

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2013AP000839

In the interest of Kaleb K., a person under the age of 17:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

KALEB K.,

Respondent-Appellant-Petitioner.

BRIEF OF *AMICUS CURIAE*
ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF KALEB K.'S
PETITION FOR REVIEW

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INTEREST OF *AMICUS CURIAE*

The Electronic Frontier Foundation (“EFF”) is a nonprofit public advocacy organization devoted to preserving civil liberties in the digital realm. EFF views the protections provided by the First Amendment as vital to the promotion of a robustly democratic society. This case is of special interest to EFF because it believes that incautiously interpreted “harassment” laws improperly restrict online speech that should receive full First Amendment protections.*

ARGUMENT

I. The Court Should Grant Kaleb’s Petition For Review Because His Petition Presents Real and Significant Questions of Federal Constitutional Law and Because the Court of Appeals’ Decision Conflicts With Controlling Opinions of the United States Supreme Court.

The Court should grant Kaleb K.’s petition for review because his petition presents real and significant questions of federal constitutional law and because the Court of Appeals’ decision conflicts with controlling opinions of the United States Supreme Court. *See* Wis.

* Counsel wishes to thank Samantha Booth, a third year law student at the UCLA School of Law, for her assistance in preparing this brief.

Stat. § 809.62(1r)(a), (d). The Court of Appeals' interpretation of Wis. Stat. § 947.0125(2)(d) makes the statute an unconstitutional content-based speech restriction, and not merely a regulation on conduct.

Section 947.0125(2)(d) makes it a crime to send an electronic message “with intent to . . . abuse another person” that “*uses any obscene, lewd or profane language* or suggests any lewd or lascivious act,” if the sender “reasonabl[y] expect[s] that the person will receive the message” (emphasis added). This is a content-based restriction. If it is read—as the Court of Appeals read it—to cover public speech *about* a person and not just speech privately said *to* a person, then it is unconstitutional.

The Court of Appeals tried to avoid this conclusion by claiming that the law punished not Kaleb's speech, but only Kaleb's “conduct” of “sending” his speech—by posting it on YouTube—“with the ‘intent to frighten, intimidate, threaten, or abuse [his Spanish teacher].’” Yet this cannot be right.

All speech involves some “conduct,” whether sending messages, moving one’s lips, or depositing ink on paper. Most speech involves some intention to bring something about using the speech.

But that cannot justify restrictions that punish speech of a certain content. Punishing a magazine, for instance, for publishing a scurrilous attack on someone cannot be justified by saying that the law is punishing the “conduct” of “sending” magazines “with the intent to offend or excoriate.” Likewise, criminalizing the posting of “lewd or profane” videos cannot be justified by saying that the law merely punishes physical conduct or a bad intention. Indeed, under the Court of Appeals’ logic, a vast range of speech restrictions could be wrongly redefined as conduct restrictions.

To be sure, Kaleb’s rap video might be punishable using some suitably narrow legal rule. It might well lead to discipline by the school, given that schools have some latitude to restrict disruptive speech by their students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507-09 (1969). Similar videos might be found

to contain constitutionally unprotected threats or defamation, though the Court of Appeals did not so find here. But if § 947.0125(2)(d) is read to criminalize publicly posted online speech, it would be unconstitutionally overbroad, regardless of whether Kaleb might have been punished under some other rule. *See Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 957 (1984) (noting that a plaintiff can challenge a substantially overbroad speech restriction even if the state could constitutionally restrict the plaintiff's speech under a narrower law).

A. Section 947.0125(2)(d) Is a Content-Based Speech Restriction.

When a law punishes a person “because of what his speech communicate[s],” the law restricts speech. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010). Even a statute that facially targets conduct is nonetheless treated as a speech restriction if the “conduct triggering coverage under the statute consists of communicating a message.” *Id.* at 2710. This is even more clearly true of a statute like § 947.0125, which ex-

pressly targets speech containing certain content, namely “lewd or profane language.”

Indeed, the U.S. Supreme Court has made clear that laws criminalizing the sending of “indecent” material through computer systems, with a supposedly culpable mental state, are generally unconstitutional content-based speech restrictions. *Reno v. ACLU*, 521 U.S. 844, 868, 871 (1997). *Reno* struck down a statute that criminalized “the knowing transmission of obscene or indecent messages to any recipient under 18 years of age.” *Id.* at 859. Though the statute included mens rea (“knowing”) and conduct (“transmission”) elements, the Court treated it as a content-based speech restriction, since it criminalized certain “messages.” *Id.* at 868. Similarly, *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 803, 812 (2000), held that a law that restricted “sexually-oriented programming” was a content-based speech restriction because it “single[d] out particular programming content for regulation.”

