2:17-cr-00212

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
Honorable Stanley A. Bastian

United States of America,
Plaintiff,

v.

Robert M. Waggy,
Defendant.

On Appeal from a Decision by
the Honorable John T. Rogers

Brief of ACLU of Washington, Pennsylvania Center for the First Amendment, and Profs. Aaron Caplan and Eugene Volokh as *Amici Curiae* in Support of Defendant

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INTEREST OF *AMICI CURIAE*

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.

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No counsel for a party has authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, contribute money to preparing or submitting this brief.

SUMMARY OF ARGUMENT

"[L]ewd, lascivious, profane, indecent, or obscene" speech to government employees at their jobs is protected by the First Amendment (at least setting aside "obscenity" in the legal sense of hard-core pornography). To the extent that Wash. Rev. Code § 9.61.230(1)(a) bars such speech in telephone calls to government offices, it is unconstitutionally overbroad and unconstitutional as applied.

Indeed, 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 the son of a negro whore." *United States v. Popa*, 187 F.3d 672 (D.C. Cir. 1999). Similarly, the Ninth Circuit has set aside a conviction for saying "fuck you" to a law enforcement officer, even though face-to-face vulgar insults are, if anything, even more offensive than similar insults in telephone calls.

United States v. Poocha, 259 F.3d 1077, 1082 (9th Cir. 2001). State high courts have likewise set aside convictions for offensive speech to government employees. The government may limit offensive phone calls to people's homes. But, as these cases make clear, it may not apply such restrictions to speech to the government.

ARGUMENT

I. Wash. Rev. Code § 9.61.230(1)(a), to the extent it covers calls to government offices, is unconstitutionally overbroad

A. The statute is a content-based restriction on speech

Section 9.61.230(1)(a) bans telephone calls that use "lewd, lascivious, profane, indecent, or obscene words" and are made with the "intent to harass, intimidate, torment, or embarrass." It is thus, on its face, content-based: It "cannot be justified without reference to the content of the regulated speech," *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (internal quotation marks omitted), and 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).

Indeed, in *Cohen v. California*, 403 U.S. 15, 26 (1971), the Supreme Court made clear that a person could not be convicted for using vulgarities in public, in that case for wearing a jacket that said "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"). Likewise, in *Reno v. ACLU*, 521 U.S. 844, 868 (1997), the Supreme Court held that a restriction on "indecent" speech was content-based.

B. The statute, if read to cover speech to the government, does not fit within any First Amendment exception

"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). There are a few narrow exceptions to that principle, such as for defamation and true threats, *id.* at 468, but vulgarity is not one of them. *Cohen*, 403 U.S. at 26. Because "one cannot forbid particular words without also running a substantial risk of suppressing ideas in the process," *id.*, even offensive words remain protected.

There is a First Amendment exception for obscenity, but that exception 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, 21, 24 (1973). Washington courts have not read "obscene" in the telephone harassment statute as limited to speech that falls within the obscenity exception.

Rather, they have read "obscene" in the lay sense of the word, as meaning "marked by violation of accepted language inhibitions and by the use of words regarded as taboo in polite usage," and as including words such as "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.32 (Wash. Ct. App. 2008) (echoing this definition). Yet, as *Cohen*

shows, such "taboo" words remain constitutionally protected under the First Amendment. (If this Court instead concludes that "obscene" in § 9.61.230(1)(a) should be read as tracking the First Amendment exception for obscenity, *see, e.g.*, *United States v. Landham*, 251 F.3d 1072, 1086 (6th Cir. 2001), then that portion of the statute would be constitutional, but of course it would not apply to Waggy's speech, which was not pornographic.)

Nor is the statute limited to restricting fighting words, which are 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, there is virtually no risk that the prohibited speech will incite *immediate* violence. For example, in *State v. Drahota*, 788 N.W.2d 796, 804 (Neb. 2010)—a case that set aside a prosecution for insulting e-mails—the Nebraska Supreme Court recognized that e-mails could not be considered fighting words, since the physical distance between sender and recipient eliminated the possibility of an immediate violent response. *See also State v. Dugan*, 303

P.3d 755, 768-69 (Mont. 2013) (concluding that the "fighting words" exception is limited "only to face-to-face interactions" "in circumstances likely to cause an immediate breach of the peace," and does not extend to telephone calls).

