occur "in a public forum." Id. at 56a. The magistrate judge also stated that "words alone are not adequate for conviction" under Section 9.61.230(1) because the statute requires that they "be uttered with the specific intent to 'harass[,] intimidate, torment or embarrass,'" and reasoned that "the statute punishes the conduct, not the words themselves." Id. at 57a.

c. The case proceeded to trial before a jury. C.A. E.R. 148-584. At the close of the government's case, the magistrate judge granted petitioner's motion for judgment of acquittal on Count 2 for insufficient evidence that petitioner made the first call on April 19, 2016, with the specific intent to harass Payne. Id. at 402-403; Pet. App. 25a. The magistrate judge denied petitioner's motion with respect to the other counts. C.A. E.R. 401-402. The jury found petitioner guilty on Counts 3 and 4 but not guilty on Count 5. Pet. App. 49a-51a.

Following the verdict, petitioner moved for judgment of acquittal, C.A. Supp. E.R. 178-195, arguing that Section 9.61.230(1)(a)'s prohibition on "indecent" language is unconstitutional as applied to the calls at issue in Counts 3 and 4 -- his second and third calls to Payne on April 19, 2016, id. at 181. Petitioner contended that those calls involved "fully protected First Amendment speech," id. at 188, and that the government lacked a "substantial privacy interest" in prosecuting calls to Payne's "work phone" during "normal business hours," id. at 192-193. The magistrate judge denied petitioner's motion,

stating that the statute "does not punish speech per se, but rather conduct and intentions." Pet. App. 47a. The magistrate judge sentenced petitioner to five years of probation. Id. at 40a.[1]

3. Petitioner appealed his convictions to the district court. C.A. Supp. E.R. 247. Petitioner argued that the First Amendment protects his "right to criticize government agencies like the VA," id. at 277, and that Section 9.61.230(1)(a) is unconstitutional "as applied" to his second and third calls to Payne, C.A. E.R. 754, while distinguishing "cases involv[ing] facial challenges" to other statutes, id. at 753. Petitioner also argued that the magistrate judge erred in instructing the jury on an "overbroad and vague" definition of "indecent" language. C.A. Supp. E.R. 297-298.

The district court affirmed. Pet. App. 22a-36a. The court agreed with the magistrate judge that "Washington's telephone harassment statute prohibits conduct, not speech," because the statute requires a showing of "'intent to harass, intimidate, torment or embarrass.'" Id. at 29a (quoting Wash. Rev. Code § 9.16.230(1)(a) (2016)). The court also determined that the statute's intent requirement ensured that the definition of "indecent" in the jury instructions did not "render[] the statute's

[1] In 2019, the magistrate judge found that petitioner had violated the conditions of his probation, C.A. Supp. E.R. 346, and sentenced him to four months of imprisonment, to be followed by one year of supervised release, D. Ct. Doc. 264, at 2-3 (Mar. 1, 2019). Petitioner completed the term of imprisonment on June 21, 2019, and his period of supervised release has been tolled pending his release from state custody.

application unconstitutionally overbroad and vague." Id. at 32a; see id. at 33a-34a.

4. The court of appeals affirmed. Pet. App. 1a-17a, 18a-21a. On appeal, petitioner renewed his contention that Section 9.61.230(1)(a) is unconstitutional as applied to his second and third calls to Payne, see Pet. C.A. Br. 17-35, and disclaimed a facial challenge to the statute, see C.A. Oral Argument at 3:50, https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000015968.

The court of appeals accepted that the jury's general verdict, which did not distinguish between Sections 9.61.230(1)(a) and (b), would be invalid if Section 9.61.230(1)(a) alone was invalid as applied, but rejected petitioner's as-applied challenge to Section 9.61.230(1)(a). Pet. App. 2a, 7a & n.4. The court observed that Section 9.61.230(1)(a) "requires proof that the defendant specifically intended to harm the victim when initiating the call," id. at 13a, and that petitioner did not challenge the jury's finding that "he had the intent required" under Section 9.61.230(1)(a), id. at 7a. And the court reasoned that, "[a]s applied here, that requirement [of specific intent] ensures that [petitioner] was convicted for his conduct, not for speech protected by the First Amendment." Id. at 13a.

The court of appeals found petitioner's reliance on the D.C. Circuit's decision in United States v. Popa, 187 F.3d 672 (1999), which upheld an as-applied constitutional challenge to a particular conviction under a federal telephone harassment

statute, to be misplaced. Pet. App. 9a. The court explained that in Popa, the defendant's "complaints about the actions of a government official were a significant component of his calls." Ibid. (citation omitted). The court found that "not" to be "the situation here." Ibid.; see also id. at 9a n.5 (stating that "[t]o the extent that Popa is not distinguishable, its analysis is against the great weight of authority -- including our own"). The court also found other "cases concerning political speech" that petitioner had cited to be "similarly distinguishable." Id. at 9a.

