No. 18-30171

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Robert M. Waggy,
Defendant-Appellant,
v.
United States of America,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON
The Honorable Stanley A. Bastian
Case No. 2:17-cr-00212

Brief of the American Civil Liberties Union of Washington, the Pennsylvania Center for the First Amendment, and Professors Aaron H. Caplan and Eugene Volokh as *Amici Curiae* in Support of Defendant

Aaron H. Caplan
Loyola Law School,
Los Angeles
919 Albany Street
Los Angeles, CA 90015
(213) 736-8110
aaron.caplan@lls.edu

Eugene Volokh
Scott & Cyan Banister
First Amendment Clinic
UCLA School of Law
405 Hilgard Ave.
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

RULE 26.1 DISCLOSURE STATEMENT

Amici curiae ACLU of Washington Foundation and Pennsylvania Center for the First Amendment have no parent companies, subsidiaries, or affiliates and they do not issue shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The ACLU of Washington is a statewide, nonpartisan, nonprofit organization, with over 80,000 members and supporters, that is dedicated to the preservation of civil liberties including the right to free speech, and that has advocated for free speech in Washington in both state and federal courts.

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 continuously 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.

---

[1] No party or party's counsel has authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief. No person has contributed money that was intended to fund preparing or submitting the brief, except that UCLA School of Law paid the expenses involved in filing this brief. All parties have consented to the filing of this brief.

Aaron H. Caplan is a professor of law at Loyola Law School, Los Angeles, where he teaches Constitutional Law and First Amendment law. He is the author of a casebook on constitutional law, and many articles on free speech law, including the law relating to interpersonal harassment. *See* Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L. J. 781 (2013).

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

SUMMARY OF ARGUMENT

The law of unsolicited phone calls does not have a high profile. Perhaps as a result, the area is plagued with case law misapplying ordinary free speech principles. Some of these common misconceptions appear in the opinions of the magistrate judge and trial court

below and in some of the state court cases on which they relied. These include the incorrect notions (a) that a law expressly targeting the content of speech should be treated as a regulation of conduct, (b) that the presence of a *mens rea* element makes a content-based law somehow not content-based, or (c) that the public forum doctrine is in any way relevant to the outcome. Because this is one of the few telephone harassment cases to reach a federal Court of Appeals, it presents an opportunity to bring light to a confused area.

1. Even when a defendant's telephonic speech is uncivil, vulgar, or offensive, it is still speech entitled to constitutional protection. A proper analysis must begin with the basic principles that government cannot restrict expression because of its content, and that any exceptions to that rule are few and far between.

The government may punish speech within a handful of historically-recognized categories, but this case fits none of them.

Beyond those categories, content-based speech restrictions may be upheld on extremely rare occasions if the government can satisfy a highly demanding form of strict scrutiny used in Free Speech

Clause cases. The government cannot do so on these facts, where a frustrated citizen uttered taboo words to a federal employee while petitioning the government for redress of grievances. Speech to the government enjoys heightened free speech protection.

In the leading case on this subject, the D.C. Circuit overturned a telephone harassment conviction for calling the office of a U.S. Attorney seven times and calling him a "whore, born by a negro whore." *United States v. Popa*, 187 F.3d 672, 673 (D.C. Cir. 1999). Similarly, the Ninth Circuit has set aside a conviction for saying "fuck you" to a law enforcement officer, *United States v. Poocha*, 259 F.3d 1077, 1082 (9th Cir. 2001). This is clearly established law: no qualified immunity is available when an officer is sued for wrongly arresting a person for disrespecting police by shouting obscenities and extending the middle finger. *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990). State high courts have likewise set aside convictions for offensive speech to government employees.

2. Unfortunately, some opinions from state courts and lower federal courts have misapplied these bedrock principles in telephone harassment cases, upholding convictions through questionable use

of ill-fitting doctrines. *Amici* explain why these errors, reflected in the opinions below, should be avoided.

