No. 24-

IN THE

Supreme Court of the United States

KATHRYN DANA PAPP,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR CERTIORARI

JEFFREY T. GREEN
GREEN LAW CHARTERED LLC
5203 WYOMING ROAD
Bethesda, MD 20816
(240) 286-5686
jeff@greenlawchartered.com

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K STREET, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

*Counsel of Record

August 27, 2024

QUESTION PRESENTED

Whether the First Amendment permits the government to criminalize speech on the basis that the speaker intends to harass, annoy, or alarm.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Kathryn Dana Papp. Respondent is the Commonwealth of Pennsylvania. No party is a corporation.

RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings:

Commonwealth v. *Papp*, No. CP-22-CR-0004780-2020, Court of Common Pleas, Dauphin County, Pennsylvania (May 3, 2022)

Commonwealth v. *Papp*, 305 A.3d 62 (Pa. Super. Ct. 2023)

Commonwealth v. *Papp*, No. 611 MAL 2023, 2024 WL 1400084 (Pa. Apr. 2, 2024) (Table)

No other proceedings are directly related to this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

PETITION FOR A WRIT OF CERTIORARI

Kathryn Dana Papp respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania.

OPINIONS BELOW

Commonwealth v. *Papp*, 305 A.3d 62 (Pa. Super. Ct. 2023)

Commonwealth v. *Papp*, No. 611 MAL 2023, 2024 WL 1400084 (Pa. Apr. 2, 2024) (Table)

JURISDICTION

The Pennsylvania Supreme Court denied Dr. Papp's petition for allowance of appeal on April 2, 2024. On June 21, 2024, Justice Alito extended the time to file this petition to August 30, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL/STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law … abridging the freedom of speech." U.S. Const. amend. I.

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV.

Pennsylvania Consolidated Statutes § 2709(a)(7) provides that a "person commits the crime of harass-

ment when, with intent to harass, annoy or alarm another, the person … communicates repeatedly." Section 2709(f) defines "[c]ommunicates" to mean "[c]onveys a message without intent of legitimate communication."

INTRODUCTION

Dr. Kathryn Papp did not "have anything nice to say" to a dog owner whom she believed was mistreating his pets. Pet. App. 53a. Instead, Dr. Papp criticized the owner during an argument in a parking lot, and she sent several messages conveying similar sentiments via Facebook, email, and text later that evening. Normally, that would end a professional relationship or a friendship. Here it did much more. Remarkably, Pennsylvania prosecuted Dr. Papp under a harassment law that criminalizes speech when the speaker possesses the intent to harass, annoy, or alarm while lacking the intent of "legitimate communication." 18 Pa. Cons. Stat. § 2709(a)(7), (f). The jury convicted Dr. Papp based solely on her argument with the owner and the messages she sent to him.

States across the country have enacted similar criminal prohibitions, and courts have struggled to reconcile these laws with the protections of the First Amendment. For some courts, these statutes criminalize conduct, not speech, and thus do not implicate the First Amendment at all. For others, laws prohibiting harassing communications are content-based regulations of protected speech that are subject to strict scrutiny and therefore unconstitutional.

This case cleanly presents the question of whether a state may criminalize pure speech because the state disfavors the speaker's intent. Dr. Papp did not act violently or threaten physical harm to the dog owner. Indeed, the prosecution focused on *what* she said in

her messages and in the brief argument in the parking lot.

The question presented is important, both because criminal harassment laws are ubiquitous and because they chill protected speech. In many states, including Pennsylvania, the line between constitutionally protected speech and a criminal conviction is vanishingly thin. Where it can be discerned, the line is blurry, often depending on the prosecutor's and jury's assessment of nebulous concepts like "intent of legitimate communication" and "intent to harass or annoy."

The freedom of speech "need[s] breathing space to survive." *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). Because the decision below reinforces a threat to this "delicate and vulnerable" freedom, *id.*, this Court should grant the petition.

STATEMENT OF THE CASE

Dr. Papp is a licensed veterinarian who has dedicated her professional life to serving animals. In May 2022, she was prosecuted and convicted for posting about a sick dog on Facebook, orally arguing with a customer, and sending several messages one evening by text, Facebook Messenger, and email. These communications were prompted by her concerns about two dogs she treated while working at Noah's Ark Veterinary Center.

