No. 19-10466

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC STAGNO,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
The Honorable Troy L. Nunley
Case No. 2:17-cr-00163-TLN-1

BRIEF *AMICUS CURIAE* OF THE PENNSYLVANIA CENTER FOR THE FIRST AMENDMENT IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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* Counsel would like to thank Kendra Delaney, Delaney Gold-Diamond, and Caleb Mathena, UCLA School of Law students who worked on the brief.

RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae the Pennsylvania Center for the First Amendment has no parent companies, subsidiaries, or affiliates and does not issue shares to the public.

All parties have consented to the filing of this *amicus* brief.

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INTEREST OF *AMICUS CURIAE*[1]

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

SUMMARY OF ARGUMENT

In a nonpublic forum such as a VA hospital, speech restrictions must be viewpoint-neutral and reasonable in light of the forum's purpose. Final Jury Instruction No. 4, which restated the 38 C.F.R. § 1.218(a)(5) ban on "otherwise improper language," failed both requirements, and thus let defendant Stagno be convicted in violation of his First Amendment rights.

1. A jury cannot be instructed to convict a defendant for engaging in racist speech or even using racist epithets. *See Matal v. Tam*, 137 S. Ct.

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[1] No party or party's counsel has authored this brief in whole or in part. No party or party's counsel or other 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.

1744, 1763 (2017) (holding that a speech restriction on racially disparaging language unconstitutionally "discriminates on the basis of viewpoint"). Yet the "otherwise improper language" instruction left the jury free to convict based on Stagno's racist speech, especially since jurors might well conclude that racist epithets are indeed improper, even if other epithets are not. The term "improper language" is facially viewpoint-based, like the exclusion of "immoral or scandalous" marks struck down in *Iancu v. Brunetti*, 139 S. Ct. 2294, 2300 (2019). And the term also leaves so much discretion for jurors to decide what is "improper" that it further impermissibly risks viewpoint discrimination.

2. Whether the prohibition on "otherwise improper language" in § 1.218(a)(5) and in the jury instruction was viewpoint-based is an open question in this Court. The question was not raised or decided in *United States v. Szabo*, 760 F.3d 997 (9th Cir. 2014), or *United States v. Agront*, 773 F.3d 192 (9th Cir. 2014), which focused only on the prohibitions on "'loud' and 'abusive' language and on 'conduct . . . which creates loud or unusual noise,'" 760 F.3d at 1003; 773 F.3d at 199.

3. The restriction on "otherwise improper language" is also unreasonable in light of the purpose of a VA medical facility. Such facilities often

treat patients suffering from mental disorders, which may include disorders that lead them to speak in angry or offensive ways. It is not reasonable to criminalize the speech of hospital patients when that speech may flow from the very illness for which they seek treatment, especially when hospitals treat (among others) veterans with Post-Traumatic Stress Disorder.

4. Final Jury Instruction No. 4 was thus unconstitutional. Stagno's Proposed Jury Instruction No. 7 should have been given instead: it would have limited "otherwise improper language" to fighting words, which would have cured the constitutional defect.

ARGUMENT

I. Final Jury Instruction No. 4 unconstitutionally suggested to the jurors that they could convict based on "language" that was rendered "improper" by its viewpoint

VA medical facilities are nonpublic fora. *Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008). Thus, restrictions on speech in VA medical facilities must be "reasonable in light of the purpose served by the forum and . . . viewpoint neutral." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985).

Yet Final Jury Instruction No. 4, which incorporates 38 § C.F.R. 1.218(a)(5), told the jury that Stagno would be guilty if he used "improper language"—a restriction that is as viewpoint-based as the restrictions on "immoral" or "scandalous" speech struck down in *Iancu*, 139 S. Ct. at 2300. *Iancu* struck down the exclusion from trademark registration of marks that were

- "immoral," meaning "inconsistent with rectitude, purity, or good morals," *id.* at 2299, and
- "scandalous," meaning "shocking to the sense of truth, decency, or propriety," "disgraceful," "offensive," or "disreputable," *id.* at 2300.

These criteria, the Court held, "distinguishe[d] between two opposed sets of ideas": "those aligned with conventional moral standards and those hostile to them" and "those inducing societal nods of approval and those provoking offense and condemnation." *Id.* This "result[ed] in viewpoint discriminatory application," *id.* —the restriction on "immoral or scandalous trademarks" "infringe[d] the First Amendment" because "[i]t disfavor[ed] certain ideas." *Id.* at 2297.

The same logic applies to the restriction on "improper language" in this case. Language is "improper" when it is "not in accord with propriety,

modesty, good manners, or good taste"[2]—a definition very similar to the definitions of "immoral" (lacking in "rectitude," "purity," or "good morals") and "scandalous" ("shocking," "disgraceful," "offensive," or "disreputable"). And, as with "immoral" and "scandalous," the ban on "improper language" distinguishes between language that is "aligned with conventional moral standards" and that which is "hostile to them," *Iancu*, 139 S. Ct. at 2300.

