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

GIBSON BROS., INC., et al.

Plaintiffs-Appellees/Cross-Appellants,

-vs.-

OBERLIN COLLEGE, et al.

Defendants-Appellants/Cross-Appellees.

Case Nos.: 19CA011563 and 20CA011632
(Consolidated)

Appeal from Lorain County
Court of Common Pleas,
Case No. 17CV193761

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE AMICUS BRIEF OF THE FIRST AMENDMENT SCHOLARS

I. PRELIMINARY STATEMENT

The First Amendment Scholars ("Amici")[1] cite to no facts in the record in their Motion and proposed Brief, except one exhibit containing defamatory statements [Brief, p. 18]. Otherwise ignoring the record and alleging facts only "***as Amici understand the record***" [Brief, p. 10], Amici mischaracterize this case as involving only student speech, falsely alleging that only the Oberlin students published statements at issue [*Id.*]. But the record actually shows that the jury decided this case based solely on the affirmative publications of defamatory statements by Oberlin College and Dean Raimondo[2] (continuing for more than a year) about the Gibsons[3] after the Gibsons pursued their rights to prevent shoplifting from their bakery.

[1] The Amici are a group of university, college, law school, journalism school and others who have written about the First Amendment, a true and accurate copy of the list of whom is attached hereto as **Exhibit 1**.

[2] Defendants-Appellants, Oberlin College and Dean Raimondo, are sometimes hereinafter referred to as "Oberlin Parties."

[3] The "Gibsons" means Cross-Appellants Gibson Bros., Inc. ("Gibson's Bakery"), Lorna Gibson, Executor of the Estate of David R. Gibson, Deceased ("David Gibson"), and Allyn W. Gibson ("Grandpa Gibson").

In fact, after more than 5 weeks of trial, the jury found the Oberlin Parties responsible for committing three torts against the Gibsons—they libeled the Gibsons, they tortiously interfered with the Gibsons' business relationships, and they intentionally inflicted emotional distress on the Gibsons.

Amici contradict their own recent prior amicus brief, arguing the other side of the case that they are presenting here. One of Amici recently articulated in this Amicus Brief filed in 2018 the balanced presentation of the "twin considerations of protection of speech and protection of reputation." Amicus Brief of First Amendment and Media Law Scholars, filed on June 19, 2018 in *Gilmore v. Jones*, Case No. 3:18-cv-00017-NKM pp. 1[4]. There, Amicus advised the court that "there is no constitutional value in knowing or malicious false statements of fact," that "protection of reputation is an important societal interest," that "[d]efamation law seeks to protect both public and private figures from malicious lies, which debase our entire system of free expression," and that "[w]ithout defamation law, public discourse 'would have no necessary anchor in truth.'". *Id.*, pp. 3-6.

In their 2018 brief, Amici recognize the critical role that defamation law still must play in protecting reputation and protecting individuals against malicious lies which otherwise undermine our entire system of free speech. *Id.* And this is exactly what the jury in this case understood and considered when they rendered their verdicts against the Oberlin Parties.

Here, Amici proffer that the unique perspective they offer to assist the Court is the body of First Amendment scholarship that they possess (Motion, p. 1). Yet, Amici either do not know or they ignore the facts in the record, and they present a skewed First Amendment/defamation

[4] A true and accurate copy of the Amicus Brief of First Amendment and Media Law Scholars, filed on June 19, 2018 in *Gilmore v. Jones*, Case No. 3:18-cv-00017-NKM is attached hereto as **Exhibit 2**.

law analysis, ignoring that First Amendment/defamation law protects both speech and reputation. Their skewed version of the facts and law shows that Amici are really only friends of the Oberlin Parties and not friends of the Court.[5]

II. LAW AND ANALYSIS

A. Amici mischaracterize the defamatory statements at issue as the students' statements and also falsely allege that the statements by the Oberlin Parties were not made with actual malice.

Amici's entire brief is premised on facts not in the record. Amici falsely allege as fact that there was only student speech so the Oberlin Parties could hardly have published defamatory statements with actual malice/knowing the defamatory statements were false or with reckless disregard for whether they were false or not [Brief, p. 10 and 20].

First, this is simply part of the "counter-narrative" about this case discussed by former Oberlin Professor, Roger Copeland, in his September 2017 letter to the Editors published in *The Oberlin Review*, and headlined, *Gibson's Boycott Denies Due Process*" [Pl. Tr. Ex. 212]:

> The facts of this case are no longer in question. And yet, a counter-narrative has taken hold, one that refuses to allow mere "facts" to get in the way . . . . At what point do you accept the empirical evidence, even if that means having to embrace an "inconvenient" truth?

This counter-narrative permeates Amici's brief.