The presence of mens rea and transmission elements in § 947.0125(2)(d)—which the Court of Appeals

describes as “nonspeech elements”—likewise does not change the fact that this statute restricts speech based on its “lewd or profane” content. The statute applied to Kaleb only because of the (indeed lewd) message Kaleb’s rap video communicates. It therefore restricts speech, even though the state must also prove that Kaleb “inten[ded]” to abuse a third party and that the speech was posted online. And just as bans on “indecent” and “sexually oriented” material are content-based speech restrictions, so are bans on “lewd” material.

Likewise, bans on “profane” material are content-based speech restrictions as well. This is true if “profan[ity]” means vulgarity, as *Cohen v. California*, 403 U.S. 15 (1971), makes clear. The Supreme Court in *Cohen* reversed a conviction for the public display of a profane word, noting that “the State certainly lacks power to punish Cohen for the underlying content of the message [his jacket] conveyed.” *Id.* at 18. The Court has since made clear that it views *Cohen* as involving a content-based restriction. *See, e.g., Playboy Entm’t Group, Inc.*, 529 U.S. at 813 (citing *Cohen* in discussing how

“content-based speech restriction[s]” aimed at offensive speech are treated). Alternatively, if “profane” is viewed as meaning religiously blasphemous, that too would be a content-based classification. *See, e.g., City of Bellevue v. Lorang*, 992 P.2d 496, 501 (Wash. 2000) (rejecting the view that a ban on “profane” speech could be subject to lower scrutiny as a content-neutral restriction).

Nor can this facially content-based restriction be treated as content-neutral under the “secondary effects” doctrine, for instance on the theory that § 947.0125(2)(d) is aimed at the impact of the speech on the listener, rather than at the speech itself. “[T]he emotive impact of speech on its audience is not a ‘secondary effect’ unrelated to the content of the expression itself.” *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (internal quotation marks omitted). “Listeners’ reaction to speech is not a content-neutral basis for regulation.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Indeed, the constitutional protection of speech against content-based restrictions is fully applicable to deliberately emotionally distressing speech. *Snyder v.*

Phelps, 131 S. Ct. 1207, 1212 (2011) (concluding that public speech was protected against liability for intentional infliction of emotional distress, even if the speech consisted of “outrageous” bigoted speech that coincided with a funeral and inflicted severe emotional distress on a grieving family); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 46, 50 (1988) (concluding that speech in a magazine was protected against liability even when the speech was “gross and repugnant” and “intended to inflict emotional injury” on its target).

The Court of Appeals’ contrary analysis rests on its misreading of *In re Douglas D.*, 2001 WI 47, 243 Wis. 2d 204, 626 N.W.2d 725. As *Douglas D.* noted, “in some circumstances words carry with them proscribable nonspeech elements,” such as “the nonspeech element of excessive volume,” which may justify restrictions on “unreasonably loud” speech. *Id.* ¶ 24. But this statement refers to content-neutral restrictions, which focus on matters unrelated to the communicative impact of the speech. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (suggesting that the excessive noise of

“a noisy sound truck” is a “‘nonspeech’ element of communication”).

Douglas D. also used “nonspeech element” to refer to refer to the constitutionally unprotected features of certain speech, such as fighting words or threats. *Douglas D.*, 243 Wis. 2d 204, ¶ 17 (citing *R.A.V.*, 505 U.S. at 386). As *R.A.V.* noted, “the exclusion of ‘fighting words’ from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a ‘nonspeech’ element of communication.” 505 U.S. at 386.

But *Douglas D.*’s statements about nonspeech elements do not apply to *content-based* speech restrictions that cover speech *outside any First Amendment exception*—whether the restriction is on “indecent” speech as in *Reno*, “sexually-oriented” speech as in *Playboy*, or “lewd or profane” speech as in § 947.0125(2)(d). Neither the speaker’s intent nor the electronic distribution of the speech constitutes a punishable “nonspeech element.” “[When] the conduct triggering coverage under

the statute consists of communicating a message[,] . . . the Court ‘must [apply] a more demanding standard’” than the one regulating nonspeech elements. *Holder*, 130 S. Ct. at 2710.

Section 947.0125(2)(d), by its very terms, restricts “lewd or profane” messages, specifically because of the content of the transmitted messages and the communicative impact the speaker intends them to have. This section is therefore a content-based speech restriction and as such is presumptively unconstitutional. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

B. Section 947.0125(2)(d), as Interpreted by the Court of Appeals, Cannot Be Justified by Analogy to Telephone Harassment Law.