And this is especially so when the "improper language" expresses racist sentiments, which many jurors could rightly view as "express[ing] opinions that are, at the least, offensive to many Americans," *Iancu,* 139 S. Ct. at 2301. Just as a restriction on speech that "demeans or disparages an individual[or] group" is viewpoint-based and thus unconstitutional even in a nonpublic forum, *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126, 1131 (9th Cir. 2018), a restriction on "improper language," applied to demeaning and disparaging epithets, is viewpoint-based as well.

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[2] *See Improper*, Merriam-Webster.com, https://merriam-webster.com/improper (last visited Mar. 15, 2020).

To be sure, we cannot know for certain exactly why the jury found Stagno's "language" to be "improper." It is conceivable, for instance, that they simply concluded that any personal insult, whether racist or otherwise, was "improper." But because "improper language" is such a vague and potentially broad term, there is no reason to be confident that the jury applied it in a viewpoint-neutral way.

Indeed, this Court has expressly recognized that a restriction that is not "sufficiently definite and objective to prevent arbitrary or discriminatory enforcement" is unconstitutional even in a nonpublic forum. *Amalgamated Transit Union v. Spokane Transit Auth.*, 929 F.3d 643, 651 (9th Cir. 2019). This reflects the well-established principle that a rule giving a decisionmaker "unbounded discretion as to substance" "raises the specter of arbitrary or viewpoint-discriminatory enforcement," and thus violates the First Amendment. *Moonin v. Tice*, 868 F.3d 853, 867 (9th Cir. 2017). This Court so held as to public employer decisions as to what are "appropriate" "communications," *id.*; and that logic applies equally to jury decisions as to what is "improper language."

Usually this principle is applied to strike down unbounded discretion exercised by licensing bodies, such as zoning boards, university administrators, public lands administrators, or city councils. *Epona v. County of Ventura*, 876 F.3d 1214, 1225 (9th Cir. 2017) (characterizing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992), as "noting that unbridled discretion raises specter of viewpoint discrimination"); *OSU Student Alliance v. Ray*, 699 F.3d 1053, 1062 (9th Cir. 2012) ("[The] danger [of content and viewpoint censorship] is at its zenith when the determination of who may speak and who may not is left to the unbridled discretion of a government official.") (quoting *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 763 (1988)); *Kaahumanu v. Hawaii*, 682 F.3d 789, 806 (9th Cir. 2012) (endorsing the view "that the viewpoint neutrality requirement includes the prohibition on a licensing authority's unbridled discretion"); *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1043 (9th Cir. 2008) (concluding that "the exercise of unbridled discretion" by a city council "permits the government to control the viewpoints that will be expressed" (citation and internal quotation marks omitted)). But the same logic applies to unbounded discretion exercised by jurors, such as when jurors are asked to decide whether

speech is "improper." Vague criminal laws "impermissibly delegate[] basic policy matters to . . . juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

In *LeRoy v. Illinois Racing Board*, the Seventh Circuit did uphold a restriction on "improper language," in the peculiar situation where a horse racing licensee was suspended for using profanity and threatening state racing regulators. 39 F.3d 711, 715 (7th Cir. 1994). But the logic of *LeRoy* does not apply here.

First, the court in *LeRoy* expressly acknowledged that, "[a]s a norm addressed to the general public for the conduct of daily affairs," the "improper language" restriction "would be seriously deficient." *Id.* Here, Stagno is a member of the public, who has been subjected to criminal punishment, not a member of a regulated occupation who is facing the loss of a license.

Second, the court in *LeRoy* also stressed that the speech restriction was "administered by an agency that, through a series of decisions,

[could] add details" to the restriction, which could ameliorate the vagueness of the "improper language" standard. *Id.* Here, the VA has apparently not tried to clarify the standard at all.

Finally, the *LeRoy* court analogized the "system Illinois applies to the racing industry" to "the civil service laws" and "the Uniform Code of Military Justice," which apply to civilian and military workers. *Id.* But restrictions on employee behavior are inevitably vague and flexible and are understood by employees in light of the hierarchical workplace practices that they see each day. *Cf. Parker v. Levy*, 417 U.S. 733, 754, 756 (1974) (upholding restrictions on speech by military members based in part on the known "custom and usage" within the special context of "military society"); *Arnett v. Kennedy*, 416 U.S. 134, 161 (1974) (plurality op.) (upholding restrictions on speech by government employees based in part on the "infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal"); *id.* at 164 (Powell, J., concurring in part and concurring in the judgment) (agreeing with the plurality's vagueness and overbreadth analysis). Racing licensees who have to daily operate within their professions might be similar to such employees; VA patients such as Stagno are not.