Second, although Amici urge that Oberlin College, in order to safeguard academic freedom, has a First Amendment based *right* to facilitate any speech, even speech that defames the Gibsons, with impunity, Amici readily admit elsewhere that the law of defamation (even after constitutionalization) exists to protect both public and private figures from malicious lies, which

[5] An *amicus curiae* is to be a friend of the court, not a friend of a party. *United States v. State of Michigan*, 940 F.2d 143, 164-65 (6th Cir.1991).

debase our entire system of free expression, and they admit that without defamation law, public discourse would not have its necessary anchor in truth. [*See infra,* Section II.C. 4]

Third, contrary to Amici's counter-narrative, the actual trial evidence demonstrates that Dean Raimondo and other Oberlin College employees published the defamatory statements at issue with actual malice. Numerous witnesses testified that Dean Raimondo and other Oberlin College administrators handed out stacks of the defamatory flyer that falsely accused the Gibsons of: (1) being a racist establishment with a long account of racial profiling and racial discrimination; and (2) accusing the owners of Gibson's Bakery (Grandpa Gibson and David Gibson) of committing the crime of assault. The testimony shows that the Oberlin administrators engaged in physically threatening activity, including blocking people from taking pictures of the demonstration, and that they published the defamatory statements with actual malice. Further, the Oberlin Parties continued their defamatory statements for more than a year, even beyond the date when the three students at issue plead guilty to the shoplifting charges and admitted in open court that their detention and arrest had nothing to do with racial discrimination or racial profiling [Tr. Trans. Vol. III, P. 78-79]:

a. Oberlin College placed Dean Raimondo, and other top administrators including Special Assistant to the President for Community and Government Relations Tita Reed and Oberlin College Vice President of Communications Ben Jones, officially in charge of the off-campus demonstrations against the Gibsons as the representative of Oberlin College. [M. Krislov Dep. Vol. I, pp. 150-151][6]
b. Oberlin College employees published the statements in the defamatory flyer;
    a. Reporter, Jason Hawk, testified as follows:
        i. Dean Raimondo approached him outside of Gibson's Bakery on November 10, 2016 and Mr. Hawk identified himself as a newspaper reporter.
        ii. Dean Raimondo directed a student to retrieve a defamatory flyer.

[6] This section of President Krislov's deposition testimony was played for the jury during trial. [Tr. Trans. Vol. III, p. 176]. The excerpts played for the jury can be found at Pl. Tr. Ex. 460. [See, Tr. Trans. Vol. XII, pp. 13-14]. President Krislov's deposition was filed with the trial court on March 15, 2019 and is part of the record on appeal.

iii. The student followed this direction and retrieved the flyer and handed it to Dean Raimondo.
iv. Dean Raimondo herself published/gave a copy of the flyer to local newspaper reporter, Jason Hawk, after he told her that he was a reporter with the *Oberlin News-Tribune*.
v. Dean Raimondo certainly knew when she handed the libelous statements to a news reporter that the libelous statements about the Gibsons would be spread far and wide through the media. [Tr. Trans. Vol. III, p. 97-105].

c. Dean Raimondo distributed a ***stack*** of copies of the defamatory flyer to the public in front of Gibson's Bakery. [Tr. Trans. Vol. V, pp. 178-79].
d. Julio Reyes, an Oberlin College employee (the Assistant Director of the College's Multicultural Resource Center) who reported to Dean Raimondo, had a ***stack of the defamatory flyers and was passing them out to the public in front of Gibson's Bakery***. [Tr. Trans. Vol. IV, pp. 15-18]. Further, at trial, Richard McDaniel (a 38-year resident of Oberlin who had served as Oberlin College's Director of Security from 1980-1995) testified that Mr. Reyes had a stack of the defamatory flyers and handed Mr. McDaniel one of them. [Tr. Trans. Vol. IV, pp. 4, 15-19]. Like Dean Raimondo, Reyes also attempted to physically prevent the public from photographing the scene. [*Id*.] McDaniel testified that Reyes became combative and physically threatening. [*Id*.] Reyes repeatedly stated, "I'm with the College." [*Id*.] When Sergeant Victor Ortiz approached to ask if there was a problem, Reyes turned away and headed back in the direction of Dean Raimondo who was speaking on the bullhorn. [*Id*.] Sergeant Ortiz confirmed witnessing Mr. Reyes' combative and obstructive conduct with Mr. McDaniel. [Tr. Trans. Vol. III, pp. 156-157].
e. Numerous witnesses testified that Dean Raimondo was actively directing and orchestrating the defamation activity using a bullhorn. [See, Tr. Trans. Vol. IV, p. 28; Tr. Trans. Vol. III, p. 111; Tr. Trans. Vol. V, pp. 178-179, 190; Tr. Trans. Vol. VI, pp. 6-7].
f. While using the bullhorn, Dean Raimondo directed that more copies of the defamatory flyer could be made at College administration offices. [Tr. Trans. Vol. V, pp. 178-179].
g. For ***more than a year***, Dean Raimondo and Oberlin College published a copy of the defamatory resolution at a prominent location in an Oberlin College administrative building that continued after the students pled guilty and admitted that racism played no part in this case. [See, Pl. Tr. Ex. 35; Tr. Trans. Vol. IV, p. 55; M. Krislov Dep. Vol. I, pp. 210-211].[7]
h. The jury saw documentary evidence that Dean Raimondo approved the use of Oberlin College funds to purchase gloves for the protesters so they would stay warm enough to continue distributing the defamatory Flyers. [Pl. Tr. Ex. 74].
i. The trial testimony also shows that the Oberlin Parties published the defamatory statements at issue with reckless disregard for their truth or falsity (actual malice):