Judge Tashima dissented. Pet. App. 14a-17a. In his view, "complaints about the actions of a government official were a significant component of [petitioner's] calls," id. at 16a, and Section 9.61.230(1)(a) is unconstitutional as applied to such "public or political discourse," id. at 14a.

ARGUMENT

Petitioner contends (Pet. 26-33) that Wash. Rev. Code § 9.61.230(1)(a) (2016) violates the First Amendment as applied to the calls at issue in this case. The court of appeals correctly rejected his as-applied challenge, and petitioner identifies no court in which the outcome of his case would necessarily have been different. In any event, this case would be a poor vehicle for this Court's review because the question presented rests in part on a fact-bound dispute with the decision below, and because the Washington Supreme Court has not authoritatively construed Section 9.61.230(1)(a). Further review is unwarranted.

1. The court of appeals correctly rejected petitioner's First Amendment challenge to the application of the statute in this case. Petitioner has not contended that Section 9.61.230(1)(a) is unconstitutional on its face. Rather, he has raised only an as-applied challenge to the statute, arguing that Section 9.61.230(1)(a) is unconstitutional as applied to the particular circumstances of his case. See Pet. C.A. Br. 17-35; pp. 8-11, supra.

a. Petitioner asserts that the calls at issue here are entitled to "special protection" under the First Amendment because they involved speech on "matters of public concern." Pet. 27-28 (citation omitted). The court of appeals correctly rejected that assertion on the ground that petitioner's calls did not involve such speech. See Pet. App. 9a (finding that "'complaints about the actions of a government official'" were "not" a "'significant component of [petitioner's] calls'" and finding petitioner's "citations to cases concerning political speech" "similarly distinguishable") (citation omitted).

"Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" Snyder v. Phelps, 562 U.S. 443, 453 (2011) (citations omitted). The fact that speech is "critic[al]" of the government or "directed at a public official" is not dispositive. Connick v. Myers, 461 U.S. 138, 149 (1983);

see ibid. (rejecting the presumption that "all matters which transpire within a government office are of public concern"). In Connick, for example, this Court determined that speech by an assistant district attorney reflecting her "dissatisfaction" with her office's decision to transfer her to a different section of the criminal court did not qualify as speech on a matter of public concern. Id. at 148. The Court emphasized that the attorney's speech, if made public, "would convey no information at all other than the fact that a single employee is upset with the status quo." Ibid.

Neither of the calls at issue here involved speech on matters of public concern under this Court's precedents. Petitioner's second call to Payne, which is the subject of Count 3, consisted of "incoherent screaming and yelling and using the F word a lot." C.A. E.R. 369. During that call, Payne heard petitioner yell at her to "do [her] fucking job and to fucking listen." Id. at 344. Petitioner testified at trial that what he meant when he demanded that Payne "do her fucking job" was merely that she "transfer [his call] to the director." Id. at 461-462. And whether Payne transferred that single call was not a matter of "political, social, or other concern to the community" or of "legitimate news interest." Snyder, 562 U.S. at 453 (citations omitted).

Petitioner's third call to Payne, which is the subject of Count 4, likewise did not involve speech on matters of public concern. During that call, petitioner reiterated his demands that

the VA pay him "his money" or else vacate "his property." C.A. E.R. 345. Petitioner contends (Pet. 28) that those demands reflected his "dissatisfaction that the government had not reimbursed his medical care or responded appropriately to his complaints." But like the "dissatisfaction" expressed in Connick, petitioner's dissatisfaction, if made public, "would convey no information at all other than the fact that a single [veteran] is upset with the status quo." 461 U.S. at 148. The subject of the call concerned petitioner "specifically," Snyder, 562 U.S. at 454 -- namely, his insistence on speaking immediately to a particular person (the director) about his demands for "his money" and "his property," rather than having a message taken and given to the appropriate department, C.A. E.R. 345 (emphases added).

Moreover, even if petitioner's calls did involve speech on matters of public concern, his as-applied challenge would still fail. Even with respect to speech on matters of public concern, certain modes of expression are not constitutionally protected at all. See R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992). And petitioner's mode of expression here was constitutionally unprotected because his calls constituted "true threats." Virginia v. Black, 538 U.S. 343, 359-360 (2003). "Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." Id. at 360. In this case, petitioner had been