ARGUMENT

I. Waggy's conviction punishes speech on the basis of its content.

"As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). Content-based speech restrictions are "presumptively invalid." *Id.* at 468 (2010) (citations omitted). This principle also applies to bans on taboo words. "One cannot forbid particular words without also running a substantial risk of suppressing ideas in the process." *Cohen v. California*, 403 U.S. 15, 26 (1971).

A. Laws banning "profane" or "indecent" words are content-based.

Waggy was convicted of violating Washington's telephone harassment statute, Wash. Rev. Code § 9.61.230(1) (applicable to defendant's phone calls to the Veteran's Administration through the Assimilative Crimes Act, 18 U.S.C. § 13). The statute makes it a

misdemeanor for a person, "with intent to harass, intimidate, torment or embarrass any other person," to make a telephone call:

> (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 to the person or property of the person called or any member of his or her family or household.

Subsection (1)(b)'s prohibition on making phone calls "repeatedly or at an extremely inconvenient hour" is an example of a content-neutral law: it forbids certain usage of telephones without regard to any words used or message expressed. Subsection (1)(c) targets true threats, one of the few categories of speech where the government may target the content of speech without violating the constitution. *See Virginia v. Black*, 538 U.S. 343, 359 (2003). But the counts on which the jury convicted Waggy involved only subsection (1)(a), the utterance of "lewd, lascivious, profane, indecent, or obscene words."[2]

---

[2] The instructions for Counts Three and Four allowed the jury to convict if Waggy used taboo words OR if he called repeatedly. ER 110, 115-16. The jury convicted on these counts. ER 99-100. Count

This portion of the statute is facially content-based. A law unquestionably targets content when it "applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). A law is facially content based when, as here, it "require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred," *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (internal quotation marks omitted). When § 9.61.230(1)(a) specifies that uttering certain "words or language" is forbidden while uttering others is not, it is unavoidably content based.

Five involved only a set of unanswered repeated calls, where Waggy uttered no words. ER 117. The jury acquitted on this count. ER 101. The conviction therefore seems based on the content of Waggy's speech in those calls where his words were in evidence. Moreover, if instructions allow a jury to convict on an unconstitutional basis (even if it relied on a constitutional basis), the conviction must be reversed. *Stromberg v. California,* 283 U.S. 359, 368 (1931).

This "commonsense" approach to identifying content-based laws applies to bans on taboo words (whether identified as profanity, vulgarity, expletives, or some other term). In *Cohen v. California*, 403 U.S. 15, 26 (1971), the Supreme Court held that a person could not be convicted for wearing a jacket in a courthouse that bore the message "Fuck the Draft." *Cohen* was decided before the Court began routinely classifying speech restrictions as content-based or content-neutral, but the Court has since treated the restriction in *Cohen* as content-based. *See United States v. Playboy Entm't Group, Inc.*, 529 U.S. 805, 813 (2000) (citing *Cohen* as precedent for the rule that "where the designed benefit of a content-based restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"); *Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972) (citing *Cohen* as precedent for the rule that the government generally may not restrict speech "because of . . . its content").

The Washington Supreme Court has held that a local telephone harassment ordinance prohibiting the utterance of "profane" language is content-based. *City of Bellevue v. Lorang*, 992 P.2d 496,

499 (Wash. 2000). Likewise, the US Supreme Court held that a restriction on "indecent" speech was content-based. *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

B. Waggy's speech does not fall within a proscribable category.

The First Amendment has "permitted restrictions upon the content of speech in a few limited areas," *United States v. Stevens*, 559 U.S. 460, 468 (2010), but their number is few and their scope purposefully narrow. A ban on taboo words is not among them.

1. Obscenity

Legally proscribable obscenity is limited to hard-core pornography: "works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973); see also *id.* at 27 (the category reaches only "'hard core' sexual conduct"). This category does not encompass merely "indecent" material, *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Reno v. ACLU*, 521 U.S. 844, 868 (1997), and certainly does not cover expletives, *Cohen*.

