No. 19-7544

In The
Supreme Court of the United States

ROBERT M. WAGGY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL COALITION AGAINST CENSORSHIP AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Coalition Against Censorship (NCAC) is an alliance of more than fifty national nonprofit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked to protect the First Amendment rights of thousands of artists, authors, teachers, students, librarians, readers, museumgoers, and others around the country. NCAC produces legal and scholarly analyses of important free-speech cases and controversies; educates policy makers, scholars, professional groups, and the general public on a wide range of free-expression issues; assists individuals and community organizations dealing with censorship; and promotes discussion and dialog among diverse stakeholders in free-speech debates. Amicus files this brief to urge the Court to resolve the split in the lower courts regarding whether a statute criminalizing harassment via telephone may also prohibit speech regarding matters of public concern or impose content-based restrictions on speech.[2]

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, nor did counsel for any party make any contribution to authoring this brief. Pursuant to Rule 37.2(a), counsel for amicus represents that all parties have provided written consent to the filing of this brief, and counsel of record for the parties received timely notice of this brief's filing.

[2] The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

SUMMARY OF ARGUMENT

Americans should not fear prosecution for criticizing the government when calling a government office, even if they use profane language. And certainly, protection for such speech should not hinge on whether the office is in Washington State or Washington, D.C. Yet that is precisely the state of affairs that will persist absent this Court's intervention. The split among the lower courts regarding the constitutionality of telephone-harassment statutes like the one at issue here threatens the continued vitality of fundamental First Amendment freedoms that permit every citizen to discuss government business, even using caustic language. The court below, like nine other Circuit courts and state courts of last resort, concluded that telephone harassment statutes do not implicate protected speech —in sharp contrast to eight other Circuit courts and state courts of last resort. In doing so, it permitted a prosecution arising from the sort of vehement political expression that this Court has consistently held to be protected. Worse, it rejected the idea that such phone calls to government offices constitute speech at all. This stark divide is especially concerning in light of the existence of many similar telephone-harassment statutes, which pose all sorts of constitutional problems, from criminalizing anonymity to making criminal liability turn on whether speech by a caller is likely to "annoy" the recipient, regardless of the protected nature of the speech. Thus, numerous other courts might soon face the stark choice between aligning with caselaw that faithfully applies this Court's First

Amendment precedents, or caselaw like the decision below that utterly does not. To avoid this, this Court should grant certiorari to clarify that protections for freedom of expression apply as strongly to telephone calls as to all other aspects of American life.

ARGUMENT

I. THE NINTH CIRCUIT'S HOLDING THAT "FIRST AMENDMENT CONCERNS" ARE "NOT IMPLICATE[D]" BY A CRIMINAL PROSECUTION FOR CALLING A GOVERNMENT OFFICE DURING NORMAL HOURS TO DISCUSS GOVERNMENT BUSINESS MISCONSTRUES CORE FIRST AMENDMENT EXPRESSION AS MERE UNPROTECTED CONDUCT.

In April 2016, Petitioner Robert Waggy called his local United States Department of Veterans Affairs (VA) hospital. Having sustained injuries in combat during his time in the Marine Corps, Mr. Waggy sought simply to have the government honor its promises in return. Pet. 5-6. In particular, Mr. Waggy wanted the VA to rectify its failure to pay for approved treatment he had received outside the VA—a failure that had devastating financial consequences for him. *Id*. To make this point, Mr. Waggy implored the hospital director's secretary, "Do your fucking job." *See id.* at 6. At first glance, it could seem that Mr. Waggy's call was unusual: it grew out of the sort of selfless sacrifice that few Americans make, it sought to redress a severe

government oversight that had put him on the brink of financial ruin, and it involved language inappropriate in that context or any other. But, at bottom, it was quite ordinary; like an estimated tens of millions of Americans every year,[3] Mr. Waggy contacted his government to discuss government business. In fact, Mr. Waggy's grievances—and his desire to redress them over the phone—are so commonplace that, at the same time the government was prosecuting Mr. Waggy, the VA was creating a centralized hotline where operators are instructed to let veterans yell at them, and the response to a veteran who screams profanity is ending the call, not calling the police.[4] And yet, because of his phone calls and the Ninth Circuit's refusal to recognize the important First Amendment interests at stake, Mr. Waggy stands convicted of federal crimes.