"barred from the [Center] because of his disruptive behavior and frequent threats," Pet. App. 2a; only a month before the calls at issue here, he had arrived outside Payne's office, intending to seize the premises, see pp. 4-5, supra; and in the first call that Payne answered on April 19, 2016, he threatened again to "show up" at the Center, seize the premises, and "use force" if necessary, C.A. E.R. 341. Against that backdrop, petitioner's second and third calls, in which he reiterated his demands for "his property" or "his money," id. at 345, and continued "screaming" "obscenities," id. at 343, were threats. Indeed, Payne testified that she felt "[s]cared to leave" and "afraid that he would come to the VA and be out in the parking lot waiting for [her]." Id. at 347-348; see id. at 345-346, 374. Even if his calls were not charged directly as threats under Wash. Rev. Code § 9.61.230(1)(c) (2016), petitioner cannot sustain his as-applied First Amendment challenge where his calls were not protected by the First Amendment.

b. Petitioner additionally suggests (Pet. 28) that his conviction is infirm because "Washington's telephone harassment law is impermissibly content-based." To the extent that he might contend that the statute is facially invalid on that basis, he did not preserve such an argument below. See pp. 8-11, supra. And he does not explain how any impermissible content distinctions would support the as-applied claim that he did preserve.

Section 9.61.230(1)(a) does not prohibit the expression of any "particular idea," R.A.V., 505 U.S. at 393. Instead, any regulation of speech as such is limited to a restriction on the use of a "particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey," ibid. And petitioner himself appears to accept that at least some such content-based restrictions are permissible in this context. He does not dispute, for example, that a law like this would be constitutional if it were even more content-based, so as to target only calls that lack a "legitimate purpose." Pet. 11, 23, 30.

In any event, however the statutory categories are defined, petitioner does not explain how his as-applied claim can succeed if his own calls may legitimately be proscribed. He has not raised a "facial" claim of overbreadth, "under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional," even if its application to the particular defendant is not. Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008) (citation omitted); see pp. 8-11, supra.[2] And aside from

[2] Petitioner's brief in the court of appeals invoked the overbreadth doctrine only in support of an argument that the particular jury instructions in his case "transformed this criminal statute into nothing more than a prohibition on speech that might offend a juror's sensibilities." Pet. C.A. Br. 37. The court of appeals rejected that argument in its separate unpublished memorandum disposition, see Pet. App. 20a, and even if petitioner had re-raised that circumstance-specific argument here, it would not warrant this Court's review.

the "public concern" theory that the court of appeals rejected on the facts, see pp. 13-15, supra; Pet. App. 9a, he has not suggested a "legitimate purpose" for his calls or otherwise explained why his calls cannot be proscribed. Nor is any "legitimate purpose" apparent in calls made "with intent to harass, intimidate, torment or embarrass," Wash. Rev. Code § 9.61.230(1) (2016), to someone other than the point of contact the VA specifically designated for him. See C.A. E.R. 217-219, 348.

2. Petitioner has not identified any court in which the outcome of his case would necessarily have been different.

a. In United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999) -- on which petitioner relies (at 17-19) -- the D.C. Circuit determined that a federal telephone harassment statute, 47 U.S.C. 223(a)(1)(C) (1996), was unconstitutional as applied to various phone calls the defendant had made. Popa, 187 F.3d at 673. In those calls, the defendant had complained that the U.S. Attorney for the District of Columbia had "violat[ed] the rights in court of the white people." Id. at 674; see id. at 673 (claiming that the U.S. Attorney had "violated . . . our rights"). The calls at issue in Popa thus involved speech on a matter of public concern. See Connick, 461 U.S. at 146 (explaining that "statements concerning [a government's] allegedly racially discriminatory policies involve[] a matter of public concern"). The D.C. Circuit reasoned that the defendant had "intend[ed] to engage in public or political discourse," and its constitutional conclusion was tied

to its finding that "complaints about the actions of a government official were a significant component of [the defendant's] calls." Popa, 187 F.3d at 677.

In this case, the court below specifically contrasted petitioner's calls with the ones in Popa, finding that "'complaints about the actions of a government official'" were "not" a "'significant component of [petitioner's] calls.'" Pet. App. 9a (quoting Popa, 187 F.3d at 677). Unlike Popa, this case does not involve speech on matters of public concern -- or even constitutionally protected speech to begin with. See pp. 13-16, supra. Given those differences, Popa does not provide a sound basis to conclude that the D.C. Circuit would necessarily have found Section 9.61.230(1)(a) unconstitutional as applied to the calls at issue here.

b. Petitioner's reliance (Pet. 19-20, 22) on Government of the Virgin Islands v. Vanterpool, 767 F.3d 157 (3d Cir. 2014), and State v. Fratzke, 446 N.W.2d 781 (Iowa 1989), is likewise misplaced. Neither of those decisions resolved a First Amendment challenge at all.

In Vanterpool, the Third Circuit declined to reach the defendant's First Amendment challenge to a Virgin Islands harassment statute because the defendant had not preserved the challenge. 767 F.3d at 162-163. In addressing the defendant's claim of ineffective assistance of counsel, the Third Circuit stated that the statute "would likely have been found

unconstitutional" if his counsel had argued that the statute was facially overbroad in the trial court. Id. at 168; see id. at 166. But the court did not resolve that overbreadth challenge, let alone address whether the statute would be unconstitutional as applied in circumstances similar to those here. See id. at 163 n.5.