Finally, the statute deliberately extends beyond speech that falls within the "true threats" exception to the First Amendment. *See Watts v. United States*, 394 U.S. 705, 708 (1969); *Virginia v. Black*, 538 U.S. 343, 359 (2003). Rather, it covers speech intended "to harass, . . . torment or embarrass," and not just to speech intended to "intimidate" (a term that might be read as limited to speech truly aimed at threatening). To the extent this brief faults the statute and its application here, it focuses only on the "harass, . . . torment or embarrass" portion of the statute.

C. Even if there is a First Amendment exception for unwanted offensive speech sent into people's homes, that exception does not apply to speech said to the government

There may be a First Amendment exception for unwanted offensive speech sent into people's homes. In *Rowan v. U.S. Post Off. Dept.*, 397 U.S. 728, 738 (1970), the Supreme Court held that the government may sometimes ban such speech, because people have no right "to send un-

wanted material into the home of another." "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." *Id.* 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).

But *Rowan* does not apply to unwanted speech communicated to government employees doing their government jobs. Indeed, courts have rejected attempts to punish such speech, even when it was highly offensive.

Thus, for example, in *Popa*, a defendant called the office of then-U.S.-Attorney Eric Holder seven times; in some of the calls, he left voicemails, and in others he spoke to two secretaries. Brief for Appellee, *United States v. Popa*, No. 98-3017, 1999 WL 34833912 (D.C. Cir.). 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*. Yet even

such highly offensive speech, the D.C. Circuit concluded, could not constitutionally be punished. *Popa*, 187 F.3d at 677.

Popa's speech would have been punishable under § 9.61.230, to the extent that statute applies to speech to government employees. The word "bitch," used as an insult, has been held to be "indecent" and "obscene" and thus covered under § 9.61.230(1)(a), *Lansdowne*, 46 P.3d at 840. It follows that "whore" would be, too, as *State v. Simmons*, 2002 WL 31393902 at *4 (Wash. App. 2002), expressly concluded. (*Simmons* is unpublished, and thus not precedential, but it shows how Washington state courts understand the statute, and is consistent with the precedential decision in *Lansdowne*.) And Popa's phone calls would likely be found to have been intended to harass, torment, or embarrass; the jury in that case concluded that they were indeed intended to "annoy, abuse, . . . or harass," 187 F.3d at 673, 676 & n.**. Yet, as the D.C. Circuit held, such speech to the government remains constitutionally protected.

The Ninth Circuit has similarly 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 is 'shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'" *Id.* at 1080 (citing *City of Houston v. Hill*, 482 U.S. 451, 461 (1987)).

The logic of that decision would equally apply to speech said to a park ranger by a telephone call to the ranger's office—or to speech said to other government employees called at their government offices—since such calls are no more offensive than are in-person insults. And in *U.S. Postal Serv. v. Hustler Magazine, Inc.*, 630 F. Supp. 867, 871 (D.D.C. 1986), the court held that the very statute involved in *Rowan* itself could not be used to block the mailing of hard-core pornography magazines to a Congressional office: When "defendants do not threaten the unique privacy interests that attach in the home," "[t]he concerns in *Rowan* . . . do not [apply]." *Id.*

Likewise, 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. 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). All these decisions recognized that such speech to government employees (or, in *Drahota*, a would-be government official) was protected by the First Amendment. *Fratzke*, 445 N.W.2d at 785; *Drahota*, 788 N.W.2d at 804; *Bigelow*, 59 N.E.3d at 1113.

To be sure, speech of this sort, especially if repeated, can distract government employees from their normal duties, and can thus interfere in some measure with government efficiency. But the risk of some such modest interference cannot justify criminalizing such speech by private citizens, as the cases discussed above show. *See 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"). And even if a serious attempt to tie up phone lines for a long time might be punishable, the statute is not limited to such behavior—indeed, the

convictions in this case were for just two phone calls, much less than the seven calls found to be constitutionally protected in *Popa*.

D. Washington state court decisions upholding § 9.61.230 are in error

Washington state court decisions are authoritative precedent for interpreting the scope of § 9.61.230, but their First Amendment analysis is of course not binding on federal courts. And unfortunately several state decisions upholding Washington criminal harassment laws have misapplied First Amendment law.

1. Speech does not lose its First Amendment protection simply because it is intended to harass, embarrass, or torment

State v. Dyson, 872 P.2d 1115, 1120 (Wash. Ct. App. 1994), upheld § 9.61.230(1)(a) on the grounds that the "intent element" of the statute "sufficiently ensures that a substantial amount of protected speech is not deterred." Here, the Magistrate Judge seemed to take the same view. ECF No. 90, at 4-5.