The individual who reported Dr. Papp to the police owned both dogs. Dr. Papp testified that on August 4, 2020, she observed Flash, the younger dog, drinking excessive amounts of water and his own urine. Pet. App. 87a. Dr. Papp also thought that Flash was blind because his pupils remained dilated when she shined a bright light in his eyes. *Id.* Based on these symp-

toms, Dr. Papp suggested a medication. Flash later suffered a seizure. *Id.* at 56a–57a.

Flash's owner took his older dog, Nick, to Noah's Ark the next day. Dr. Papp had concerns about this dog too. She testified that Nick "was overweight" and "had specific lumps that are … almost always associated with liver disease and hypothyroidism." Pet. App. 89a. And because she had observed Flash's symptoms the day before, Dr. Papp became worried that the owner was not caring for his dogs properly. She ran tests on Nick, including blood work and x-rays, to further assess his condition. *Id.* at 58a.

When the owner went to pick up Nick that afternoon, he was upset by the extra charges for those tests and disputed them. He spoke with Dr. Papp briefly by phone before she brought Nick out of the clinic. While handing the dog off, Dr. Papp criticized the owner for letting the health of his pets deteriorate. During this argument in the parking lot, the owner said he would "seek [his] legal options" against Dr. Papp because he believed that she had caused Flash's seizure by prescribing the medication. Pet. App. 78a. The argument ended when the owner told Dr. Papp to send him the bill for the approved charges. Pet. App. 60a. There was "no physical contact" during this interaction. *Id.* at 75a.

Around 5:30 pm that same day, Dr. Papp sent the owner a text message with a video of Flash from his time at Noah's Ark. Pet. App. 62a, 81a. The message included the word "abuse." *Id.* at 82a. A few minutes later, Dr. Papp started sending the owner messages through Facebook. The first message stated that Dr. Papp would report the owner for mistreating his pets, including by not taking Nick to the vet frequently enough and declining important tests. *Id.* at 65a. The owner responded by telling Dr. Papp to "end all con-

tact with [him] other than for payment for [the] wellness visit" and "approved" shots. *Id.* Dr. Papp responded an hour later by informing the owner that he could block her, that she would report him, and that he could contact Dr. Papp's attorney. The owner did not block her. At trial, he attributed this decision partially to his lack of technological savviness and partially to his desire to "preserv[e] [the] evidence" so that the police could read the messages. *Id.* at 80a and 66a.

Dr. Papp sent several other messages that evening. She told the owner that he acted improperly by declining certain tests for the dog and for not noticing or caring about Flash's blindness. Pet. App. 67a. The owner again asked her to stop contacting him, and Dr. Papp again said that he could block her. Dr. Papp then sent screenshots of information she had found online about the owner's mortgage and his wife's traffic violation. Just before 10 pm, Dr. Papp messaged the owner to provide the name of her attorney, stating that she did "not have time for low lifes [sic] with broke [sic] moral compasses." *Id.* at 69a. When the owner told Dr. Papp that he had contacted the police, she responded around 11:45 pm that she had told the police "everything." *Id.*

At trial, the prosecution pointed to two other communications to support the harassment charge. The first was an email that Dr. Papp sent around 6 pm on August 5—the same day she sent the text and Facebook messages—in which she criticized the owner and his wife for not noticing Flash's blindness and for not taking good care of Nick. Pet. App. 69a–70a. The second was a video of Flash at Noah's Ark that Dr. Papp posted to Facebook the day before her argument with the owner. See *id.* at 71a–72a. Dr. Papp did not mention the owner in this post or send it to him. In-

stead, Dr. Papp simply posted the video with the caption "Yet another crazy one. So grateful for wonderful pet owners." *Id.* at 76a.

That was the extent of Dr. Papp's communications with the owner: an argument in a parking lot, an email, a text message, several Facebook messages, and (possibly) a Facebook post. Based on those communications, the State charged her with harassment under § 2709, which criminalizes, among other things, repeated communications made "with intent to harass, annoy or alarm another" and "without [the] intent of legitimate communication." The jury convicted Dr. Papp after a two-day trial focused on the content of the communications she sent to the dog owner. See Pet. App. 92a–93a.

