IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

STATE OF OHIO, Plaintiff-Appellee, v. MATTHEW A. GOLGA, Defendant-Appellant	C.A. No. 23CA011946 Appeal From the Elyria Municipal Court, Case No. 2021CRB00305

Brief of *Amici Curiae* Profs. Stephen R. Lazarus, Kevin Francis O'Neill, Margaret Christine Tarkington, and Eugene Volokh, and 1851 Center for Constitutional Law in Support of Defendant-Appellant

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INTEREST OF *AMICI CURIAE*[1]

The individual *amici curiae* are law professors who have written and taught extensively on constitutional law and in particular on First Amendment law:

- Stephen R. Lazarus (Cleveland-Marshall College of Law),
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- Margaret Christine Tarkington (Indiana University-Purdue University Indianapolis McKinney School of Law, formerly [2010-11] University of Cincinnati College of Law), and
- Eugene Volokh (UCLA School of Law).

Amicus curiae 1851 Center for Constitutional Law is a nonprofit, nonpartisan law firm dedicated to protecting Ohioans' constitutional rights, including their freedom of speech.

INTRODUCTION

Matt Golga called the City of North Ridgeville Water Department with a grievance: He believed that the Department, by shutting off his water supply due to late payments, was threatening his and his family's health. In those calls to government officials, Golga used offensive language. Because of this, he has been sentenced to six months in jail.

[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.

Golga's conviction under Ohio's telecommunications harassment statute, R.C. 2917.21(A)(1), violated his First Amendment rights to speak and to petition the government for redress of grievances. Golga did not threaten violence, engage in face-to-face "fighting words," or incite others to cause harm. Yet nothing in the statute—which bans telephone calls made "with purpose to harass, abuse, or annoy"—limits itself to those well-established exceptions to First Amendment protection. Nor does anything in the statute limit itself to calls that are so frequent that they unduly tie up emergency lines or even government phone lines more broadly. If Golga's conviction is affirmed, this would open the door for others to be convicted based on one-time telephone calls.

United States v. Popa, 187 F.3d 672 (D.C. Cir. 1999), offers a helpful and closely analogous precedent. In *Popa*, a defendant left seven voice-mail messages for the D.C. U.S. Attorney's Office containing racist insults about then-United States Attorney Eric Holder, and was convicted under the federal law banning calls made with "intent to annoy, abuse, . . . or harass any person." *Id.* at 674. But the D.C. Circuit Court reversed, concluding that the law unconstitutionally "swe[pt] within its prohibitions telephone calls to public officials where the caller may [have] 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." *Id.* at 676-77.

This Court should likewise conclude that the statute may not constitutionally be applied to complaints to public officials, whose positions require hearing grievances—even offensively framed ones. And it should therefore reverse Golga's conviction, reaffirming that Ohioans are entitled to call government offices to express their grievances, without worry that rude words said out of fear, anger, or distress will lead to criminal prosecution.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Amici curiae adopt the Statement of the Case and Statement of Facts in Appellant's Brief.

ARGUMENT

I. Ohio's statute cannot be constitutionally applied to the speech in this case.

R.C. 2917.21(A)(1) prohibits "knowingly" calling another "with purpose to harass, intimidate, or abuse any person at the premises to which the telecommunication is made." Yet the terms "harass" and "abuse" may encompass a substantial amount of constitutionally protected criticism—and, as in Golga's case, legitimate grievances communicated to public officials. (If "intimidate" is read as covering only true threats, then that portion of RC 2917.21(A)(1) would be constitutional, but Golga was not prosecuted under that theory.)

Ohio courts define "harass" and "abuse" broadly, by "applying [their] common everyday meaning." *City of Hamilton v. Combs*, 2019-Ohio-190, 131 N.E.3d 297, ¶ 21 (12th

Dist.). To "harass," for example, is defined as "'to exhaust,' 'to fatigue,' or 'to annoy persistently.'" *Id.* Likewise, the prohibition on telephone calls that "abuse . . . or harass" has been read as including "making a telephone call with the purpose to mistreat another person, . . . or to persistently torment the recipient of the telephone call." *State v. Kronenberg*, 2015-Ohio-1020, ¶ 34 (8th Dist.) (cleaned up).