But a statute cannot be saved by the presence of an intent requirement—"under well-accepted First Amendment doctrine, a speakers' motivation is entirely irrelevant to the question of constitutional protection." *F.E.C. v. Wis. Right to Life, Inc.*, 551 U.S. 449, 468 (2007) (lead

op.); *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.

And this constitutional protection, even for speech intended to harass government employees on the job, makes sense for two reasons. First, as the Supreme Court in *Wisconsin Right to Life* and the D.C. Circuit in *Popa* held, speech on public matters cannot lose its First Amendment protection simply because of its supposedly bad intention.

Second, punishing speech based on the speaker's supposed intention to annoy, abuse, harass, embarrass, or torment risks deterring even well-intentioned speech. "No reasonable speaker would choose" to engage in speech that is subject to an intent-based statute if his "only de-

fense to a criminal prosecution would be that its motives were pure. An intent-based standard blankets with uncertainty whatever may be said, and offers no security for free discussion." *Wis. Right to Life*, 551 U.S. at 468 (Roberts, C.J., joined by Alito, J.) (internal quotation marks omitted). "First Amendment freedoms need breathing space to survive," and "[a]n intent test provides none." *Id.* at 468-69 (citations omitted). Any effort to distinguish restricted speech from unrestricted speech "based on intent of the speaker . . . would 'offe[r] no security for free discussion,' and would 'compe[l] the speaker to hedge and trim.'" *Id.* at 495 (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy and Thomas, JJ.) (internal citations omitted; brackets in original).

The same applies to § 9.61.230, to the extent the statute covers speech to government employees. People calling government offices to seek redress for what they see as mistreatment will often be frustrated and angry. They may anticipate that, in the heat of the conversation, they may say something vulgar and thus "indecent"—or, especially when discussing matters such as sex crimes, something "lewd"—even if their intentions are only to explain their problems.

Consider, for instance, a crime victim who repeatedly calls the police department to complain about what she views as inadequate attention being paid to her case. She may anticipate that she might become angry, and use vulgarities to the government employee fielding her call. If the caller hears of prosecutions such as that of Waggy, and realizes that she could be criminally punished if the prosecutor and jury concludes that she also intended to "harass" or "embarrass" the government employee, she might be hesitant to call in the first place, because the intent-based test would "offe[r] no security for free discussion," *Wis. Right to Life*, 551 U.S. at 468 (Alito, J.).

This is especially so given that the particular intentions that trigger the statute do not set a high bar. "[T]o harass" includes "to vex, trouble, or annoy continually or chronically"; "to torment" includes "to cause worry or vexation to." *Webster's Third New International Dictionary, Unabridged* (online ed. 2017); *see City of Seattle v. Huff*, 767 P.2d 572, 576 (Wash. 1989) (consulting this dictionary in defining "intimidate" in a criminal harassment statute). A caller can rightly worry that a prosecutor and a jury will infer that his frustrated call complaining about

governmental mistreatment or delays will be seen as intended to "embarrass" or to "vex."

"Criticism of the police, profane or otherwise, is not a crime," *Poocha*, 259 F.3d at 1082; the same is true of criticism of other government departments. And making it a crime whenever it is engaged in with a supposed intent to "harass," "embarrass," or "torment" would deter such criticism, even by speakers who know their intentions are pure but who might worry about how those intentions are later construed.

2. Section 9.61.230(1)(a) is not a regulation of speech in a "nonpublic forum"

City of Seattle v. Huff, 767 P.2d 572 (Wash. 1989), held that a city ordinance restricting threatening telephone calls was constitutional because it restricted speech in a "nonpublic forum"; such restrictions are subject to a lower level of First Amendment scrutiny. *Id.* at 574-75. Here, the Magistrate Judge took the same view. ECF No. 90, at 4.

But the nonpublic forum doctrine does not apply here: it is limited only to government-owned property. *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 538-40 (1980) (noting that two classic nonpublic forum cases, *Greer v. Spock*, 424 U.S. 828 (1976), and *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), were applicable only to speech on

the government's property). Telephone systems are not subject to forum analysis since they are "privately-created, -owned, and -operated." *Van Bergen v. State of Minn.*, 59 F.3d 1541, 1552-53 (8th Cir. 1995). Indeed, the Supreme Court has applied strict scrutiny to restrictions on telephone speech. *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

As it happens, the result in *Huff* was correct. The ordinance in that case targeted only true threats, which are excepted from First Amendment protection. *See Watts*, 394 U.S. at 708; *Black*, 538 U.S. at 359; *City of Bellevue v. Lorang*, 140 Wash. 2d 19, 28 (2000) (striking down a broader telephone harassment law than the one in *Huff*, and describing *Huff* as involving "repeated and threatening phone calls"). But the court in *Huff* reached this right result through the wrong First Amendment analysis.