Section 9.61.230(1)(a) criminalizes not only "obscene" words spoken by telephone with scienter, but also those that are "lewd, lascivious, [or] indecent." This plainly does not track the *Miller* definition for constitutionally punishable obscenity. To the contrary, the statute has been interpreted to reach expression that is "altogether unbecoming" and "marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage," including words like "shit" and "bitch." *State v. Lansdowne*, 46 P.3d 836, 840 (Wash. Ct. App. 2002); *see also State v. Alphonse*, 197 P.3d 1211, 1219 n.43 (Wash. Ct. App. 2008) (echoing this definition). Yet, as *Cohen* shows, such taboo words remain constitutionally protected under the First Amendment.

Here, the jury was instructed that "indecent" means "grossly improper or offensive; unseemly, inappropriate," and that "obscene" means "extremely offensive under contemporary community standard of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate." ER 118. The definition of "obscene" then continued with an allusion to the *Miller* test, even

though no Washington case limits the statute to that definition.[3] The addition of this language in the instructions does not render the error harmless, because the jury could have relied upon the portions of the instruction that did not track the *Miller* definition of obscenity. *Stromberg v. California,* 283 U.S. 359, 368 (1931).

2. Fighting words

The government may punish "fighting words," defined as words that create a "likelihood that the person addressed would make an immediate violent response." *Poocha*, 259 F.3d at 1081. Mere "verbal criticisms"—even profane or indecent ones—do not constitute fighting words. *Id.* at 1080, 1082. Because § 9.61.230(1)(a) punishes telephone calls, where there is no face-to-face interaction, the prohibited speech cannot incite *immediate* violence. *See State v.*

[3] By contrast, 47 U.S.C. §223(a) includes the phrase "obscene, lewd, lascivious, filthy or indecent," but it has been interpreted to require proof in all cases that the defendant uttered constitutionally obscene speech. *United States v. Landham*, 251 F.3d 1072, 1086 (6th Cir. 2001); *ApolloMedia Corp. v. Reno*, 19 F. Supp. 2d 1081, 1096 (N.D. Cal. 1998), *aff'd*, 526 U.S. 1061 (1999). Only a state court could impose such a limitation on § 9.61.230(a)(1), and the Washington Courts have not done so. If they did, Waggy's speech would not qualify as constitutionally obscene, because that term does not include vulgar insults. *Landham*, 251 F.3d at 1086.

Dugan, 303 P.3d 755, 768-69 (Mont. 2013) (the fighting words category does not extend to telephone calls); *State v. Drahota*, 788 N.W.2d 796, 804 (Neb. 2010) (same for emails).

3. True threats

Subsection (1)(c) punishes telephonic threats to inflict injury on personal property when uttered with the requisite intent. This is a constitutionally permitted proscription against true threats. But Waggy was not charged under this subsection.

4. Speech integral to criminal conduct

Although its precise status and meaning are debated, the Supreme Court decision in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949), is sometimes cited for the notion that "speech or writing used as an integral part of conduct in violation of a valid criminal statute" does not establish a free speech defense to the criminal charge. Indeed, a bank robber cannot beat the charges merely because the robbery included speech like "give me all the money."

The key, of course, is that the speech not constituting a defense must be uttered as part of conduct that violates "a valid criminal

statute," meaning a statute that defines a crime without regard to the content of speech. Otherwise, *Giboney* could be stretched to mean that a statute making it a crime to criticize the President violates no one's speech rights because criticism of the President is an "integral part" of the offense. *See,* Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1036-43 (2016) (analyzing *Giboney* arguments raised in criminal harassment cases). When § 9.21.230(a)(1) defines the criminal conduct as the utterance of taboo "words or language," it does not define criminal conduct independent of speech: it makes speech the crime. *See* Part II.A below (analyzing "conduct, not speech" arguments)