[7] *See supra*, fn. 6.

i. Oberlin College President Marvin Krislov testified that labeling someone as a racist is one of the worst things that can be done to a person. [Tr. Trans. Vol. XIV, p. 179].[8]

ii. Oberlin College Chief of Staff, Ferdinand Protzman, testified that no one in the Oberlin administration thought the Gibsons were racists [Tr. Trans. Vol. III, p. 23].

iii. Special Assistant to the President Tita Reed testified at trial that she, as a person of color, had never experienced any racism from David Gibson or Gibson's Bakery in the 25 years she had lived in Oberlin [Tr. Trans. Vol. III, p. 75-76].

iv. President Marvin Krislov also testified that prior to November 2016 and during his 10 year tenure at Oberlin College, he had never heard any complaints or accusations about racial profiling by the Gibsons. [Krislov Depo. Vol. 1, pp. 105-6].[9]

v. Oberlin College administrators completely ignored numerous communications from alumni and community members, some of whom were persons of color, that supported the Gibsons and informed the College that the Gibsons do not have a history of racial profiling or discrimination. [See, Pl. Tr. Exs. 111, 134, 161, and 485]. These communications were either ignored or the senders were outright ridiculed with V.P. Ben Jones even calling those who defended the Gibsons "***idiots***." [See, Pl. Tr. Ex. 134].

vi. At the time of the shoplifting incident, the Oberlin Parties were aware that their students had a shoplifting culture and that the students would shoplift from downtown establishments such as Gibson's Bakery and from campus establishments as well [Tr. Trans. Vol. V, pp. 80-81; Pl. Tr. Ex. 37].

vii. When Oberlin College top administrators received an email on November 10, 2016, from Oberlin College employee, Emily Crawford that numerous persons of color in the community did not believe that Gibsons were racists and that this was misplaced anger, top administrator Title Reed replied, ***"Doesn't change a damn thing for me"*** [Pl. Tr. Ex. 63].

viii. Dean Raimondo was well aware that the owners of Gibson's Bakery did not commit an assault as the defamatory flyer claimed. Former Oberlin Police Sergeant Victor Ortiz testified that he explained the circumstances and charges related to the arrest of the three students to Dean Raimondo on November 9, 2016, the day before the flyer was handed out. [Tr. Trans. Vol III, pp. 149-150]. Yet, Dean Raimondo refused to issue a correction or a retraction.

j. The jury saw many of Oberlin College and Dean Raimondo's internal communications and heard testimony of their actions that showed hatred, ill will, and a spirit of revenge toward the Gibsons and anyone that tried to support them including alumni, longtime members of the community, and even professors, such as the following:

i. "I hope we rain fire and brimstone on that store." [Pl. Tr. Ex. 206].

[8] *See supra*, fn. 6.
[9] *See supra*, fn. 6.

ii. Referring to people complaining about the College hurting a small local business as "idiots." [Pl. Tr. Ex. 134].
iii. Saying: "Fuck em…they've made their bed now…" when Gibsons did not "drop charges" against student shoplifters [*Id*.].
iv. Roger Copeland, a distinguished theater professor of Oberlin College, wrote in the campus newspaper that: "The time has come for the Dean of Students, on behalf of the College, to apologize to the Gibson family for damaging not only their livelihood but something more precious and difficult to restore—their reputation and good standing in the community." Dean Raimondo was sent a copy of the article by Vice President of Communications Ben Jones with a text message saying "FUCKING ROGER COPELAND". [Pl. Tr. Ex. 211]. In response, Dean Raimondo agreed and said "Fuck him" and contemplated "unleashing the students" again. [*Id.*]
v. When she heard ***the truth*** (*i.e*., persons of color throughout the town saying they were embarrassed and disgusted by the College's treatment of the Gibsons who were the "wrong target", not racist, and simply victims of a crime), Oberlin College administrator Tita Reed evidenced her knowing disregard of the truth when she responded: ***"doesn't change a damned thing for me."*** [Pl. Tr. Ex.63].
vi. When Oberlin Professor Kirk Ormand told President Krislov, Dean Raimondo, and Special Assistant Tita Reed that shoplifting perpetrated by students needs to be addressed, Dean Raimondo says, "I'm so sick of Kirk." [Pl. Tr. Ex. 86].

B. **Standard of Review.**

The decision to permit amicus curiae is a matter of judicial discretion. *State v. Ioannidis*, 3rd Dist. Allen No. 1-86-52, 1987 WL 13130 at *15 (June 18, 1987). A motion for leave to file an amicus brief must identify the applicant's interest and explain why such a brief is desirable, given the briefing to be submitted by the parties. App.R. 17. An amicus curiae's function is to assist "the court on matters of law about which the court is doubtful." *City of Lakewood v. State Emp't Relations Bd.*, 66 Ohio App.3d 387, 394, 584 N.E.2d 70 (8th Dist.1990). Importantly, ***an amicus curiae is to be a friend of the court, not a friend of a party***. *United States v. State of Michigan*, 940 F.2d 143, 164-65 (6th Cir.1991).