3. This case cannot be distinguished from *Popa* on the grounds that § 9.61.230 covers only certain words, and requires an intent to harass, embarrass, or torment

State v. Alphonse, 197 P.3d 1211, 1218 (Wash. Ct. App. 2008), rejected an overbreadth challenge to § 9.61.230(1)(a), and tried to distinguish *Popa* on the grounds that § 9.61.230 "does not include speech that an-

noys or abuses, and while it does contain an intent to harass, it also requires that such intent be accompanied by either (1) lewd, lascivious, profane, or obscene words, (2) suggestions of lewd or lascivious acts, or (3) threats of injury." But there is no First Amendment difference between speech to the government that is meant to "harass" and speech that is meant to "abuse[]" (one of the statutory terms in *Popa*). Indeed, *State v. Alexander*, 888 P.2d 175, 180 (Wash. Ct. App. 1995), concluded that the harassment statute covers "speech that is intended to abuse." And, for reasons given above, speech does not lose its constitutional protection just because it involves "lewd, lascivious, profane, [indecent,] or obscene words" (*Alphonse* omitted the word "indecent" from its paraphrase of § 9.61.230(1)(a)). As discussed at p. 9, the speech in *Popa* was indeed "indecent," and yet remained constitutionally protected.

As in *Huff*, the bottom-line result in *Alphonse* may have been sound, because the speech in that case threatened the recipient of the speech and likely the recipient's wife. *Alphonse*, 197 P.3d at 1216. But the underlying logic of *Alphonse* was not sound, and ought not be applied to nonthreatening speech.

4. Precedents related to "the privacy of the home" cannot justify § 9.61.230(1)(a) to the extent the statute applies to speech to a government office

Finally, *Alexander* upheld § 9.61.230(1)(a) against a First Amendment challenge on the theory that the First Amendment does not protect speech that "intrudes into the privacy of the home." *Alexander,* 888 P.2d at 179. *State v. Lilyblad*, 177 P.3d 686, 691 (Wash. 2008), in turn mentioned in passing that the statute was constitutional, relying entirely on *Alexander*. Both of those cases involved prosecutions for offensive speech into people's homes (and, for one of the defendants in *Alexander*, for 680 "hang-up" calls in four days to the United Way Crisis Clinic, calls that did not involve any speech at all); the courts had no occasion to decide whether the statute would be constitutional if it were read to extend to speech to government offices. *See also City of Bellevue*, 140 Wash. 2d at 28 (striking down a broader harassment ban, and distinguishing *Alexander* based partly on the "vulnerability of the recipients of the calls," vulnerability that would be especially lacking for calls to government employees at government offices).

E. The statute must therefore be subjected to strict scrutiny, which it cannot pass

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.

Yet, as the cases cited above show, the government does not have a compelling interest in protecting listeners generally from offensive or even indecent speech, at least outside the home. When people confront offensive speech in public places, the burden "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). Likewise, a government employee receiving an offensive telephone call can simply hang up the phone.

II. The statute was unconstitutionally applied to Waggy's speech

For much the same reasons as those given above, § 9.61.230(1)(a) was unconstitutionally applied to Waggy's speech. Waggy's call was made to a trained government employee at her office. Underlying his crude and offensive words was a substantive complaint about substand-

ard service. ECF No. 118, at 220-21. Waggy's speech did not consist of true threats or fighting words. He was engaged in constitutionally protected, even if vulgar (and likely counterproductive), petitioning of the government for redress of grievances. *See Poocha*, 259 F.3d at 1082. And no compelling government interest can support punishing Waggy for using offensive language over the telephone to a government office.

CONCLUSION

By criminalizing the use of certain language in calls made to a government offices, § 9.61.230(1)(a) imposes a content-based restriction on speech that falls outside any First Amendment exception; that restriction is subject to strict scrutiny, which it cannot pass. The statute is thus facially invalid, to the extent that it applies to calls to government offices; and it is also invalid as applied to Waggy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4,129 words, excluding the material excluded by Fed. R. App. 32(f).

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CERTIFICATE OF SERVICE

I certify that the foregoing document was filed electronically on Mar. 14, 2018 via CM/ECF, which served all the counsel.

s/ Eugene Volokh
Eugene Volokh