In Fratzke, the Iowa Supreme Court declined to reach the defendant's First Amendment challenge to an Iowa harassment statute because his argument that the evidence was insufficient to sustain his conviction independently required invalidating his conviction. See 446 N.W.2d at 783 (declining to "reach the constitutional questions"). The statute at issue in Fratzke required a showing that the defendant acted "without legitimate purpose." Id. at 784. Although the court construed that element in light of the First Amendment's "guarantee of free expression," id. at 785, it did not address whether the First Amendment would permit applying the Iowa statute in circumstances similar to those here. See ibid. (describing the circumstances of that case as involving a letter, mailed to the clerk of a traffic court, that was "critical of speed laws, critical of law enforcement priorities, and harshly critical of one state trooper," who would be "less likely to respond belligerently to 'fighting words'") (citation omitted).

c. The remaining decisions that petitioner asserts (Pet. 21-23) to be in conflict with the decision below are likewise inapposite. Each of those decisions determined that a different

State's statute was facially overbroad, not that it was unconstitutional as applied to circumstances like those here. See Bolles v. People, 541 P.2d 80, 82-84 (Colo. 1975); People v. Klick, 362 N.E.2d 329, 330-332 (Ill. 1977); State v. Peterson, 936 N.W.2d 912, 916-921 (Minn. Ct. App. 2019); State v. Vaughn, 366 S.W.3d 513, 518-520 (Mo. 2012); People v. Golb, 15 N.E.3d 805, 813-814 (N.Y. 2014), cert. denied, 574 U.S. 1079 (2015); State v. Dronso, 279 N.W.2d 710, 712-714 (Wis. Ct. App. 1979); see also State v. Brobst, 857 A.2d 1253, 1254-1257 (N.H. 2004) (finding statute facially overbroad under the New Hampshire Constitution and declining to "reach the federal issue"); Provo City v. Whatcott, 1 P.3d 1113, 1115-1116 (Utah Ct. App. 2000) (finding statute "unconstitutionally overbroad both facially and as applied" but applying facial overbreadth analysis).

Under the First Amendment, a statute may be facially overbroad even if "some of its applications" would have been "perfectly constitutional"; indeed, the doctrine comes into play only when the challenged statute has a "plainly legitimate sweep." United States v. Williams, 553 U.S. 285, 292 (2008). Because the remaining decisions on which petitioner relies addressed only whether another State's statute was facially overbroad, they provide no sound basis to conclude that those courts would have found Section 9.61.230(1)(a) unconstitutional as applied in the particular circumstances here. See, e.g., Klick, 362 N.E.2d at 331 (stating that a statute may constitutionally proscribe the "terror

caused to an unsuspecting person when he or she answers the telephone, perhaps late at night, to hear nothing but a tirade of threats, curses, and obscenities"). And, as previously noted, see pp. 8-11, 17 & n.2, supra, petitioner did not preserve an overbreadth challenge to the statute here.

3. In any event, this case would be a poor vehicle for this Court's review, for two reasons.

First, the question presented includes a fact-bound premise that the court below rejected. The question asks "[w]hether a statute that prohibits telephone harassment may, consistent with the First Amendment, prohibit speech on matters of public concern or impose content-based restrictions on speech." Pet. i. But the court of appeals determined that the calls at issue in this case did not involve speech on matters of public concern. See Pet. App. 9a (finding that "'complaints about the actions of a government official'" were "not" a "'significant component of [petitioner's] calls'" and finding petitioner's "citations to cases concerning political speech" "similarly distinguishable") (quoting Popa, 187 F.3d at 677). Thus, for this case to implicate the question presented in the petition -- and for it to implicate the conflict petitioner asserts (Pet. 17-19) with the D.C. Circuit -- this Court would have to reject that determination of the court of appeals. Whether the calls in this case involved speech on matters of public concern, however, is a case-specific determination that does not warrant this Court's review.

Second, the Washington Supreme Court has not authoritatively interpreted the state statute in respect to its application to facts like those at issue here. Indeed, because this case is a federal prosecution under the Assimilative Crimes Act, 18 U.S.C. 13, no state court has had the opportunity to construe Section 9.61.230(1)(a) in this case. Any review in this Court of the question presented would be more appropriate in a case in which the lower courts were applying a statute over which they have direct interpretive authority, such that the statute's application has the imprimatur of the relevant judicial branch. As petitioner notes (Pet. 23), some state courts have imposed limiting constructions on their States' telephone harassment statutes, and the Washington Supreme Court could potentially do so as well. And should that occur, it would be a ground on which petitioner (who received only a probationary sentence) could seek postconviction relief.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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