The Pennsylvania Superior Court affirmed her conviction in October 2023. See Pet. App. 1a. Dr. Papp argued that Pennsylvania's harassment statute violated the Constitution facially and as applied to her. See *id.* The Superior Court disagreed. In its view, § 2709 criminalizes "the *act* of repeatedly communicating a message," so the statute regulated conduct rather than the "content of speech." *Id.* at 21a (emphasis added). That was so, the court asserted, even though the "content of [Dr. Papp's] messages was relevant" to assess whether she intended to harass, annoy, or alarm the owner, and whether she had "legitimate" communicative intent. *Id.* at 27a. The court therefore held that the statute need not survive strict scrutiny—a holding that doomed Dr. Papp's facial and as-applied challenges. See *id.* at 23a, 28a. Dr. Papp petitioned the Pennsylvania Supreme Court for an allowance of appeal, which the state's high court denied on April 2, 2024. *Id.* at 38a.

REASONS FOR GRANTING THE PETITION

I. The decision below reinforces significant disagreement among State Supreme Courts about laws criminalizing annoying or harassing speech.

Over four decades ago, Justice White underscored the "difference in opinion among those courts that have considered constitutional challenges" to statutes criminalizing phone calls made "with intent to harass, annoy or alarm another." *Gormley* v. *Dir., Conn. State Dep't of Prob.*, 449 U.S. 1023, 1023 (1980) (White, J., dissenting from denial of certiorari). He also observed that the decisions that had upheld similar laws were in "obvious tension" with this Court's precedent. *Id* at 1024. Since then, neither the disagreement among lower courts nor the tension with this Court's First Amendment decisions has disappeared. Quite the opposite. Laws like Pennsylvania's are widespread (see Pet. App. 40a–48a), and state courts continue to struggle to consistently apply First Amendment principles to these statutes. Some statutes have been declared unconstitutional; others have been upheld and in all instances individuals are left to the accident of geography and the whim of a prosecutor as to whether their communications will be subject to criminal prosecution.

A. Statutes like Pennsylvania's are ubiquitous.

In one form or another, criminal laws prohibiting harassment are on the books in every state and the District of Columbia. See Pet. App. 40a–48a. Almost all follow a similar pattern by criminalizing communications made with some motivation that the legislature has deemed illegitimate, often the intent to harass or annoy another. Although the particulars vary,

the plain terms of these laws implicate a vast amount of communication.[1]

These statutes take on even greater importance in the digital age because they apply to electronic media that are ubiquitous and essential to speech in today's world. When a user of email or social media hits "send" or "post" more than once, she may do so at the risk of criminal liability. And in many states, including Pennsylvania, the line between a criminal prosecution and everyday angry or insulting speech on the Internet turns on a prosecutor's assessment of the content of the message and what it says about the speaker's motivation.

B. The lower courts disagree about how to apply the First Amendment to statutes criminalizing harassing or annoying speech.

Lower courts across the country have addressed the constitutionality of harassment laws that cover electronic communications, as Pennsylvania's does. They are divided on how these laws interact with the First Amendment.

Courts in at least seven jurisdictions have held that these statutes regulate speech on the basis of its content. For that reason, these courts hold that the First Amendment applies in full force to criminal statutes similar to Pennsylvania's and that those laws are unconstitutional.

---

[1] Alaska's harassment statute differs from most in that it applies to a more limited subset of electronic communications, including those that are "obscene" or "threaten[ ] physical injury or sexual contact." Alaska Stat. § 11.61.120(a)(4). Nebraska limits its regulation of electronic communications similarly. *See* Neb. Rev. Stat. § 28-1310(1); *see also id.* § 28-311.02–03 (requiring "intent to injure, terrify, threaten, or intimidate").

Courts in at least six jurisdictions have reached the opposite conclusion, holding that electronic harassment laws are not content-based regulations of speech. Under their reasoning, these laws regulate conduct, not speech, and thus do not implicate the First Amendment.

1. Two recent opinions from the courts of last resort in Colorado and Texas are emblematic of the disagreement about whether electronic harassment statutes criminalize conduct or speech.