II. This Court has never decided whether 38 C.F.R. § 1.218(a)(5)'s ban on "otherwise improper language" is viewpoint-based

This Court has never confronted the constitutionality of the "otherwise improper language" prohibition: it has only upheld other parts of 38 C.F.R. § 1.218(a)(5)—the ban on "loud or abusive" speech and noise. *Szabo*, 760 F.3d at 1003; *Agront*, 773 F.3d at 193.

The *Szabo* panel stressed that it was "undisputed that 38 C.F.R. § 1.218(a)(5) is a viewpoint neutral regulation," 760 F.3d at 1003, likely because restrictions on loud and abusive noise are not facially viewpoint-based the way that the "improper language" restriction is. The facts of *Szabo* also in any event involved true threats of violence, *id.* at 1000, which fall within a recognized exception to First Amendment protection. Likewise, "Agront [did] not argue[] that his First Amendment rights [were] at issue and . . . brought only an as-applied [vagueness] challenge" to the ban on loud and abusive language. *Agront*, 773 F.3d at 195.

"'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.'" *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall*,

266 U.S. 507, 511 (1925)). "[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1286-88 (9th Cir. 1985) (noting that several previous decisions had assumed a particular conclusion—there, that the Commerce Clause applied to Guam—but holding that those decisions were not binding on that point because the issue had not been raised or discussed in those cases).[3] And whether the "improper language" ban is viewpoint-based has never been litigated in this Court.

III. Restricting "otherwise improper language" is not reasonable in light of the forum's purpose

Besides being viewpoint-neutral, speech restrictions in a nonpublic forum must be "reasonable in light of the purpose of the forum and all the

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[3] *See also, e.g.*, *Munoz v. Mabus*, 630 F.3d 856, 860 n.3 (9th Cir. 2010) (concluding that a prior decision was not binding precedent on a point that the decision "had no opportunity to decide"); *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1046 n.14 (9th Cir. 2007) (concluding that a prior decision was not binding precedent on a point because the decision "did not expressly address [the] issue," and the issue was not "brought to the attention of the court"); *In re Larry's Apartment, LLC*, 249 F.3d 832, 839 (9th Cir. 2001) ("What is significant, however, is the fact that [in prior cases] we did not discuss the question of the propriety of using an Arizona sanction statute in an action in federal court; nor does it appear that the issue was then brought before us. . . . [T]hose cases [therefore] do not require us to hold that it is proper to use the Arizona sanction statutes in federal litigation."). All these precedents cite *Webster v. Fall*.

surrounding circumstances. The government must provide more than a rational basis for the restriction; the restriction must reasonably fulfill a legitimate need." *Peake*, 552 F.3d at 766.

The purpose of the VA clinic here, like in *Szabo*, is to provide healthcare to veterans, 760 F.3d at 1003—including veterans with various psychiatric disorders. Disorders such as PTSD can lead sufferers to sometimes use "improper language," by inhibiting a patient's impulse control and causing "irritability and aggression" and "defiance of authority and social norms;"[4] patients with these disorders may therefore find it hard to conform their speech to restrictions imposed by the VA. It is thus not reasonable for the VA to criminally punish the very patients it is trying to treat, simply because they use "improper language" that may

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[4] U.S. Department of Veterans Affairs, *PTSD and DSM-5*, PTSD: National Center for PTSD, https://www.ptsd.va.gov/professional/treat/essentials/dsm5_ptsd.asp (last visited Mar. 18, 2020); American Psychiatric Association, *Disruptive, Impulse-Control, and Conduct Disorders*, Psychiatry Online: DSM Library, https://dsm.psychiatryonline.org/doi/10.1176/appi.books.9780890425596.dsm15 (last visited Mar. 24, 2020). Veterans suffer from PTSD at rates between 11 and 30 percent. U.S. Department of Veterans Affairs, *How Common is PTSD in Veterans?*, PTSD: National Center for PTSD, https://www.ptsd.va.gov/understand/common/common_veterans.asp (last visited Mar. 18, 2020).

well flow from the very psychological symptoms for which its patients seek treatment.

IV. The District Court erred in denying Stagno's Proposed Instruction No. 7

To make the "improper language" prohibition constitutionally permissible, then, the prohibition had to be limited to constitutionally unprotected speech, such as "fighting words." Accordingly, At trial, Stagno's counsel offered proposed Instruction No. 7:

> As used in 38 C.F.R. § 1.218(a)(5) "improper language" means language which by its very utterance, inflict injury or tends to incite immediate breach of the peace. However, the mere use of racist insults is not considered "improper language" under this ordinance unless accompanied by other language tending to incite a breach of the peace.
>
> In determining whether language is likely to lead to a breach of the peace the jury should consider whether the person hearing the language has been trained in responding to insulting language as part of the person's employment, such as a law enforcement officer or psychiatric facility staff member.