C. Amici's "aiding and abetting" arguments were not preserved for appeal and ignore the facts in the record.

1. *The Oberlin Parties did not preserve the alleged "aiding and abetting" jury instruction errors.*

The Oberlin Parties failed to make specific objections to the aiding and abetting jury instruction either (a) based on the definition of aiding and abetting; or (b) based on any overbreadth, void for vagueness, or academia immunity, and therefore none of these alleged errors were preserved. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 32 (2000); *Cox v. Cox*, 2009-Ohio-1446, para. 10-13 (no specific objection made so jury instructions in connection with defamation action not preserved). There was no discussion or objection at all as to overbreadth, vagueness, or academia immunity concerning the aiding and abetting instruction. When the Gibsons identified their requested language, the Oberlin Parties' ***only objection*** was that the "correct" definition was already contained in the instructions [June 6, 2019, Tr. Trans., p. 16]. But aiding and abetting was not defined in the instruction. Thus, this sole objection is not specific and has no basis. Later during the hearing on jury instructions, the Gibsons provided a definition based on *Black's Law Dictionary*, and the Oberlin Parties did not offer any objection on the record. [*Id.*, p. 42]. Thus, none of the objections at issue has been preserved for appeal.

2. *Even if preserved (and they were not), Amici's intentional or negligent mischaracterization of the facts corrupts their jury instruction arguments.*

In their aiding and abetting argument, Amici falsely allege that the Oberlin Parties did not defame the Gibsons and that only the students published the statements at issue [Brief, p. 10]. Yet the evidence in the record shows that the jury held the Oberlin Parties responsible for their own independent tortious conduct that destroyed Gibson's Bakery and smeared the Gibson's name and reputation, ***including actively passing out stacks of the defamatory flyer***.

And ***any Oberlin Parties'*** aiding and abetting activity consists again of their ***affirmative actions to continue the publication of the false and defamatory statements by others***—for example, testimony by multiple witnesses that Dean Raimondo directed and orchestrated the defamation efforts using a bullhorn [Tr. Trans. Vol IV, p. 28; Tr. Trans. Vol. III, p. 111; Tr. Trans. Vol. V, pp. 178-79, 190; Tr. Trans. Vol. VI, pp. 6-7] and that Dean Raimondo directed the making of additional copies of the defamatory flyer at Oberlin College Administration Offices [Tr. Trans. Vol. V, pp. 178-79]. Had Amici read the record, they would know that their stated concern that aiding and abetting could include simply a "thumbs up" or saying, "be quiet," does not exist on this record—instead, at issue was the Oberlin Parties' affirmative conduct to procure others to also publish the defamatory statements.

3. Amici ignore Ohio law.

Compounding their factual errors, the Amici either are not aware of or just completely ignore applicable Ohio law demonstrating that the aiding and abetting instruction is a correct statement of Ohio law and appropriate on the facts at hand. The Ninth District has held: "Any act by which the defamatory matter is communicated to a third party constitutes publication." *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 743. For purposes of publication of defamatory materials, "any act" includes aiding and abetting:

> As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication. Hence, one who requests, ***procures, or aids and abets*** another to publish defamatory matter is liable as well as the publisher.

Cooke v. United Dairy Farmers, Inc., 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶25 (citations omitted) (emphasis added). *See also, Murray v. Knight-Rider, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶104 ("a person who requests, procures, or aids or abets in the publication of defamatory matter is liable."). The Oberlin Parties themselves even tried to

submit their own aiding and abetting instruction [Defs.' Proposed Jury Instructions June 4, 2019, p. 11].

Finally, even if the aiding and abetting instruction were incorrect (and it is not), any error was harmless error because the Gibsons submitted substantial evidence of Oberlin College administrators, including Dean Raimondo and Julio Reyes, actually distributing the copies of the defamatory flyer at the protests. Thus, the trial court's aiding and abetting instructions was a proper statement of Ohio law.

4. ***The Court should not adopt academia immunity or privilege—Amici's prior judicial filing confirms the need for the anchor of truth***

Amici propose that because college campuses are "peculiarly the marketplace of ideas" that institutions of higher education should have a First-Amendment based *right* for their own speech and to encourage, assist, and facilitate their students speaking, including defamatory speech [Brief, p. 14]. But this is not the law. And Amici's prior brief shows that they know that protection of free speech cannot trample all other values or our free society will devolve into chaos without anchoring free speech to the truth. Amici know that defamation law exists to protect public and private figures from malicious lies such as those in the case at hand, which would repudiate our entire system of free expression. There is simply no social value in permitting the falsehoods that have harmed the Gibsons' reputation and their bakery to stand.

As one of the Amici has articulated in an Amicus Curiae brief filed in June 2018 and in a separate law review article:

> Indeed, defamation law creates and enforces social boundaries about what speech is and is not acceptable. It "exists not merely to validate the dignitary interests of individual plaintiffs" but also "helps to make meaningful discourse possible," and "gives society a means for announcing that certain speech has crossed the bounds of propriety" . . . . Defamation law seeks to protect both public and private figures from malicious lies, which debase our entire system of free expression" . . . . Without defamation law, public discourse "would have no necessary anchor in truth."