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[3] *See* Pew Research Center, *How Americans Get in Touch With Government* (May 2004), https://www.pewresearch.org/internet/2004/05/24/how-americans-get-in-touch-with-government/ (last visited Feb. 26, 2020) (reporting that "[m]ore than half of all Americans contact the government in a given year").

[4] *See* Jessica Contrera, *Trump Promised to Fix Veterans' Problems. Now They Call His Hotline Desperate for Help.*, Wash. Post (Aug. 5, 2018), https://www.washingtonpost.com/local/trump-promised-to-fix-veterans-problems-now-they-call-his-hotline-desperate-for-help/2018/08/03/9d2b7c14-95b8-11e8-a679-b09212fb69c2_story.html (last visited Feb. 26, 2020). *See generally* Press Release, U.S. Dep't of Veterans Affairs, White House VA Hotline Now Fully Staffed and Operational Around the Clock to Serve Nation's Veterans (Nov. 29, 2017), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=3980 (last visited Feb. 26, 2020).

A. Speech On Matters Of Public Concern Retains Its First Amendment Protection, Even When It Is Crude Or Offensive.

This Court has long condemned restrictions on speech regarding matters of public concern, because "expression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas v. Johnson*, 491 U.S. 397, 411 (1989). Thus, the Court has repeatedly stepped in to protect even highly offensive speech that is critical of the government. For example, in holding unconstitutional a conviction for burning an American flag "in a way that [the defendant knew would] seriously offend one or more persons likely to observe or discover his action," *id.* at 399, 400 n.1 (quoting Tex. Penal Code Ann. § 42.09(b) (1989)), the Court held that onlookers' alleged visceral negative reactions to flag-burning did not justify restricting such expression, *id.* at 408. The Court explained that "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it incites a condition of unrest . . . or even stirs people to anger.'" *Id.* at 408-09 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)); *see also id.* at 421 (Kennedy, J., concurring) (finding Johnson's expression "repellent . . . to the Republic itself," but nonetheless protected by the First Amendment).

As indicated in *Johnson* and numerous cases before and since, protection for offensive speech is especially strong when it is critical of the government. *See*, *e.g.*, *Cohen v. California*, 403 U.S. 15, 25-26 (1971)

(holding that vulgarities such as wearing a "fuck the draft" jacket in a courthouse are protected because of the need to permit the expression of the emotional force of one's disagreement with the government). In *Snyder v. Phelps*, 562 U.S. 443, 454-58 (2011), the Court protected protestors' rights to confront a military funeral with posters such as "Thank God for Dead Soldiers" and "God Hates Fags" because the posters addressed "matter[s] of public concern." The government could not impose penalties on this "discourse solely to protect others from hearing it . . . [absent] a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* at 459 (quoting *Cohen*, 403 U.S. at 21). Likewise, in *Boos v. Barry*, 485 U.S. 312, 318 (1988), the Court struck down a law proscribing the display of signage critical of foreign governments near embassies. Even though "protect[ing] diplomats is grounded in our Nation's important interest in international relations[,]" *id.* at 323, and Congress had enacted the law in furtherance of its constitutional mandate to "define and punish . . . Offenses against the Law of Nations," *id.* at 316 (quoting U.S. CONST., art. I, § 8, cl. 10), the Court concluded foreign dignitaries are not immune from the First Amendment's expectation that "in public debate our own citizens must tolerate insulting, even outrageous speech," *id.* at 322-24. Similarly, in *Watts v. United States*, 394 U.S. 705, 706, 708 (1969) (per curiam), the Court recognized a protester's ostensible threat against the President—"I am not going [to participate in the draft]. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."—as protected

"political hyperbole." Because the "language of the political arena . . . is often vituperative, abusive, and inexact," the protestor's "very crude offensive method of stating a political opposition to the President," *id.* at 708 (internal quotation marks omitted), could not be criminalized consistent with the First Amendment, even despite the United States's "overwhelming[] interest in protecting the safety of its Chief Executive," *id.* at 707.