C. The restriction on Waggy's speech cannot be justified under First Amendment strict scrutiny.

Since § 9.61.230(1)(a) is content-based and bans speech that falls outside any First Amendment exception, it is unconstitutional unless it is narrowly tailored to a compelling government interest. *Reed*, 135 S. Ct. at 2226. As applied in Free Speech Clause cases, this is a heightened form of "strict scrutiny," *id.* at 2227, sometimes called "the most exacting standard of review," *id.* at 2237 (Kagan,

J., concurring in the judgment). Under this standard, any justification of the presumptively invalid content-based speech restrictions is heavily disfavored. After all, "[t]he First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470. "[I]t is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1665-66 (2015). As an example, the Supreme Court upheld a content-based ban on campaigning within 100 feet of a polling place—a restriction narrowly tailored to the overwhelming interest in the fairness of democratic elections. *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion). Accordingly, the burden on the government under First Amendment strict scrutiny is extraordinarily high. The government cannot meet that burden here.

1. Strong criticism directed to government employees, even when it involves taboo words, is constitutionally protected.

Waggy's use of taboo words during his calls to the Veterans' Administration was no doubt vulgar, intemperate, and likely counterproductive. But the words were uttered in the course of communicating with government officials, where Waggy had a constitutionally protected right to criticize even with words that convey strong emotion and cause discomfort to the listener. "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." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987).

The same principle applies when taboo words are directed to other kinds of government employees at the workplace. In *Popa*, a defendant called the office of then-U.S. Attorney (and future Attorney General) Eric Holder seven times over the course of two months. His calls repeatedly referred to Holder as a "whore, born by a negro whore." *Popa*, 187 F.3d at 673. Popa was prosecuted for telephone harassment, on the theory that "the secretaries who answered the

phones—and the United States Attorney—have a right to be free of harassment, even while at work in a government office." Brief for Appellee, *Popa*, 1999 WL 34833912. But as vulgar and upsetting as Popa's speech was, "complaints about the actions of a government official were a significant component of his calls," *Popa*, 187 F.3d at 677. Using a criminal statute to punish such calls was unconstitutional. (This result was reached even though the D.C. Circuit applied a less rigorous standard of review than First Amendment strict scrutiny, because the differently-worded statute in *Popa* was arguably not content-based. *Id.* at 675-76. In a strict scrutiny case like Waggy's, the result is even more clearly the same.)

Although the Ninth Circuit has not decided cases involving telephonic vulgarity towards government employees, it has held that saying "fuck you" to a park ranger falls "squarely within the protection of the First Amendment." *Poocha*, 259 F.3d at 1082. "The Supreme Court has consistently held that the First Amendment protects verbal criticism, challenges, and profanity directed at police officers" unless the speech falls into a proscribable category like fighting words. *Id.* at 1080 (citing *City of Houston v. Hill*, 482 U.S.

451, 461 (1987)). "Criticism of the police, profane or otherwise, is not a crime," *Poocha*, 259 F.3d at 1082. This is clearly established law: no qualified immunity is available to an officer who wrongly arrests a person for disrespecting police by shouting obscenities and extending the middle finger. *Duran v. City of Douglas*, 904 F.2d 1372, 1377-78 (9th Cir. 1990).

State courts have reached similar rulings on facts resembling telephonic harassment of government officials. The Supreme Court of Iowa overturned a harassment conviction for sending a "nasty" letter to a state highway patrolman, calling him a "red-necked m*th*r-f*ck*r." *State v. Fratzke*, 446 N.W.2d 781, 782, 784 (Iowa 1989). The Nebraska Supreme Court overturned a conviction for sending insulting e-mails to a candidate for state legislature. *Drahota*, 788 N.W.2d at 800, 803. And the Massachusetts Supreme Judicial Court held that expletive-filled letters sent to a town selectman, calling him "the biggest fucking loser" and a "fucking asshole," likewise could not be criminally punished. *Commonwealth v. Bigelow*, 59 N.E.3d 1105, 1108, 1112 (Mass. 2016).