The first paragraph was based on the "fighting words" test from *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942), *see* ER 327-28; the second is consistent with *United States v. Poocha*, 259 F.3d 1077, 1081 (9th Cir. 2001) ("As the Supreme Court has suggested, the fighting words exception recognized in *Chaplinsky* requires a narrower application in cases involving words addressed to a police officer, 'because a properly

trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to "fighting words."'" (citing *City of Houston v. Hill*, 482 U.S. 451, 462 (1987)). The District Court rejected the proposal without explanation. ER 290.

In so doing, the District Court committed reversible error. "[A] criminal defendant has a constitutional right to have the jury instructed according to his theory of the case, provided that the requested instruction is supported by law and has some foundation in the evidence." *United States v. Marguet-Pillado*, 648 F.3d 1001, 1006 (9th Cir. 2011) (citations and internal quotation marks omitted). If these conditions are met, "[t]he district court's failure to give a defendant's requested instruction . . . warrants per se reversal, unless other instructions, in their entirety, adequately cover that defense theory," *id.* (citations and internal quotation marks omitted). The conviction could still be affirmed if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error," *Neder v. United States*, 527 U.S. 1, 15 (1999), but that is not so here—a rational jury might well have concluded that Stagno's insults and accompanying language did not sufficiently "tend to

incite a breach of the peace," especially since no breach of the peace in fact happened.

To be sure, if the "otherwise improper language" restriction was construed to only prohibit vulgar words (whether racist or otherwise), it might pass constitutional muster as viewpoint-neutral, though *Iancu v. Brunetti* left the question unsettled. 139 S. Ct. at 2302 n.*. But, just as in *Iancu*, there is no basis for reading "improper language" in such a limited way:

> [T]he Government explains that [its] reinterpretation [of the exclusion of "immoral or scandalous" speech] would mostly restrict the PTO to refusing marks that are "vulgar" . . . . But we cannot accept the Government's proposal, because the statute says something markedly different. This Court, of course, may interpret "ambiguous statutory language" to "avoid serious constitutional doubts." But that canon of construction applies only when ambiguity exists. "We will not rewrite a law to conform it to constitutional requirements." So even assuming the Government's reading would eliminate First Amendment problems, we may adopt it only if we can see it in the statutory language. And we cannot. The "immoral or scandalous" bar stretches far beyond the Government's proposed construction.

Id. at 2301 (citations omitted). Here, like in *Iancu*, nothing in the subsection limits the "improper language" ban to vulgarities.

And even if the restriction on "improper language" were interpreted by this Court to outlaw only expletives uttered in VA hospitals, such an

interpretation could not retroactively authorize punishing Stagno on that theory. In *Cohen v. California*, the Court rejected a proposed reinterpretation of California's disorderly conduct as limited to banning vulgarities only in courthouses (rather than throughout the whole state):

> Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places.

403 U.S. 15, 19 (1971). Likewise, any attempt to support Stagno's conviction on the ground that "improper language" should be read as consisting solely of expletives "must fail in the absence of any language in the [regulation] that would have put appellant on notice" of this surprising limiting construction.

Therefore, because the restriction on "improper language" cannot be construed as merely a ban on vulgarities, and because the subsection separately restricts "loud" and "abusive" language, the only reasonable and constitutional reading of the restriction is that it prohibits otherwise unprotected categories of speech. And Stagno's words did not amount to any other kind of unprotected speech except perhaps for fighting words—

"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky*, 315 U.S. at 572. The First Amendment thus required the court to give the jury an instruction such as that proposed by the defendant.

CONCLUSION

Final Instruction No. 4's articulation of the § 1.218(a)(5) restriction on "otherwise improper language" is viewpoint-based because it invited the jury to punish Stagno for his racist speech. The restriction is facially viewpoint-based, and its vagueness also gives the jury discretion to implement it in a viewpoint-based way. Moreover, the restriction is unreasonable because it criminalizes speech which flows from the very symptoms for which patients seek treatment at the VA.

Because of this, Stagno's Proposed Instruction No. 7—which is supported by law, grounded in the evidence, and not covered by other accepted jury instructions—was constitutionally required to inform the jury of Stagno's defense and to prevent the infringement of his First Amendment rights.

Respectfully Submitted,

s/ Eugene Volokh

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3453 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.

Dated: April 29, 2020

s/ Eugene Volokh

Attorney for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief *Amicus 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 April 29, 2020.

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

Dated: April 29, 2020

s/ Eugene Volokh

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