Amicus Brief of First Amendment and Media Law Scholars, filed on June 19, 2018 in *Gilmore v. Jones*, Case No. 3:18-cv-00017-NKM pp. 3-5 (citations omitted)[10]; Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace,* 49 Duke L.J. 855, 885-86 (2000) (citing Robert C. Post, Constitutional Domains (1995); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution,* 74 Cal. L. Rev. 691, 713 (1986).

And both the United States Supreme Court and the Ohio Supreme Court warn against such privileges. In *Gertz,* a case relied on by Amici and the Oberlin Parties, the United States Supreme Court warned against "absolute protection for the communications . . . [which] requires a total sacrifice of the competing value served by the law of defamation. The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood. We would not lightly require the State to abandon this purpose, for, as Mr. Justice Stewart has reminded us, the individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.'" *Gertz v. Robert Welch, Inc*., 418 U.S. 323, 341 (1974). In *Lansdowne*, the Ohio Supreme Court quoted this same passage from *Gertz* with approval and also quoted the Ohio Constitution reminding us that "Every citizen may freely speak, write, and publish his sentiments on all subjects, *being responsible for the abuse of that right; . . . .* " (emphasis in original). *Lansdowne v. Beacon Journal Pub. Co*., 32 Ohio St.3d 176, 179-180 (*citing* Ohio Constitution, Article I, Section 11) Moreover, these courts have consistently recognized that "[T]here is no constitutional value in false statements of fact." *See, e.g., Gertz,* at 340.

Critically, the lone case cited by Amici does not even create a privilege that would protect defamatory academic speech. The 1967 *Keyishian* case cited did not involve any claims of defamation. *Keyishian v. Bd of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 603 (1967). In *Keyishian,* the Supreme Court ruled that requiring loyalty oaths in exchange for state

[10] *See supra*, fn. 4.

employment was unconstitutional. Faculty members at the State University of New York challenged a regulation designed to eliminate "subversive" voices by preventing the employment or retention of such persons. The Court held that the imprecise regulation at issue violated the First Amendment but did not grant an academia privilege for defamation.

5. ***Amici's overbreadth and void for vagueness analyses have not been applied to jury instructions and are not warranted on the facts at issue.***

The jury instruction at hand does not even fall within Amici's overbroad or a void for vagueness analysis. First, both doctrines are really only applicable to whether statutory provisions or injunctions are vague or overbroad because they can be prior restraints on all future speech. Defamation cases that apply these concepts are cases reviewing statutory defamation actions or injunction situations where the language is a prior restraint and it is difficult to fashion language to fit to all future situations. The Gibsons have found no case applying either doctrine to a jury instruction. And this makes sense as the jury instruction in the case at hand is not mandatory in any future court cases. The jury instruction was case specific, and it does not act as prior restraints as do statutes and injunctions.

Moreover, neither doctrine is applicable to the facts at hand—again because this is a case about the Oberlin Parties' own affirmative defamatory statements and their affirmative aiding and abetting activity that ensured continued publication of the defamatory statement that the Oberlin Parties were making. The Oberlin Parties' aiding and abetting conduct was not akin to the extreme situations posed by Amici of simply giving a thumbs up sign or saying, "be quiet." [Brief, p. 12].

Amici's overbroad analysis directs the Court to a lone case that does not even deal with defamation in which a bookstore proprietor was convicted for violating a statute prohibiting persons from knowingly promoting a sexual performance by a child under the age of 16 by

distributing material which depicted such a performance. *New York v. Ferber,* 458 U.S. 747, 769-70 (1982). The Court applied the overbreadth doctrine only to a statute and directed that overbreadth analysis should only be used when *facial invalidation of the statute is truly warranted and then "only as a last resort" and only when truly related to First Amendment issues*. *Id.* On the facts at hand there is simply no overbreadth issue before the Court. And this Court, like the United States Supreme Court, should not apply this "last resort" doctrine in this case where it is not warranted, and not truly related to First Amendment issues.

For the same reasons, Amici's suggested void for vagueness argument is also inapplicable. Amici again borrow this doctrine from a case analyzing that the anti-noise ordinance at issue was not void for vagueness and did not impermissibly abut on sensitive areas of basic First Amendment freedoms. *Grayned v. City of Rockford,* 408 U.S. 104, 108-109. Likewise, this doctrine is not applicable in this case where the facts also show that this is not a First Amendment case but a case where the Oberlin Parties were held liable for their own affirmative publications of defamatory statements about the Gibsons.

D. Amici's attempt to re-analyze whether the defamatory statements are actionable is totally undermined because they simply duplicate the Oberlin parties' argument and reargue how the law applies to their counter-narrative of facts.

1. *Amici base their analysis on a false narrative of the facts and simply duplicate the Oberlin Parties' opinion/fact analysis.*

Amici's entire brief is based on the false claim that the speech at issue is the speech of students. They then repeat and reargue one of the arguments made by the Oberlin Parties' in their appellate brief—that the defamatory flyer and the resolution are protected opinion, which is not the role of an amicus brief. *Ryan v. Commodity Futures Trading Com'n,* 125 F.3d 1062, 1063-64 (7th Cir 1997) (Chief Judge Posner) ("**we judges should be assiduous to bar the gates**

to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal").