Implicit in these decisions is a rejection of two government interests that might be asserted in an effort to satisfy First Amendment strict scrutiny.

2. The interest in residential privacy is inapplicable.

Telephone harassment statutes are most often applied to protect the privacy and security of persons in their homes. *Amici* are unaware of any recent cases that evaluate this interest in light of the First Amendment strict scrutiny announced in cases like *Reed*. There are, however, earlier decisions upholding statutes that protect the home against an intrusion of unwanted or offensive messages. Most prominent is *Rowan v. U.S. Post Office Dept.*, 397 U.S. 728, 738 (1970), where the Supreme Court held that the government may refuse to deliver certain categories of mail if recipients have indicated they do not want to receive anything from that sender. The Court found no right "to send unwanted material into the home of another," *id.*, speaking frequently about the privacy rights of "householders," *id.* at 736-37. Telephone harassment laws

that ban unwanted calls to people's homes have at times been upheld on the strength of *Rowan*. *See, e.g.*, *Gormley v. Director*, 632 F.2d 938, 944 (2d Cir. 1980).

The logic of *Rowan* was linked to the privacy interest of the home, which of course has its own unique constitutional status recognized in the Fourth Amendment. *Rowan* acknowledged that it was departing from to the general rule that exposure to uninvited speech outside the home is a necessary cost of free expression. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." 397 U.S. at 738.

In particular, *Rowan's* privacy-based rationale does not apply to unwanted speech communicated to government employees doing their government jobs. In *U.S. Postal Service v. Hustler Magazine, Inc.*, 630 F. Supp. 867 (D.D.C. 1986), the court declared that the *Rowan* statute could not be used to block receipt of unsolicited advertisements and magazines sent by a publisher of sexually explicit material to Congressional offices. When "defendants do not

threaten the unique privacy interests that attach in the home[, t]he concerns in *Rowan*" do not apply. *Id.* at 871.

3. The interest in governmental efficiency is not compelling

Government employees deserve better treatment than Ms. Payne got from Waggy. The government has a legitimate interest in ensuring that government employees are able to do their jobs. This interest could be sufficient to uphold a prosecution for "repeatedly" disturbing a government office with hang-up phone calls containing no attempt at communication. Such a statute would be a content-neutral regulation of the time, place, or manner. *But cf. Popa*, 187 F.3d at 677 (finding "no evidence that Popa's seven phone calls" "in any discernable way impeded the efficiency of the U.S. Attorney's office," despite "the brief distraction of the clerical staff who answered Popa's calls").

This prosecution is different, because it targets not the quantity of calls but the content of the speech uttered during them. A government employee may understandably be bothered by this content, but that does not justify criminal prosecution of the speaker. There is a "longstanding refusal" to impose liability "because the speech

in question may have an adverse emotional impact on the audience." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988). "[S]peech cannot be restricted simply because it is upsetting or arouses contempt." *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

When people confront offensive speech outside the home, the burden typically "falls upon the viewer to avoid further bombardment of his sensibilities by averting his eyes." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975). This principle applies to passersby who could see movies with nudity over the fence at a drive-in theater in *Erznoznik* and to bystanders in the courthouse where Cohen wore his "Fuck the Draft" jacket. Similar self-help was used effectively here, when Ms. Payne hung up on Waggy when he became vulgar, and then declined to answer his later calls.

II. This Court should not repeat errors often found in telephone harassment decisions.

A. Subsection (1)(a) cannot be reframed as a regulation of non-expressive conduct

According to the district court, "the primary issue on appeal is whether Defendant was convicted for his *speech*; or whether he was convicted for *the act* of calling Sandra Payne, with the [requisite

intent], by means of [taboo words]. The Court finds [that] Washington's telephone harassment statute prohibits conduct, not speech." ER 140 (original italics).