B. The First Amendment Especially Protects Speech That Directly Seeks To Influence Government Action.

The Court is especially protective of vituperative or offensive speech about the government when it is directed at the government. The Court has recognized that the First Amendment protects "provocative and challenging" criticism leveled at government officials, even when this criticism is face-to-face. *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (quoting *Terminiello*, 337 U.S. at 4) (striking down a law permitting police to arrest anyone who "oppose[d], molest[ed], abuse[d] or interrupt[ed]" a police officer, including by verbal disagreement). Similarly, the Court held that even "vulgar or offensive speech" in opposition to police behavior merits First Amendment protection unless it falls within the narrow category of "fighting words." *Lewis v. City of New Orleans*, 415 U.S. 130, 131 n.1, 134 (1974) (striking down as facially invalid a city ordinance prohibiting the use of "opprobrious" language toward police under which defendant was convicted for "yelling

and screaming . . . 'you god damn m.f. police' " during a traffic stop). Perhaps presciently, this Court has expressed concern that government officials would abuse the broad discretion inherent in these laws by "arrest[ing] the speaker rather than . . . correct[ing] the conditions about which he complains." *Hill*, 482 U.S. at 465 n.15 (quoting *Younger v. Harris*, 401 U.S. 37, 65 (1971) (Douglas, J., dissenting)); *see also Cohen*, 403 U.S. at 26 (noting that if government were permitted to "forbid particular words," such as "fuck," this power could become "a convenient guise for banning the expression of unpopular views").

Petitioner's speech is especially deserving of protection because he was not merely expressing his discontent in general, but rather engaging directly with a government official regarding policy. Because "interactive communication concerning political change" constitutes "core political speech," the "First Amendment protects [an individual's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 421-22, 424 (1988) (striking down state law restrictions on signature gathering). This is true whether that communication takes a traditional form or consists of less formal methods of petitioning for governmental action. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 393 (2011) (citing *Brown v. Louisiana*, 383 U.S. 131 (1966)) ("[T]he right to petition is not limited to petitions lodged under formal procedures.").

The VA's own recently established telephone hotline for grievances demonstrates just how critical this

right can be. Over 250,000 calls were made to the hotline in its first two years of operation. *See* Press Release, U.S. Dep't of Veterans Affairs, White House VA Hotline Surpasses 250,000 calls from Veteran Community (May 21, 2019), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5257 (last visited Feb. 27, 2020). Reporting about the hotline is replete with stories like Mr. Waggy's: a veteran seeking to resolve an unwarranted bill he could not afford, a veteran with brain damage who called "many times" about wrongfully denied benefits, a veteran who wants nothing other than to yell about his frustration, and daily instances of profane tirades. *See* Contrera, *supra*. In addition to showing how common—and vital—such visceral pleas to the government can be, the hotline also highlights the absurd results of the circuit split at issue here: although it is branded the "White House VA Hotline" (and many callers take this literally), its operators actually work seventy-four miles away in West Virginia. *Id.* Though a relatively short distance geographically, this makes a world of difference legally, as the D.C. Circuit has recognized the important First Amendment implications of telephone harassment statutes, *United States v. Popa*, 187 F.3d 672, 676-78 (D.C. Cir. 1999), while the Fourth Circuit views such statutes as prohibiting only conduct, not speech, *Thorne v. Bailey*, 846 F.2d 241, 242 n.1, 243 (4th Cir. 1988) (holding that a West Virginia telephone harassment statute criminalizing "mak[ing] repeated telephone calls, during which conversation ensues, with intent to harass any person at the called number" prohibited conduct, not protected speech). *See* Pet. 13-14, 17-19.

C. Contrary To The Ninth Circuit's Decision, Neither The Statute's Intent Element Nor Its Purported Focus On Conduct Immunizes It From First Amendment Scrutiny.