Rejecting Amici's duplicative argument is particularly appropriate in this case because Amici do not bring a single case to the attention of the Court in connection with this analysis that was not fully briefed by the parties on summary judgment and in connection with the motions for judgment notwithstanding the verdict and for a new trial and remittitur in this case. Amici simply cite to the exact same law that the trial court meticulously applied in its MSJ Ruling and that parties argued in connection with the Motions for Summary Judgment [2019 Entry and Ruling on Oberlin College and Meredith Raimondo's Motions for Summary Judgment ("MSJ Ruling"), pp. 7-22; Brief, pp. 14-18].

2. ***Amici's duplicate analysis of whether the defamatory statements at issue are actionable is wrong.***

In its MSJ Ruling, the trial court carefully applied Ohio's four factor "totality of the circumstances" test in determining that the defamatory flyer and the resolution are actionable statements and not protected opinion. [MSJ Ruling, *Id.*]:

> In *Scott* we adopted a totality of the circumstances test to be used when determining whether a statement is fact or opinion. Specifically, the court should consider: the specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which the statement appeared.

Vail v. The Plain Dealer Publishing Co., 72 Ohio St.3d 279, 282, 649 N.E.2d 182 (1995), *citing Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). No one factor is dispositive. *Id*. Instead, the test is "fluid." And Amici agree that this is the appropriate test [Brief, at pp. 15-16]. Here, the totality of the circumstances show that the Oberlin Parties' defamatory statements are not protected opinions.

Amicus' main argument is that the term "racist" means different things to different people. Amicus' analysis ignores Ohio and other case law to the contrary showing that the term "racism" has a well-defined and understood meaning, making it capable of being defamatory. Amicus also continues to ignore the facts in the case that show that none of those testifying had any trouble understanding the term "racist." [*See, e.g., supra,* § II.A., pp. 5-6]. And here the defamatory statements also proclaimed that Gibsons had a "long account" of racial profiling and discrimination and violence against minorities. Each of the statements also intimated that they were based on factual information, including undisclosed facts, within the Oberlin Parties' possession. Moreover, claiming that someone commits discrimination based on a particular characteristic such as race or disability is verifiable, as repeatedly shown in disability and employment discrimination law *See, e.g., Williams v. Spitzer Auto World Amherst,* Inc., 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 14 (concerning racial discrimination) and *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civ. Rights Commission,* 66 Ohio St.2d 192, 197, 421 N.E.2d 128 (1981); *Marbley v. Metaldyne Co.*, 9th Dist. Summit No. 21377, 2003-Ohio-2851, ¶¶ 7-13; *Dunlap v. Tennessee Valley Auth.*, 519 F.3d 626, 629–31 (6th Cir.2008).

In fact, under Ohio law, a publication stating that someone is "racist," in and of itself, can constitute actionable defamation. *Lennon v. Cuyahoga Cty. Juvenile Court,* 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶¶ 26, 30 ("In the instant case, the specific language used is unambiguous. One co-worker told another co-worker that appellant was a racist."). The court, in *Lennon,* acknowledged that branding someone a racist can be defamatory on its face and "weighs heavily toward actionability, as we cannot think of a scenario in which these words are not pejorative." *Id.* at ¶ 30. And former President Marvin Krislov agreed that being called a racist is

one of the worst, most damaging things one may be called. [Tr. Trans. Vol. XIV, p. 179]. ***David Gibson confided with President Krislov that over-90-year-old Grandpa Gibson was afraid he was going to die being labeled a racist***. [Tr. Trans. Vol. X, p. 169]. *See, In Webber v. Ohio Dept. of Pub. Safety*, 10th Dist. No. 17AP-323, 2017-Ohio-9199, 103 N.E.3d 283, ¶ 36 (the court explained that under Ohio law, "being referred to as racist may, at times, constitute defamation per se."). *See, also Armstrong v. Shirvell*, 596 Fed.Appx. 433, 441 (6th Cir.2015), *citing Milkovich*, 497 U.S. 1 (upholding a defamation verdict for a claim which was based, in part, on an accusation of racism because the term "racist" has a well-defined and understood meaning, thereby making it "capable of being defamatory."). *See, also, Afro-Am. Pub. Co. v. Jaffe*, 366 F.2d 649, 653 (D.C.Cir.1966) (same).

Here, the defamatory flyer and the resolution were not just allegations of racism, but included allegations of a "LONG ACCOUNT of RACIAL Profiling and DISCRIMINATION" and the commission of the crime of assault. The defamatory flyer adds that the claim is supported by a "LONG ACCOUNT" of racial profiling and discrimination. And a "long account" suggests that there exists a documented record, and compilation, of a pattern of racial profiling and discrimination events. This makes the entire statement, and each subpart, verifiable, thereby weighing heavily in favor of a determination that they are (false) statements of fact rather than protected opinions. *See Lennon*, 2006-Ohio-2587, ¶ 30.