In 2022, the Colorado Supreme Court invalidated a portion of Colorado's harassment law that prohibited a person from "initiat[ing] communication with a person" with the "intent to harass, annoy, or alarm another" and "in a manner *intended to harass*." *People* v. *Moreno*, 506 P.3d 849, 851–52 (Colo. 2022) (quoting Colo. Rev. Stat. Ann. § 18-9-111(1)(e)). Moreno was charged under the statute for sending a series of emails to his ex-wife and posting once on Facebook. *Id.* at 851. Through these communications, he insulted his ex-wife and sought to see his children. *Id.* The Colorado Supreme Court invalidated the "intended to harass" provision of the harassment statute, reasoning that it "unconstitutionally restricts protected speech" and was overbroad. *Id.* at 851, 857. Put simply, the intent-based harassment law criminalized "a substantial amount of protected speech." *Id.* at 855. And because "the swipe of a finger can often block, or at least delete, unwanted communication," the law did not survive as a constitutional protection of privacy. *Id.* at 857.

Nine days later, the highest criminal court in Texas reached the opposite conclusion in a divided decision. The court upheld a criminal conviction under a Texas law that prohibited sending "repeated electronic communications in a manner reasonably likely to

harass, annoy, [or] alarm" and with the "intent to harass, annoy, [or] alarm … another." *Ex parte Barton*, 662 S.W.3d 876, 878 (Tex. Crim. App. 2022) (quoting Tex. Penal Code Ann. § 42.07(a)(7)). That statute, the court held, regulates only "non-speech conduct" and thus "does not implicate the First Amendment." *Id.* at 884.

Presiding Judge Keller dissented. In her view, the statute—which covered "electronic communications"—meant what it said and regulated speech, not conduct. *Id.* at 886 (Keller, P.J., dissenting). Electronic communications use digital "mediums for delivering *speech*" and are "inherently communicative." *Id.* at 888 (emphasis added). In no sense, then, are these communications mere "non-speech conduct." *Id.* Further, the First Amendment "protects a great deal of speech that is purposefully annoying, alarming, or embarrassing." *Id.* at 889. The majority therefore erred by applying the rational basis test to Texas's harassment law. See *id.* at 890.

2. Decisions from other jurisdictions reflect the confusion about whether harassment statutes similar to Pennsylvania's are content-based regulations of speech or permissible regulations of conduct.

Courts in Arizona, Montana, Washington, Wyoming, and now Pennsylvania agree with the majority of the Texas Court of Criminal Appeals in *Barton*. All have upheld statutes that criminalize sending electronic communications with the intent to harass another. In *Dugan* v. *State*, for example, the Wyoming Supreme Court upheld the state's harassment statute, which criminalizes "[c]ommunicating … by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses" and "with intent to harass another person." *Dugan* v. *State*, 451 P.3d 731, 736 (Wyo. 2019) (quoting Wyo. Stat. Ann.

§ 6-2-506). Dugan was convicted for sending ten letters describing sexual topics to a woman while he was incarcerated. *Id.* at 735. Affirming his conviction, the Wyoming Supreme Court rejected Dugan's argument that the statute was a "content-based regulation of speech." *Id.* at 739. Chief Justice Davis disagreed on this point. *Id.* at 749 (Davis, C.J., dissenting) (explaining that the statute is a "content-based restriction on speech"). In his view, "law enforcement will be required to consider the content of the speech to determine if it fits" within the statute's contours, so the law could not be read as a mere regulation of conduct. *Id.* at 750.

Similarly, in *State* v. *Lamoureux*, the Montana Supreme Court held that the state's harassment statute was not a "content-based regulation on speech." 485 P.3d 192, 200 (Mont. 2021), *cert. denied*, 142 S. Ct. 860 (2022). That law criminalized, among other things, profane electronic communications made "with the purpose to … harass" or "annoy." *Id.* at 197. Despite that focus on particular kinds of speech, the court held that the statute regulates "conduct;" namely, the "conduct being that the speech was uttered with the purpose and specific intent of … harassing another person." *Id.* at 200; see also *State* v. *Brown*, 85 P.3d 109, 113–14 (Ariz. Ct. App. 2004) (statute's "intent to harass" requirement meant that "the statute does not apply to pure First Amendment speech"); *State* v. *Mireles*, 482 P.3d 942, 954 (Wash. Ct. App. 2021) (holding that the "intent requirement of the cyberstalking statute sufficiently limits the statute's reach to conduct" and thus prevents it from punishing the "content of speech"); Pet. App. 1a.