In the decision below, the Ninth Circuit disregarded decades of this Court's jurisprudence emphasizing that "expressive disorder . . . must itself be protected," *see Hill*, 482 U.S. at 475, and held instead that Mr. Waggy's conviction "does not implicate First Amendment concerns," Pet. App. 10a. Rather, the court held Mr. Waggy was only being penalized for his "non-expressive conduct," *id.*, consisting of "making telephone calls with the intent to harass, intimidate or torment," *id.* at 8a (internal quotation marks omitted)—even though the subsection of the statute under which he was convicted plainly targets the use of "lewd, lascivious, profane, indecent, or obscene words," *see id.* at 3a. By so holding, the Ninth Circuit aligned itself with one side of a deepening lower-court split, joining courts that hold that the presence of an intent element turns communicative phone calls into pure conduct. *See* Pet. 12-17. As recognized by the Circuits and state courts of last resort that have reached the opposite conclusion, this holding is not in accord with this Court's precedents.

Contrary to the Ninth Circuit's assertion that the "require[ment] that the defendant specifically intended to harm the victim when initiating the call . . . ensures that Defendant was convicted for his conduct, not for speech protected by the First Amendment[,]" *id.* at 13a, this Court has on multiple occasions

demonstrated that neither an intent element nor a focus on conduct can save a political-speech restriction from First Amendment scrutiny altogether. In *Snyder*, the funeral protest case, the Court invalidated a tort judgment that included an "intent[ ] or reckless[ness]" element, because "any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed." 562 U.S. at 451, 457. *Johnson* invalidated a conviction under a law requiring the actor's knowledge that his act was likely to "seriously offend one or more persons." 491 U.S. at 400 n.1. There, the Court held that "[i]t would be odd" to argue that the "serious offen[se]" requirement made the law less constitutionally suspect, because when a "speaker's opinion . . . gives offense, that consequence is a reason *for* according it constitutional protection[.]" *Id.* at 408-09 (emphasis added) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978) (opinion of Stevens, J.)); *see also id.* at 412 (quoting *Boos*, 485 U.S. at 321 (plurality opinion of O'Connor, J.)) ("[T]he emotive impact of speech on its audience is not . . . unrelated to the content of the expression itself."). Similarly, the Presidential threats statute in *Watts* had a "willful[ness]" element, but the Court nonetheless described the statute as "criminal[izing] a form of pure speech." 394 U.S. at 705, 707. In *Cohen*, 403 U.S. at 16, 18, the Court overturned a disturbing-the-peace conviction arising from wearing a profane jacket in a courthouse. Though the statute contained a "malic[e] and willful[ness]" element, the Court held that the "conviction quite

clearly rests upon the asserted offensiveness of the words Cohen used to convey his message[.]" *Id.*[5]

The Washington statute at issue here is analogous. As the court below recognized, it "contains a speech component" in addition to its intent component. Pet. App. 8a. Indeed, subsection (a) prohibits "[u]sing any lewd, lascivious, profane, indecent, or obscene *words* or *suggesting* the commission of any lewd or lascivious act" on a phone call with the requisite intent. *Id.* at 3a (emphasis added). That this provision is speech-regulating becomes even more plain when it is contrasted with subsection (b), which prohibits making certain types of telephone calls with the requisite intent "whether or not conversation ensues." *Id.*

Even if intent-focused telephone harassment statutes could properly be construed as regulating conduct, the Ninth Circuit's reasoning would still be flawed. The "First Amendment would . . . be a hollow promise if it left government free to destroy or erode its guarantees . . . so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967). Thus, this Court has held that

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[5] Outside the telephone context, the Ninth Circuit itself has recognized that laws do not escape First Amendment scrutiny simply by purporting to regulate intent or conduct. *United States v. Poocha*, 259 F.3d 1077, 1079-82 (9th Cir. 2001) (reversing on First Amendment grounds the conviction of a defendant who stated "fuck you" to a park ranger, under a disorderly conduct provision that required the "intent to cause public alarm, nuisance, jeopardy or violence").

"conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments[.]'" *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). The applicable test is "whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Johnson*, 491 U.S. at 409 (quoting *Spence*, 418 U.S. at 410-11) (alterations present in *Johnson*); *see also Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 505 (1969) (wearing a black armband is speech); *Gerritsen v. City of Los Angeles*, 994 F.2d 570, 576-77 (9th Cir. 1993) (handing out political leaflets is speech). There is little question that this test is satisfied here. As a matter of pure common sense, the use of a telephone to transmit words to another person would seem to be at least as communicative as burning a flag or wearing a certain color armband. Bolstering this common-sense conclusion, the trial testimony of the recipient of Mr. Waggy's phone calls indicates that she in fact understood the message he sought to communicate. C.A. ER 345 ("The third call was reiterating that he wants his property or wants his money, that's all he wants.").

The court below failed to correctly apply the strong First Amendment protections that this Court has consistently reiterated regarding speech on matters of public concern. This outcome is especially concerning because Mr. Waggy's speech was not just any speech, but rather speech directed at the government, seeking to affect the way the government went about its

business. The Ninth Circuit's decision to join the courts concluding that telephone harassment statutes do not implicate core rights of free expression simply by reference to concepts like "intent" or "conduct" should especially raise alarm because, as described below, laws presenting similar constitutional problems exist throughout the United States.

II. THIS ISSUE IS PARTICULARLY IN NEED OF THIS COURT'S REVIEW BECAUSE NUMEROUS STATE HARASSMENT LAWS PERMIT PROSECUTIONS AGAINST INDIVIDUALS FOR CONSTITUTIONALLY PROTECTED SPEECH TO PUBLIC OFFICIALS ABOUT MATTERS OF PUBLIC CONCERN.

This Court has recognized that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection" of the First Amendment. *Miller v. California*, 413 U.S. 15, 20 (1973) (citing *Roth v. United States*, 354 U.S. 476, 484-85 (1957)). However, like the Washington statute at issue here, many states' criminal harassment statutes restrict constitutionally protected speech by regulating either the content of the speech itself or by criminalizing the speech on the basis of the listeners' likely response to that speech, regardless of the social importance of the speech. These statutes punish speakers for profanity or speech of an indecent character, or for content likely to offend a potential listener. In doing so, they risk chilling speech generally

and especially risk chilling speech against public officials with the power to encourage prosecutions against the speaker.

A. A Speaker Risks Criminal Punishment For Constitutionally Protected Speech—If That Speaker Chooses To Speak In The Wrong State.

Like Washington's statute, many other states' criminal harassment statutes raise First Amendment concerns by: (i) punishing profane speech or speech of an "indecent" character, (ii) prohibiting speech likely to "annoy" or "harass" the listener, or (iii) penalizing anonymity.

Harassment is not an unprotected category of speech, nor is speech that is profane, offensive or indecent. *United States v. Stevens*, 559 U.S. 460, 468-69 (2010). However, many state harassment statutes punish profane or scandalous speech. For example, in New Jersey, it is a crime to make a communication "in offensively coarse language" with the purpose to harass. N.J. Stat. Ann. § 2C:33-4. Alabama and Oklahoma have harassment statutes with similarly broad language, without exemptions to protect speech concerning issues of political or social importance. Ala. Code § 13A-11-8(b)(1) (making it a Class C misdemeanor to "telephone[] another person and address[] to or about such other person any lewd . . . words or language" with the "intent to harass or alarm"); Okla. Stat. tit. 21, § 1172(A)(1) (prohibiting using a means

of telecommunication to willfully make "any comment, request, suggestion, or proposal which is . . . lewd, lascivious, filthy, or indecent" by classification as a misdemeanor for a first offense, and felony for any offense thereafter). Statutes like these plainly encompass constitutionally protected speech and raise First Amendment concerns.