This might be a tolerable description of subsection (1)(b) (making repeated phone calls), but not of subsection (1)(a). The *actus reus* element of the crime is the utterance by telephone of "lewd, lascivious, profane, indecent, or obscene words or language." To be sure, the words and language were delivered in conjunction with some conduct that could be described as nonverbal (dialing a telephone). But all forms of expression could be described as involving some nonverbal conduct. Picketing is accompanied by the conduct of holding a placard; leafleting is accompanied by the conduct of standing on a sidewalk; and even ordinary speaking is accompanied by the conduct of expelling air through the larynx. Calling it something other than speech does not make it so.

Even if subsection (1)(a) were somehow viewed as a restriction of conduct, it would be an unconstitutional restriction of *expressive* conduct. Use of taboo words or language is undoubtedly expressive

conduct: behavior where "an intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), Under *United States v. O'Brien*, 391 U.S. 367, 376 (1968), "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," government regulation of that conduct will be upheld only if (among other things) it is content-neutral, *i.e.*, justified by a governmental interest "unrelated to the suppression of free expression," *id.* at 377. The *O'Brien* concept was recently re-expressed in *Reed*, which said that a facially content-neutral law would still be treated as content-based if it cannot be "justified without reference to the content of the regulated speech" or if it was adopted by the government "because of disagreement with the message the speech conveys." *Reed*, 135 S. Ct. at 2227 (internal punctuation omitted), citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Here, the governmental interest is to suppress the expression of taboo words. This interest can only be justified by reference to the

content of those words; and they are prohibited because the government disagrees that they should be uttered. To the extent *O'Brien* applies at all, subsection (a)(1) flunks it. (The same result would be reached if the law were examined under the test for "time, place or manner" restrictions, which "is little, if any, different" from the *O'Brien* test. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 298 (1984).)

B. Intent elements do not convert content-based laws into content-neutral ones.

In part, the district concluded that Waggy's prosecution involved only conduct because the statute contained a *mens rea* element. ER 141 ("due to this intent requirement, the statute criminalizes conduct, not speech"). This notion has also appeared in some decisions of the Washington Court of Appeals, *see State v. Alphonse*, 197 P.3d 1211, 1218 (Wash. Ct. App. 2008); *State v. Alexander*, 888 P.2d 175, 180 (Wash. Ct. App. 1995); *State v. Dyson*, 872 P.2d 1115, 1120 (Wash. Ct. App. 1994), and of other courts, *see Gormley v. Director*, 632 F.2d 938, 944 (2d Cir. 1980).

It is a fallacy to argue that a *mens rea* element renders a content-based law content-neutral. Subsection (1)(a) makes it a crime to utter forbidden "words or language" with bad intent, but other words or language uttered with the identical bad intent are not criminalized. The difference is not the intent of the defendant, but the content of the defendant's speech.

Admittedly, a *mens rea* element narrows the universe of behavior the statute reaches. As with any law defining criminal conduct, the legislature might choose to punish only when the conduct is performed with scienter. (In subsection (1)(b), for example, "repeatedly" making phone calls is an offense only if done with bad intent.) But it was error for the courts below to conclude that because subsection (1)(a) does not reach *all* telephonic expression of taboo words, it does not regulate speech at all. Regardless of the additional intent element, the act prohibited by subsection (1)(a) is the use of specified words or language.

In addition, intent elements will not salvage a content-based statute because "under well-accepted First Amendment doctrine, a

speakers' motivation is entirely irrelevant to the question of constitutional protection." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (lead op.) (citation omitted); *id.* at 492 (Scalia, J., concurring in the judgment) (agreeing with this view). Indeed, *Popa* set aside the conviction under the federal telephone harassment statute even though the statute required a showing of a bad intent on the speaker's part; 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. The intent to annoy, abuse, or harass does not strip speech of protection, *Popa* held, at least when the speech is "public or political discourse," which includes calls to government offices complaining rudely about alleged mistreatment. *Id.* at 677.