Other courts, while not squarely addressing the issue, have similarly reasoned that harassment statutes are "limited to proscribing conduct" and thus do

"not prohibit speech or expression." *State* v. *Calvert*, No. 15-0195, 2016 WL 3179968, at *4 (W. Va. June 3, 2016) (describing statute criminalizing, among other things, communications "with the intent to harass" if the speaker contacts another after being asked to stop); *State* v. *Shuck*, 166 N.E.3d 122, 127 (Ohio Ct. App. 2020) ("the telecommunications harassment statute focuses on the caller rather than on the content of the telecommunication").

On the other side of the ledger, *People* v. *Marquan M.* is illustrative. 19 N.E.3d 480 (N.Y. 2014). There, the court invalidated a county law that prohibited "communicating … with no legitimate private, personal, or public purpose, with the intent to harass, annoy, threaten, abuse, taunt, intimidate, torment, humiliate, or otherwise inflict significant emotional harm on another person." *Id.* at 484. The defendant was charged after creating a Facebook page where he posted "vulgar and offensive" descriptions of his classmates' "sexual practices and predilections." *Id.* In holding that the statute violated the First Amendment, the court reasoned that the law "allows law enforcement officials to charge a crime based on the communicative message that the accused intends to convey, as evidenced by the fact that defendant was prosecuted because of the offensive words he wrote on Facebook." *Id.* at 488 n.4. So unlike statutes that *truly* criminalize conduct, such as prohibitions on physical stalking that apply "without regard to the content of any communication," the county's law encroached on protected speech. *Id.*

Courts in Illinois, Connecticut, D.C., Mississippi, and Missouri have employed similar reasoning and recognized similar statutes as content-based regulations of speech. See *People* v. *Relerford*, 104 N.E.3d 341, 350 (Ill. 2017) (holding that the relevant provi-

sion "must be considered a content-based restriction because it cannot be justified without reference to the content of the prohibited communications"); *State* v. *Billings*, 287 A.3d 146, 169 (Conn. App. Ct. 2022) (holding harassment statute unconstitutional as applied because the defendant's conviction "rested solely on the content of [his] … Facebook conversation with a third party"), *cert. denied*, 346 Conn. 907 (2023); *Mashaud* v. *Boone*, 295 A.3d 1139, 1155–59 (D.C. 2023) (en banc) ("The … statute's plain terms prohibit a vast amount of speech … based on its content."); *Edwards* v. *State*, 294 So.3d 671, 676–78 (Miss. Ct. App. 2020) (statute criminalizing posting messages "for the purpose of causing injury," including "emotional injuries," covers "protected speech"); *State* v. *Vaughn*, 366 S.W.3d 513, 519–20 (Mo. 2012) (same for statute criminalizing "[k]nowingly mak[ing] repeated unwanted communication to another").

3. This divide over whether laws like Pennsylvania's impermissibly regulate speech is symptomatic of a deeper, longstanding debate about the ability of legislatures to criminalize offensive speech in the name of protecting others' sensibilities. "Today's technology merely amplifies this old-fashioned problem." *Moreno*, 506 P.3d at 855.

In 1980, the Second Circuit upheld a criminal conviction under Connecticut's telephonic harassment statute, which criminalized making phone calls with the "intent to harass, annoy or alarm another." *Gormley* v. *Dir., Conn. State Dep't of Prob.*, 632 F.2d 938, 940 & n.1 (2d Cir. 1980). The Second Circuit "decline[d] the invitation" to follow the lead of three state courts that had invalidated similar harassment statutes. *Id.* at 942 n.5 (citing *Bolles* v. *People*, 541 P.2d 80 (Colo. 1975), *People* v. *Klick*, 362 N.E.2d 329 (Ill. 1977), and *State* v. *Dronso*, 279 N.W.2d 710 (Wis.

App. 1979)). Instead, the Second Circuit held that the "Connecticut statute regulates conduct, not mere speech." *Id.* at 941. This Court denied Gormley's petition for certiorari over the dissent of Justice White. *Gormley*, 449 U.S. at 1023.