Other state harassment statutes criminalize speech that is likely to "annoy" or "harass" the listener. For instance, the Texas Penal Code prohibits making repeated telephonic or electronic communications, with the "intent to harass, annoy, alarm, abuse, torment, or embarrass another . . . in a manner reasonably likely to harass, annoy, alarm, abuse, torment, embarrass or offend another." *See* Tex. Penal Code Ann. § 42.07(a)(7); *see also* Ala. Code § 13A-11-8(b)(1)(a) (making communicating by telephone with the "intent to harass or alarm . . . in a manner likely to harass or cause alarm" a Class C misdemeanor); Ark. Code Ann. § 5-71-209(b)(1)(A) (criminalizing communicating by telephone with "the purpose to harass, annoy, or alarm . . . in a manner likely to harass, annoy or cause alarm" as a Class A misdemeanor).

The government cannot selectively shield the public from offensive speech. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975) (holding that "when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power," and striking down as facially invalid an ordinance prohibiting

employees of drive-in theaters from showing movies with nudity that may be visible from a public place). This is especially so when that speech is directed towards public officials: callers may call a public official with "an intent to verbally 'abuse' a public official for voting a particular way on a public bill, 'annoy' him into changing a course of public action, or 'harass' him until he addresses problems previously left unaddressed." *Popa*, 187 F.3d at 676-77 (holding a telephone harassment statute criminalizing making a call "with the intent to annoy, threaten, abuse or harass" unconstitutional as applied to a defendant who called the office of then U.S. Attorney for the District of Columbia Eric Holder and directed racial epithets against him during those calls). That the government cannot prohibit speech solely because it expresses an offensive idea is a "bedrock principle" of the First Amendment. *Snyder*, 562 U.S. at 458 (quoting *Johnson*, 491 U.S. at 414). However, by their plain language, these statutes attach criminal penalties to intending to express offensive ideas, and succeeding in offending a listener.

Lastly, although speech does not lose its Constitutional protections for mere anonymity, *see McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (finding that "[a]nonymity is a shield from the tyranny of the majority" and protected by the First Amendment), some states criminalize using the telephone to speak anonymously as harassment. *See, e.g.*, N.J. Stat. Ann. § 2C:33-4(a) (punishing making a communication "anonymously" as a petty offense). The Washington statute

at issue in this case, in addition to its other constitutional problems, also proscribes anonymity. Wash. Rev. Code § 9.61.230(1)(b) (prohibiting calls made "anonymously" with the "intent to harass, intimidate, torment or embarrass any other person"). Anonymity is particularly important in political speech, from the right to vote one's conscience without fear of retaliation to ensuring a crowd does not prejudge a political message on the basis of an unpopular speaker's identity. *McIntyre*, 514 U.S. at 342-43. Yet these laws, by their terms, allow the state to charge someone who complains to government officials over the phone without disclosing their identity.

B. The Fear Of Retaliation For Speaking Against Public Officials Is More Than Merely Hypothetical—These State Statutes Are Easy To Abuse.

State statutes designed to protect citizens from harassment may be easily abused if not drafted to protect political speech or speech on other matters of public concern. For example, a Connecticut man was charged under a New York harassment statute for writing "fuck your shitty town bitches" on a speeding ticket that he otherwise completed and returned properly. *Barboza v. D'Agata*, 151 F. Supp. 3d 363, 367-68 (S.D.N.Y. 2015), *aff'd*, 676 F. App'x 9 (2d Cir. 2017). The man was told his payment would not be accepted and was instructed to appear before the Court for the ticket. *Id.* at 368. However, when he appeared, he was charged with aggravated harassment in the second

degree. *Id*. At the time of his arrest, the New York law, similar to that of other states as described above, criminalized communicating with a person "in a manner likely to cause annoyance or alarm." *Barboza*, 676 F. App'x at 11 n.1 (citing N.Y. Penal Law § 240.30(1)).[6]