Yet calling government officials with the intent to "annoy" or even "torment" them "persistently" is constitutionally protected. "Filling a city councilman's voicemail box with complaints about his vote on a controversial municipal ordinance may 'vex' or 'cow' him . . . [b]ut criminalizing that speech would collide with the First Amendment." *United States v. Yung*, 37 F.4th 70, 78 (3d Cir. 2022).

"There is no categorical 'harassment exception' to the First Amendment's free speech clause," *Saxe v. State College Area School District*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.); *Rodriguez v. Maricopa Cnty. Cmty. College Dist.*, 605 F.3d 703, 708 (9th Cir. 2010); *B.H. ex rel. Hawk v. Easton Area School Dist.*, 725 F.3d 293, 323 n.25 (3d Cir. 2013); *TM v. MZ*, 326 Mich.App. 227, 240 (2018); and that principle is especially apt when it comes to complaints to government officials. "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). What is true of challenges to police action is also true of challenges to other government action, especially where that action threatens people's health.

The D.C. Circuit's decision in *Popa,* 187 F.3d at 673, is helpful here. In that case, the defendant called the U.S. Attorney's Office seven times in about a month. *Id.* Though he had initially called to complain about alleged police brutality, he also shifted to personal, racist invective, referring to then-United States Attorney Eric Holder—who would later become Attorney General—as "a criminal, a negro," a "criminal with cold blood," and a "whore, born by a negro whore." *Id.* at 673. Though his tirades were left on voicemail, rather than being said directly to a listener, they obviously had to be listened to by government officials.

Popa was convicted under the federal telecommunications harassment statute, 47 U.S.C. § 223(a)(1)(C), which banned "anonymous phone calls with the 'intent to annoy, abuse, threaten, or harass" (like Ohio's statute, but with the additional prohibition of calls with "intent to annoy"). *Id.* at 673-74. But the D.C. Circuit held that the conviction violated the First Amendment. *Id.* at 678. "Insofar as the intents to annoy, to abuse, or to harass were implicated, the statute fails intermediate scrutiny as applied to Popa's conduct." *Id.* (No evidence could support a claim that Popa had made the calls with constitutionally punishable intent to threaten. *Id.*)

> Under the statute as written, and as the jury in this case was instructed, no protection whatsoever is given to the political speech of one who intends both to communicate his political message and to annoy his auditor . . . from whom the speaker seeks redress.

Id. The D.C. Circuit therefore concluded that the federal statute could not constitutionally be applied to calls to the government. *Id.*

Other state courts have likewise overturned harassment convictions on First Amendment grounds. The Iowa Supreme Court, for example, overturned a conviction under Iowa's harassing communications statute, which banned writings made with "intent to . . . annoy" and "without legitimate purpose," where defendant had written a "nasty letter" to a state highway patrolman to protest a speeding ticket. *State v. Fratzke*, 446 N.W.2d 781, 782 (Iowa 1989). The letter sharply criticized the patrolman's conduct, and also called him a "red-necked m*th*r-f*ck*r" and wished him a "particularly painful death." *Id.* (expurgation in original). The Iowa Supreme Court rejected the trial court's notion that "offensive language . . . will strip a communication of its otherwise legitimate purpose." *Id.* at 785. And the court held that the conviction violated the First Amendment, noting that "our Constitution does not permit government officials to put their critics, no matter how annoying, in jail." *Id.* at 782.

Likewise, the Nebraska Supreme Court reversed a breach of the peace conviction where defendant sent insulting emails to a candidate for state legislature: "[E]ven when criticisms of public figures are outrageous, if they fall short of provoking an immediate breach of peace, they are protected by the First Amendment." *State v. Drahota*, 280 Neb. 627, 638 (2010). And the Massachusetts high court reversed a defendant's harassment conviction, where defendant had sent several letters calling a town selectman, among

other things, "the biggest fucking loser"—the letters, the court noted, constituted criticisms of a government official and were thus constitutionally protected political speech. *Commonwealth v. Bigelow*, 475 Mass. 554, 555, 562 (2016).