This debate persists today. Now, however, this long-running issue has emerged in the context of Internet-based communications taking place over email and social media. "While in the past there may have been difficulty in identifying the most important places … for the exchange of views, today the answer is clear. It is cyberspace[.]" *Packingham* v. *North Carolina*, 582 U.S. 98, 104 (2017). And state legislatures have responded to this new reality, updating or adding harassment laws to bring electronic communications within the ambit of criminal prohibitions on speech based on the speaker's motivation.

Yet some courts continue to hold that these laws criminalize conduct, not speech, despite the "obvious tension" with this Court's First Amendment jurisprudence that Justice White identified decades ago. *Gormley*, 449 U.S. at 1024 (White, J., dissenting from denial of petition for certiorari). That tension has only become more palpable because of the greater sweep of electronic harassment statutes and the prevalence of electronic communications in the digital age.

II. The decision below is inconsistent with this Court's decisions.

The Superior Court upheld Pennsylvania's statute because it is "directed at the harassing nature of communications." Pet. App. 21a. In the court's view, § 2709 "seeks to regulate *conduct*," *id.* (emphasis in original), even though it criminalizes *communications*, see 18 Pa. Cons. Stat. § 2709(a)(7), (f). The court asserted that § 2709 "does not seek to restrict

the *content* of speech" and thus is not content-based. Pet. App. 25a (emphasis in original). Instead, the "content of [Dr. Papp's] messages was relevant" only to determine her intent—namely, whether she intended the messages "as legitimate communications" and whether she intended to "harass, alarm, or annoy" another. *Id.* at 27a–28a. So the court refused to apply strict scrutiny. See *id.* at 26a.

That decision is wrong twice over. Pennsylvania's statute regulates speech, not conduct, and it does so on the basis of the speech's content. The state may not insulate such a law from strict scrutiny simply by including an intent requirement. If content-based regulations of speech could so easily be transformed to elude the First Amendment, then the government could "foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429.

A. The First Amendment applies in full force to speech intended to harass or annoy.

A law that regulates speech on the basis of its content, whether expressly or "subtl[y]," is "subject to strict scrutiny." *Reed* v. *Town of Gilbert,* 576 U.S. 155, 165 (2015). Such laws are "presumptively invalid." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992).

This Court has identified narrow "categories of expression" that may be regulated because of their content, free from the confines of strict scrutiny. *Id.* at 383. "These 'historic and traditional categories'" are "well-defined and narrowly limited." *United States* v. *Stevens*, 559 U.S. 460, 468–69 (2010). They include obscenity, defamation, fraud, incitement, speech integral to criminal conduct, true threats, fighting words, and child pornography. See *id.* at 468–69, 471;

see also *Virginia* v. *Black*, 538 U.S. 343, 359 (2003). But legislatures may not add speech to this carefully tailored list by resorting to "an ad hoc balancing of relative social costs and benefits." *Stevens*, 559 U.S. at 470 (rejecting such an approach as "startling and dangerous").

Harassing and annoying speech is not one of the "well-defined" categories of unprotected speech. To the contrary, "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001) (Alito, J.); see also *Rodriguez* v. *Maricopa Cnty. Cmty. Coll. Dist.*, 605 F.3d 703, 708 (9th Cir. 2010) (same). Although "non-expressive, physically harassing *conduct*" may fall "outside the ambit of the free speech clause," harassing *speech* does not. *DeJohn* v. *Temple Univ.*, 537 F.3d 301, 316 (3d Cir. 2008).

That should be no surprise. After all, the First Amendment "protects the speech that we detest as well as the speech we embrace." *United States* v. *Alvarez*, 567 U.S. 709, 729 (2012) (plurality opinion). And insulating detestable speech from censorship is the very "hallmark of the protection" of the First Amendment, which exists to ensure the "'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting." *Black*, 538 U.S. at 358. Accordingly, the Superior Court's conclusion that "§ 2709 is directed at the *harassing nature* of … communications," Pet. App. 21a (emphasis added), does not mean that the First Amendment's protection against content-based regulations of speech disappears. Speech intended to harass or annoy is not unprotected speech, no matter how much Pennsylvania's legislature—and the legislatures of other states—may want it to be. The government

simply lacks the power to enforce the social admonition that "if someone has nothing nice to say about someone else, then say nothing." When criminally enforced by the government, that is unconstitutional censorship, plain and simple.