By holding that Kaleb’s posting of his rap video on YouTube qualifies as “send[ing] a message” for § 947.0125(2)(d) purposes, the Court of Appeals read the statute as banning not only private offensive speech *to* another person, but also offensive speech said to the public *about* that person. Yet such a reading would make the statute unconstitutionally overbroad.

Courts have generally upheld telephone harassment statutes that ban certain offensive phone calls, concluding that speech made solely to an unwilling listener lacks First Amendment value. *See, e.g., United States v. Lampley*, 573 F.2d 783, 787 (3d Cir. 1978); *City of Montgomery v. Zgouvas*, 953 So. 2d 434, 443 (Ala. Crim. App. 2006). But this First Amendment exception for offensive one-on-one communications cannot be extended to cover offensive speech to the general public, which (unlike offensive phone calls) may well find receptive listeners.

Indeed, the United States Supreme Court has consistently rejected listener offense as a justification for restricting speech to the public, including when the speech causes a private figure severe distress. *E.g., Snyder*, 131 S. Ct. at 1219. Such distressing speech is protected even when it is vulgar and motivated by “hatred” toward its target. *Hustler*, 485 U.S. at 53.

Yet, as interpreted by the Court of Appeals, § 947.0125(2)(d) would criminalize the very kinds of speech that *Hustler* and *Snyder* found to be constitution-

ally protected. Section 947.0125(2)(d) bans not only constitutionally unprotected obscenity (as defined by *Miller v. California*, 413 U.S. 15, 24-25 (1973)), but also speech containing “lewd or profane” language. Nor is it limited to vulgar speech about schoolteachers, or even to vulgar speech that lacks a political dimension.

Thus, the law as interpreted by the Court of Appeals could have criminalized the vituperation against Jerry Falwell involved in *Hustler v. Falwell*, which was “lewd or profane,” was seen by Falwell, and was likely “inten[ded] to abuse or harass.” And the law could have criminalized much online speech about the Monica Lewinsky or Anthony Weiner scandals, if such speech contained “lewd or profane” language, was likely to be read by its subjects, and was found by a jury to be “inten[ded] to abuse or harass.” The law would also cover lewd or profane political cartoons and caricatures, which often exploit “embarrassing events” involving public figures in a “slashing and one-sided” manner and are “often calculated to injure the feelings of the subject of the portrayal.” *Hustler*, 485 U.S. at 54 (noting that

harsh cartoons are protected, in a case that itself involved “lewd or profane” language).

Nor is the law as interpreted by the Court of Appeals sufficiently narrowed by the requirement that the speech be “inten[ded] to abuse or harass.” First, much harsh criticism, such as the speech in *Hustler*, could be seen by a prosecutor, judge, or jury as intended to abuse or harass. And in any event, the fact that the language of § 947.0125(2)(d)—a criminal statute—could reasonably cover these scenarios implicates the core concern of the overbreadth doctrine: that a broadly worded law will chill a substantial amount of constitutionally protected speech. The risk of criminal liability “may well cause speakers to remain silent rather than communicate *even arguably* unlawful words, ideas, and images.” *Reno*, 521 U.S. at 872 (emphasis added).

Second, with respect to speech to the general public, there is “no categorical rule that divests ‘harassing’ speech . . . of First Amendment protection.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210 (3d Cir. 2001) (Alito, J.). “Indeed, ‘the point of all speech pro-

tection . . . is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Snyder*, 131 S. Ct. at 1219 (citation omitted). "[E]ven when a speaker or writer is motivated by hatred or ill will his expression [is] protected by the First Amendment." *Hustler*, 485 U.S. at 53.

Indeed, similar statutes—when read to cover public speech about people and not just private speech to them—have already been applied by prosecutors to political speech. In 2011, for example, a Washington prosecutor alleged that an anonymous cartoonist, who had posted video cartoons parodying the local police department, violated a law that was very similar to Wis. Stat. § 947.0125(2)(d). *In re King County Search Warrants 11-1172*, No. 11-2-12056-2 KNT (Wash. Super. Ct. July 28, 2011).¹

Like § 947.0125(2)(d), the Washington law criminalized "mak[ing] an electronic communication to [another] person or a third party" "with intent to harass, in-

¹ This document is available at <http://www.law.ucla.edu/volokh/crimharass/61571607-Renton-Parody-Doc1-8.pdf>.

timidate, torment, or embarrass [that] other person” “[u]sing any lewd, lascivious, indecent, or obscene words, images, or language.” Wash. Rev. Code Ann. § 9.61.260. Claiming the statute was violated because the video alluded to alleged on-duty sexual conduct by certain police officers, the prosecutor secured a search warrant to uncover the speaker’s identity. Declaration of City of Renton Police Chief Kevin Milosevich, *In re King County*, No. 11-2-12056-2 KNT (Wash. Super. Ct. Aug. 16, 2011).² Only following a public outcry was the warrant ultimately withdrawn and the investigation stopped. See Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 Nw. U. L. Rev. 731, 734 (2013).