C. The public forum doctrine is inapplicable.

Some state cases have erroneously held that city ordinances restricting threatening telephone calls were constitutional because they restricted speech in a "nonpublic forum" where regulations may be upheld if they are reasonable and viewpoint-neutral (a

much more deferential standard than First Amendment strict scrutiny). *City of Seattle v. Huff*, 767 P.2d 572, 574-75 (Wash. 1989);;[4] *State v. Alexander*, 888 P.2d 175, 179 (Wash. Ct. App. 1995).

The public forum doctrine is inapplicable here. The doctrine arose to resolve cases where a speaker seeks access to government-owned property to engage in expression. Some government property will be considered a public forum, open all speakers and all subjects. *E.g.*, *Hague v. CIO*, 307 U.S. 496 (1939) (sidewalks); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (parks). Other government property will be considered a nonpublic forum, where access can sometimes be restricted on the basis of speaker or subject matter. *E.g.*, *Adderley v. Florida*, 385 U.S. 39, 47 (1969) (prison); *Greer v. Spock*, 424 U.S. 828, 836 (1976) (military base); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983) (inter-office mail system). None of this has anything to do with telephonic speech, because such speech does not involve access to government property.

[4] As it happens, *Huff* reached the right result, but for the wrong reason. The defendant made true threats, and could have been punished on that basis.

Even though heavily regulated and subject to common carrier obligations, "the telephone system is not a nonpublic forum, because it is a privately-created, -owned, and -operated entity." *Van Bergen v. Minnesota*, 59 F.3d 1541, 1552-53 (8th Cir. 1995). When the government regulates speech by telephone, "the rationale supporting the standard [in nonpublic forum cases] does not apply." *Id.* at 1553. See also, Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 Willamette L. Rev. 647, 658 (2010) (discussing *Huff*).

The government can and does pass laws regulating speech on private property, including on private telephone, cable TV, and internet service, but if such laws are content-based they will be constitutional only to the extent they survive First Amendment strict scrutiny. See *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989) (applying strict scrutiny to statute regulating "indecent" speech over the telephone); *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (refusing to lower the applicable level of scrutiny for content-based regulation of indecent speech via internet).

D. The word "harassment" is a statutory label, not a constitutionally proscribable category of speech.

Some lower court opinions have implied, typically in conjunction with "conduct, not speech" arguments, that speech deemed harassing necessarily falls within a proscribable category. For example: "Prohibiting harassment is not prohibiting speech, because harassment is not protected speech." *Alexander*, 888 P.2d at 179 (internal quotation marks omitted).

The term "harassment" is used in a bewildering range of laws, sometimes to mean very different things. Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L. J. 781, 810-11 (2013). In this case, § 9.61.230 is titled "telephone harassment." Its *mens rea* element can be established by, among other things, intent to "harass." For constitutional purposes, what matters is that there is no recognized First Amendment exception for speech deemed harassing. *Saxe v. State College Area School Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.) ("there is no categorical 'harassment exception' to the First Amendment's free speech clause"); *State v. Burkert*, 174 A.3d 987, 1000 (N.J. 2017) (same; overturning criminal harassment conviction). Statutes regulating behavior that a legislature

terms "harassment" will either be constitutional or not, but for reasons unrelated to that label.

Here, subsections (1)(b) and (1)(c) use the term "harassment" to describe constitutionally permissible bans on repeated calls and true threats. But subsection (1)(a) – no matter what statutory label is attached to it – is a content-based restriction on speech violates the constitution when applied to calls to government offices.

CONCLUSION

By criminalizing the use of specified "words or language" in calls made to government offices, § 9.61.230(1)(a) imposes a content-based restriction on speech that falls outside any proscribable category and does not survive First Amendment strict scrutiny. The statute is thus invalid as applied to calls to government offices.

Respectfully Submitted,

s/ Eugene Volokh

Attorney for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,461 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2016 in 14-point Century Schoolbook.

November 6, 2018

s/ Eugene Volokh
Attorney for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amici Curiae* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 6, 2018.

All participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

November 6, 2018

s/ Eugene Volokh
Attorney for *Amici Curiae*