B. Legislatures may not insulate laws from strict scrutiny by targeting "illegitimate" motivations for the speech.

"[U]nder well-accepted First Amendment doctrine, a speaker's motivation is entirely irrelevant to the question of constitutional protection." *FEC* v. *Wis. Right to Life, Inc.,* 551 U.S. 449, 468–69 (2007) (opinion of Roberts, C.J.) (quoting M. Redish, *Money Talks: Speech, Economic Power, and the Values of Democracy* 91 (2001)). That is because an "intent test provides none" of the "breathing space" that "First Amendment freedoms need … to survive." *Id.* Put differently, "the First Amendment's protections" do not fluctuate with the government's assessment of which "motives" are "worthy"; instead, they "belong to all, including to speakers whose motives others may find misinformed or offensive." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 595 (2023). A contrary rule "could lead to the bizarre result that identical" speech "could be protected speech for one speaker, while leading to criminal penalties for another," simply based on a prosecutor's and jury's evaluation of the speaker's purpose. *Wis. Right to Life*, 551 U.S. at 468 (opinion of Roberts, C.J.).

Of course, the First Amendment applies with full force to speech even where the speaker's intent is deemed to be illegitimate, whether by a prosecutor, legislature, or society. Effective criticism routinely results from people speaking out of anger, frustration, or disdain. But "[d]istressing speech," no matter the motivation behind it, remains "an important and

often valuable part of life." *Mashaud*, 295 A.3d at 1156. Who can know in advance which motives for speaking are "legitimate" or not? Such a standard also poses a serious vagueness problem under the Due Process Clause, but when used in a criminal statute against speech, then it flatly violates the First Amendment.

The risk that speech will be chilled as a result is inevitable in a world where the government posits: "Say nothing at all" or face criminal sanctions. Statutory requirements that the speaker possess the "intent to harass or annoy" do not alleviate the deterrence concerns. See *Dorman* v. *Satti*, 862 F.2d 432, 436 (2d Cir. 1988) ("The term[ ] … 'harass' … do[es] not admit of distinct limiting constructions" and "can mean anything."); see also Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 Hastings L.J. 781, 814 (2013) ("'Intent to harass' is no less vague than 'conduct that harasses.'"). Nor do requirements that speakers lack the "intent of legitimate communication" somehow save the day. See*, e.g.*, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164 (1972) (statutory qualifier "without any lawful purpose or object" may be a "trap for innocent acts"); *Thornhill* v. *Alabama*, 310 U.S. 88, 100 (1940) ("The phrase 'without a just cause or legal excuse' does not in any effective manner restrict the breadth of the regulation; the words themselves have no ascertainable meaning …."). These vague harassment laws, then, "blanket[ ] with uncertainty whatever may be said" while "offer[ing] no security for free discussion." *Wis. Right to Life*, 551 U.S. at 468 (opinion of Roberts, C.J.). Said differently, when the "public perception, or a court's perception, of the … intent" of a speaker is the focal point of a criminal prohibition on speech, that standard is "impermissibly vague and thus ineffective to

vindicate … fundamental First Amendment rights." *Id.* at 492 (Scalia, J., concurring, joined by Kennedy and Thomas, JJ.).

Further, regulations of speech that turn on the speaker's putative intent assume that speakers communicate with a single purpose or, perhaps, that prosecutors and juries are capable of untangling multiple purposes. But one of the reasons a "speaker's purpose can be so hard to accurately identify" is "because multiple purposes are so often intertwined." Eugene Volokh, *The Freedom of Speech and Bad Purposes*, 63 UCLA L. Rev. 1366, 1386 (2016). Dr. Papp's messages illustrate this point. Was she seeking to shame an individual into action? To communicate a sense of urgency? To vent frustration with how a situation was handled? Or did she communicate with some combination of these and other purposes? And, critically here, how is an intent-based statute like Pennsylvania's supposed to tease apart these purposes without focusing on the content of the communications?