In Georgia, a disabled Marine veteran was arrested for driving under the influence and alleged he had asked his arresting officer and jail staff to check on his ill mother, for whom he was the sole caretaker. Complaint at 3, *Green v. Chitwood*, No. 4:15-cv-00057 (N.D. Ga. Mar. 17, 2015), ECF No. 1. According to the veteran, no one did, and his mother was found dead days later. *Id.* Understandably angry, he used the terms "damn asshole" and "damn bullshit" when he called 911 and complained about the officers. *Id.* at 3-4; *see also* Defendant's Initial Disclosures at 2, *Green v. Chitwood*, No. 4:15-cv-00057 (N.D. Ga. June 29, 2015), ECF No. 13. He was arrested shortly thereafter and charged with violating a Georgia law prohibiting the use of "obscene, vulgar, or profane language with the intent to intimidate or harass" an emergency dispatcher. Complaint at 5, *Green*, No. 4:15-cv-00057;

[6] The Court of Appeals of New York found this statute unconstitutionally overbroad under both the state and federal constitutions in the time between the defendant's charge and the summary judgment in his ensuing 42 U.S.C. § 1983 case. *People v. Golb*, 15 N.E.3d 805, 813-14 (N.Y. 2014) (finding the statute unconstitutional because it criminalized "any communication that has the intent to annoy"). The law was therefore updated, effective November 1, 2019, and now requires a defendant to have communicated a threat to cause physical harm to a person, a person's family, or a person's property in order to constitute harassment. N.Y. Penal Law § 240.30(1) (2019).

Defendant's Initial Disclosures at 3, *Green*, No. 4:15-cv-00057; *see* Ga. Code Ann. § 16-11-39.2(b)(1).[7] Although the veteran used profane language, his intent to protest his treatment by government officials was clear. Broadly worded harassment laws, however, can make such vehement criticism of government officials the subject of a criminal prosecution.

III. STATES CAN STRUCTURE LAWS TO COMBAT TRUE HARASSMENT WHILE PROTECTING POLITICAL SPEECH.

Statutes with explicit protections for constitutionally protected speech allow states to combat harassment while recognizing the important First Amendment issues at stake. *See*, *e.g.*, Ariz. Rev. Stat. Ann. § 13-2916(C) (stating "[t]his section does not apply to constitutionally protected speech or activity or to any other activity authorized by law"); Colo. Rev. Stat. § 18-9-111(8) (highlighting that "[t]his section is not intended to infringe upon any right guaranteed to any person by the first amendment to the United States constitution or to prevent the expression of any religious, political, or philosophical views"); 11 R.I. Gen. Laws § 11-52-4.2(a) (defining the willful "course of conduct" required to violate the statute as specifically excluding "constitutionally protected activity"); S.D. Codified Laws § 22-19A-5 (defining a course of conduct that violates the statute to exclude "[c]onstitutionally

[7] This law does not prohibit using an emergency call to lodge a complaint against police. It only prohibits using a particular type of speech while doing so.

protected activity"). By clearly stating that harassment statutes cannot be applied to speech that is constitutionally protected, these statutes guard against overzealous prosecutions for speech that is not within the enumerated categories of unprotected speech. Defining harassment to include only speech without any legitimate purpose also avoids criminalizing protected speech. *See*, *e.g.*, 11 R.I. Gen Laws § 11-52-4.2(a) (stating harassment cannot serve any "legitimate purpose"); S.D. Codified Laws § 22-19A-4 (defining harassment serving "no legitimate purpose"); Tenn. Code Ann. § 39-17-308(a)(2) (covering as harassment certain communications only if made "without lawful purpose"). Defining harassment as speech without legitimate purpose would exclude speech designed to "annoy" or "offend" elected officials into taking action. Furthermore, explicitly carving out constitutionally protected speech from harassment statutes ensures the statutes cannot be used to threaten individuals who use offensive language to convey an unpopular idea to an elected official.

CONCLUSION

The Ninth Circuit's decision imperils political expression to public officials by legitimizing statutes that criminalize that expression as harassment. The First Amendment provides firm protections for the expression of even unpopular or offensive ideas, particularly when that expression is aimed at public officials. This speech is essential to the ability to effectively petition

the government for redress or for political change, and its protection is vital to democracy.

Respectfully submitted,

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