Around the same time, William Cassidy was prosecuted in federal court for posting derogatory and sometimes vulgar Twitter messages about a particular American Buddhist leader. *United States v. Cassidy*, 814 F. Supp. 2d 574, 578-79 (D. Md. 2011). Cassidy

² This document is available at <http://www.volokh.com/wp-content/uploads/2012/06/Renton-Declarations.pdf>.

was indicted for violating a federal statute that made it a crime to, “with the intent . . . [to] harass, or intimidate, or cause substantial emotional distress to a person . . . use[] . . . any interactive computer service . . . to engage in a course of conduct that causes substantial emotional distress to that person.” *Id.* at 580-81. A court ultimately dismissed the indictment on the grounds that the statute unconstitutionally attempted to criminalize public speech about the target, rather than focusing only on private speech said just to the target. *Id.* at 585-86, 588.

Also in 2011, Philip Speulda, a city council candidate in New Jersey, distributed a flyer about his opponent, Robert Van Deusen, that used a photo Speulda found on the Internet depicting Van Deusen in a hot tub with two other men. The flyer was intended to suggest either that Van Deusen was gay or that he lacked judgment by posting such a photo of himself online, even as a joke. Kristie Cattafi, *Harassment Charges Dismissed Against Hawthorne Primary Candidate*, *Gazette* (Hawthorne, N.J.) (Oct. 6, 2011).

The police then issued Speulda a summons for criminal harassment under N.J. Stat. § 2C:33-4 (2005), on the grounds that the flyer was distributed with a “purpose to harass” and that it was “likely to cause annoyance or harm.” *See* Complaint-Summons, *State v. Speulda*, No. 1604-S-2011-000159 (Hawthorne Bor. Mun. Ct. June 9, 2011).³ Though charges were dismissed a few months later, no precedent was set to foreclose a similar prosecution under that same statute in the future.

These examples are by no means exhaustive, but they demonstrate the danger posed by overbroad anti-harassment laws like § 947.0125(2)(d). Indeed, the very presence of potentially broad restrictions on speech to the public can deter people from speaking: Most people would rather avoid arrest or prosecution even if they think that, at trial or on appeal, they can ultimately raise a good First Amendment defense. It is therefore especially important for this Court to consider the constitu-

³ This document is available at <http://www.volokh.com/wp/wp-content/uploads/2011/07/speuldacomplaint.pdf>.

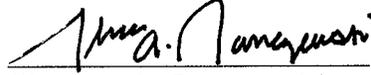
tionality of § 947.0125(2)(d), as it has been interpreted by the Court of Appeals, and to clarify that speech to the public about people is constitutionally protected even when it contains “lewd or profane language.”

CONCLUSION

The Court of Appeals’ opinion made two errors of constitutional magnitude. First, it failed to recognize that § 947.0125 is a content-based speech restriction, rather than a mere conduct regulation. Second, its interpretation of § 947.0125 as covering public speech about people would make § 947.0125 unconstitutionally overbroad. This case thus merits review by this Court.

Dated this 31st day of January, 2014.

Respectfully submitted,



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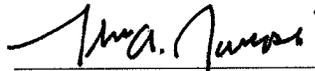
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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rules 809.19(7), 809.19(8)(b) and 809.62(4) in that it is in a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,968 words.

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**CERTIFICATION OF COMPLIANCE WITH
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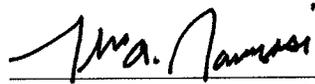
I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certification has been served with the paper copies of this petition filed with the court and served on opposing parties.

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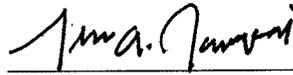
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CERTIFICATION OF THIRD-PARTY DELIVERY

I certify that on January 31, 2014, Nonparty Electronic Frontier Foundation's Motion for Leave to File a Brief Amicus Curiae in Support of Kaleb K.'s Petition For Review and proposed Brief of Amicus Curiae Electronic Frontier Foundation in Support of Kaleb K.'s Petition For Review were delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within 3 calendar days. I certify that on January 31, 2014, I caused to be served by First Class Mail three copies Nonparty Electronic Frontier Foundation's Motion for Leave to File a Brief Amicus Curiae in Support of Kaleb K.'s Petition For Review and proposed Brief of Amicus Curiae Electronic Frontier Foundation in Support of Kaleb K.'s Petition For Review upon all parties to the Petition. I further certify that the motion and brief were correctly addressed.

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