To ask this last question is to answer it. Some statutes are "facially content based" in that they "overt[ly]" discriminate against certain kinds of speech. *City of Austin,* v. *Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022). But "subtler forms of discrimination" are content-based too when they "achieve identical results based on function or purpose." *Id.* Such regulations "cannot escape classification as facially content based simply by swapping" out an "obvious" content-based regulation for one that does the same work—and implicates the same First Amendment concerns—via proxy. *Id.*; see also *Reed*, 576 U.S. at 163–64 (explaining that "subtle" distinctions that "defin[e] regulated speech by its function *or*

purpose" are still content-based and "subject to strict scrutiny" (emphasis added)).

That is precisely what Pennsylvania has done with § 2709. The law is a "function-or-purpose statute" that uses a speaker's motivations as a "'proxy' for subject matter," so it "is content-based." *Schrader* v. *Dist. Att'y of York Cnty.*, 74 F.4th 120, 127 (3d Cir. 2023). As Dr. Papp's prosecution demonstrates, § 2709 looks to the content of the speech to assess whether the speaker's motives create criminal liability—*i.e.*, whether the messages show an intent to harass or annoy while revealing the absence of legitimate communicative intent. The Superior Court admitted as much: the "content" of Dr. Papp's "messages was relevant" to "determine if the messages were intended as legitimate communications" and to "determine if [her] intent was to harass, alarm, or annoy." Pet. App. 27a–28a. That is a candid but alarming illustration of how statutory language focused on legitimacy and intent can operate as a proxy to punish speech based on the "content of [its] messages." *Id.*

The statutory requirement that a speaker lack the "intent of legitimate communication" drives home the content-based nature of this criminal law. See § 2709(f). This requirement calls for the prosecutor and jury to assess what the speaker said. But "the First Amendment forbids the government from deciding whether protected speech qualifies as 'legitimate.'" *Marquan M.*, 19 N.E.3d at 487. So try as it may, Pennsylvania cannot disguise its content-based regulation of speech as a content-neutral regulation of conduct.).

C. As applied to plaintiff, Pennsylvania's law is unconstitutional.

The prosecution made clear in its opening statement that § 2709 applied to Dr. Papp because of what she said: "if you don't have anything nice to say, don't say it at all." Pet. App. 53a. This is a case where the state's "generally applicable law" against harassment "was directed at [Dr. Papp] because of what [her] speech communicated." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

Dr. Papp's case involves no physical element, see Pet. App. 75a, or threat of violence. Indeed, it does not even involve communications that lasted more than one day. So this case does not implicate potential state interests that might justify the restriction on her First Amendment rights. Instead, Pennsylvania has criminalized her speech because it has deemed her "communications" to be "of a non-legitimate nature." *Id.* at 28a–29a. That violates the First Amendment.

III. This case is an excellent vehicle for clarifying how the First Amendment applies to laws like Pennsylvania's.

This case is an ideal vehicle to address the question presented. Dr. Papp challenged the law as a content-based regulation of speech at trial, see Pet. App. 85a, on appeal to the Pennsylvania Superior Court, see *id.* at 1a, and in her petition to the state's Supreme Court, see *id.* at 38a. The decision below squarely addressed that argument. This case arises on direct review, thus avoiding complications that sometimes arise on collateral review. And resolution of the question presented does not depend on any disputed facts.

Crucially, this case does not involve complicating issues that would prevent this Court from squarely

addressing how the First Amendment applies to harassing or annoying *speech*. There was no physical element to the dispute between Dr. Papp and the dogs' owner. See Pet. App. 75a. Nor did Dr. Papp threaten him with physical harm. So this case is about pure speech—speech in a parking lot, speech on Facebook, speech by text, and speech by email. It is thus an excellent vehicle for addressing the question presented and providing much-needed clarity about whether legislatures may criminalize speech made with disfavored motives or that the State deems to be "illegitimate."

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

JEFFREY T. GREEN
GREEN LAW CHARTERED LLC
5203 WYOMING ROAD
Bethesda, MD 20816
(240) 286-5686
jeff@greenlawchartered.com

CARTER G. PHILLIPS*
SIDLEY AUSTIN LLP
1501 K STREET, NW
Washington, DC 20005
(202) 736-8000
cphillips@sidley.com

*Counsel of Record

August 27, 2024