This Court should do the same. Golga, like Popa and other vocal critics of the government, called a government office to communicate a grievance—here, that a lack of running water could harm him and his family. He used language that was no more offensive than Popa's racist insults. He made no threats, and was not prosecuted for making threats. Indeed, the people at the Department interacted with Defendant peaceably, face-to-face, shortly after the call. 1 Tr. 189-90. His speech was therefore constitutionally protected.

II. Some speech directed at the government may be properly punishable, but not merely offensive speech.

Holding that Ohio's telephonic harassment statute cannot constitutionally cover mere insults said to government officials would still leave the government ample room to punish genuinely harmful speech. For instance, true threats of violence can certainly be punished. *See, e.g., United States v. Weiss*, No. 20-10283, 2021 WL 6116629, *1-*3 (9th Cir. Dec. 27, 2021) (holding that defendant could be prosecuted for sending threatening e-mails to Senator Mitchell McConnell's office, under the federal ban on "utiliz[ing] a telecommunications device . . . with intent to abuse, *threaten*, or harass any specific person" (emphasis added)).

Unwanted telephone calls made to the "home of another" may also be constitutionally prohibited under a properly crafted statute. The U.S. Supreme Court has held that a person does not have a First Amendment right "to send unwanted material into the home of another," *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970), and some courts have relied on this proposition to uphold telephonic harassment statutes similar to Ohio's. *See, e.g., Hagedorn v. Cattani*, 715 F. App'x 499, 507 (6th Cir. 2017) (applying the *Rowan* court's decision to a personal email account because it is the "functional equivalent of a home mailbox"). Yet such precedents restrict speech to public officials' homes, personal e-mail addresses, or personal telephone numbers, not to their offices. Indeed, *Hagedorn*, 715 F. App'x at 501, affirmed a harassment conviction for sending repeated emails to the personal email address of a public official in part because the defendant "retain[ed] multiple channels through which she can communicate with [the public official]—including his *official . . . email address.*" *Id.* at 507 (emphasis added); *see also U.S. Postal Serv. v. Hustler Magazine, Inc.*, 630 F. Supp. 867, 874 (D.D.C. 1986) ("the right to be let alone provides a Member of Congress only limited refuge in the office").

A suitably narrow statute can also punish callers for disrupting emergency government services, such as by "tying up someone's line with a flood of calls, each of which is terminated by the caller as soon as it is answered." *Popa*, 187 F.3d at 677. But it does not appear that Golga's calls rose to the level of such disruption, and he certainly did not tie

up any emergency lines, such as 9-1-1 services. And in any event, nothing in R.C. 2917.21(A)(1) limits the statute to such disruption.

In this respect, this case is similar to *Cohen v. California,* 403 U.S. 15 (1971), where the Court overturned Cohen's conviction for wearing his "Fuck the Draft" jacket in a courthouse. It is conceivable that a narrow law forbidding vulgarities just inside courthouses might be constitutional; the interiors of courthouses would today likely be viewed as "nonpublic fora" in which reasonable, viewpoint-neutral restrictions are allowed. *See, e.g., United States v. Gilbert,* 920 F.2d 878, 884 (11th Cir. 1991). But, the Court held,

> 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. at 19. Likewise, any attempt to support Golga's conviction on the ground that the statute seeks to prevent government phone lines from being tied up must fail in the absence of any language in the statute that would have put Golga on notice that calls made a certain number of times would become forbidden though individual calls (including insulting ones) are constitutionally protected.

CONCLUSION

Americans are entitled to call their government offices to express their grievances, especially when there is a plausible case that their and their families' safety are in danger. That includes the right to express themselves using offensive words, as cases such as

United States v. Popa illustrate. Golga did no more than that, and his conviction should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under that a copy of the foregoing was served on counsel for all parties by email on the date of filing.

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