Likewise, the defamatory resolution expressly prefaces its defamatory remarks by announcing "[a]fter review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts" before going on to state that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike." [Pl. Tr. Ex. 35]. Again, the publication

suggests that due diligence was undertaken and its conclusions are based on verifiable facts, thus eliminating the argument that it offers mere opinions.

Moreover, accusing a business of being a racist establishment or a business owner of being a racist can be verified. In fact, shortly after the shoplifting incident and the demonstrations, the Oberlin City Police Department conducted a statistical analysis of apprehended shoplifters at Gibson's Bakery from 2011 through November 14, 2016. [Pl. Tr. Ex. 269]. Of the 40 adults arrested for shoplifting at Gibson's Bakery from 2011 through November 14, 2016, 32 were Caucasian. [*Id.*]. The existence of this law enforcement study weighs heavily in favor of Gibsons' position on verifiability.

In like manner, each of the following defamatory statements by the Oberlin Parties can be verified: the claim that someone has profiled based on race; the claim that someone discriminates on a particular characteristic such as race or disability; and claiming that someone has committed a crime such as assault.

Amici's cursory analysis, however, does not, as required by Ohio and US Supreme Court law truly apply a totality of the circumstances test. It simply, with little reference to the actual statements at issue and no reference to the facts in the record (other than quoting a portion of the flyer), adopts the position of Oberlin College and Dean Raimondo. Amici's cursory analysis *addresses the first two factors concerning both the flyer and the resolution* together and *addresses the third and fourth factors concerning both the flyer and the resolution together,* all in less than three pages [Brief, pp. 16-18]. Amici's analysis is not helpful to the Court and, in this instance, does not comport with Ohio law requiring an analysis of the totality of the circumstances.

Finally, the Oberlin Parties also claim that the libelous statements at issue are just opinions. (See, Oberlin Parties Appellate Brief, pp. 12-16). In responding to the Oberlin Parties' appeal, Gibsons will fully address why the Oberlin Parties' defamatory statements are statements of fact (and not opinion) under Ohio's totality-of-the-circumstances.

E. Amici's punitive damages argument fails because it is also based on the counter-narrative of "facts" not in the trial record and ignores applicable Ohio law.

Finally, Amici spend less than 1 page arguing that the trial court erred in allowing the jury to consider punitive damages. Here, Amici merely reiterate the arguments in the Oberlin Parties' Appellate brief, citing only to the single case also cited by the Oberlin Parties, *Gertz*. Again, Amici bring no new law and no special expertise or insight to assist the Court. The two issues raised by both the Oberlin Parties in their appellate brief and by Amici are (i) that the Oberlin Parties could not have made the defamatory statements with actual malice—knowing that the statements were false or entertaining serious doubts as to their truth; and (ii) the issue of actual malice should not have been reviewed by the jury in the compensatory and the punitive phases of trial.

1. The jury received substantial evidence showing that the Oberlin Parties acted with actual malice.

Amici again, with no citation to the record, simply address this issue in one sentence where they falsely allege as fact that "Defendants neither made nor directed the making of statements and so could hardly have done so knowing that they were false or entertaining serious subjective doubts about their truth." [Brief, p. 20]. However, the evidence in the record refutes each part of this false assertion: the Oberlin Parties in fact made and published statements independent of any student speech [*See supra* § II.A., pp. 4-5]; the Oberlin Parties also directed others, including students, to make publish and continue to publish defamatory statements [S*ee*

Id.]; and the Oberlin Parties did so with the knowledge that the statements were false or made with reckless disregard for whether they were false or not [*See supra* § II.A., pp. 5-7].

The jury heard substantial evidence that the Oberlin Parties made the defamatory statements knowing they were false or with reckless disregard as to their truth, including (a) that none of the Oberlin College administrators believed that the Gibsons were racists or had a history of racial profiling, including President Krislov; Chief Of Staff Ferdinand Protzman; and Special Assistant to the President, Tita Reed (a woman of color who had lived in Oberlin for 25 years); (b) that Dean Raimondo learned the night before the demonstrations from former Police Sergeant Victor Ortiz that none of the owners had committed an assault on the three students as alleged in the defamatory flyer; (c) that even before the publishing of the defamatory flyer, the Oberlin parties were well aware that Oberlin students had a culture of shoplifting both on campus and in the downtown area, including Gibson's Bakery; (d) that numerous others believed and were advising the Oberlin Parties that the Gibsons were not racist, had no history of racial profiling, and that this was simply misplaced anger; and (e) and hearing that ***the truth*** (*i.e.*, persons of color throughout the town were saying they were embarrassed and disgusted by the treatment of the Gibsons who were the "wrong target," not racist, and just victims of a crime) simply evoked the Oberlin response, ***"doesn't change a damned thing";*** and (e) the jury saw countless emails and communications showing high-level Oberlin College administrators responding with vitriolic and profane remarks attacking the Gibsons and anyone supporting or defending the Gibsons (including alumni, longtime members of the community, and even professors). And the following additional evidence of libel actual malice was also introduced:

Trial Trans. Vol. VII	***90-year-old*** Grandpa Gibson testified that Gibson's Bakery had been doing business with Oberlin College since "before [he] was born." (PI 7:2-9). No claims of racial profiling or discrimination for that century-long relationship.
Pl. Tr. EX. 111	On November 16, 2016, while the Student Senate Resolution was posted in Wilder Hall, an Oberlin College alum sent an email that was forwarded to President Krislov and VP Raimondo stating, ***"To treat either Mr. Gibson or his business as racist... seems to us completely inappropriate in multiple ways."***
Pl. Tr. EX. 161	On December 20, 2016, while the Student Senate Resolution was posted in Wilder Hall, an Oberlin College alum sent President Krislov an email that was forwarded to VP Raimondo stating, "I have known Dave Gibson and his father for more than fifty years. ***They are a family of gentle and fine people"***
Pl. Tr. EX. 485	On November 11, 2016, during the protests, James Henderson, a long-time resident of Oberlin, sent VP Raimondo an email stating, "My greatest concern is a statement... that Gibson's bakery and the Gibson family specifically are racists, and that they have a long history of mistreating customers of color. ***That does not sound like the family that I have known for nearly my entire life[.]"***
Trial Trans. Vol. III	Chief of Staff Protzman confirmed that ***none of the Oberlin College administrators "thought the Gibsons are racists."*** (P23:19-22)
Pl. Tr. EX. 458-1	On November 10,2016, VP Ben Jones sent VP Raimondo a text message relaying that he heard that "the shoplifting was clear and ***there was no racial profiling"***
Trial Trans. Vol. III	Chief of Staff Protzman confirmed that ***he "had never heard anything that suggested, prior to November of *16, that the Gibson family or the Gibson *s Bakery had a long history of racial profiling***[.]" (P19:17-24).
Trial Trans. Vol. III	Special Assistant Tita Reed testified that she has not had any experience of racism with David Gibson. (P75:22-76:6).
Trial Trans. Vol. III	President Krislov confirmed that during his tenure with Oberlin College, "no one had ever suggested to [him] that the Gibson family or Gibson's Bakery was racist[.]" (Ex. 460, pp. 5-6).
Trial Trans. Vol. IV	Former Oberlin College Director of Security Rick McDaniel confirmed that in his 15 years with the college there was no "issue with racial profiling or racial discrimination by the Gibsons." (P8:8-17).
Pl. Tr. EX. 63	On November 11, 2016, in the middle of the protests, former Oberlin College employee Emily Crawford sent an email to VP Ben Jones that was forwarded to VP Raimondo, stating, "I have talked to 15 townie friends who are [people of color] and they are disgusted and embarrassed by the protest... to them this is not a race issue at all and ***they do not believe the Gibsons are racist***. They believe the students have picked the wrong target." Tita Reed responded on November 11, 2016 that the information ***"Doesn't change a damned thing for me"***

2. Libel actual malice was properly submitted to the jury during the punitive damage phase of trial.

Amici apparently are not aware of or intentionally disregard Ohio's statute on bifurcation of punitive damages, as Amici erroneously argue, with no citation to any authority, that the issue of libel actual malice should not have been submitted to the jury in both the compensatory phase (as to presumed damages) and in the punitive phase (as to punitive damages) of the trial. But this was required under the Ohio punitive damages cap statute that Amici does not even cite. As outlined below, once the Oberlin Parties exercised their statutory right to bifurcate punitive damages into a separate trial phase (which statutorily precluded the Gibsons from presenting evidence as to punitive damages in the compensatory phase of the trial), actual malice was relevant to both phases of the trial. R.C. 2315.21(B)(1).

Under Ohio law, when a defamation claim involves private persons regarding a matter of public concern, the plaintiff must show actual malice to recover presumed damages (part of compensatory damages) and punitive damages, *Gilbert,* 142 Ohio App.3d at 744. Actual malice for both purposes, which the parties called "libel actual malice," is the same standard taken from *New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964): publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." Thus, to receive an award of presumed damages (but not actual damages) and to receive an award of punitive damages, Plaintiffs were required to show libel actual malice.

Amici now argue that libel actual malice should not have been submitted in both the compensatory and punitive phases. Amici are wrong. And they have no expertise on Ohio's punitive damages cap statutory requirements after the Oberlin Parties requested to bifurcate the issue of punitive damages. In fact, they do not even cite to the Ohio statutory provisions. Amici's bare assertions on this Ohio law issue do not aid the Court.

Pursuant to Ohio R.C. §2315.21(B)(1) (a)-(b), once the Oberlin Parties filed their Motion to Bifurcate the compensatory and punitive phases of trial, the trial court was required to separate the trial into two phases: a compensatory damage and a punitive damage phase. After bifurcation, per the plain terms of R.C. §2315/21(B)(1)(a), Plaintiffs were statutorily precluded from presenting any evidence as to punitive damages during the compensatory phase of trial. Thus, by bifurcating the trial, the Oberlin Parties separated libel actual malice into two separate issues: during the compensatory phase, for a jury determination on presumed damages only, and then, during the punitive phase, for a jury determination concerning punitive damages. If not submitted in both phases, the Gibsons would not have had any opportunity to put on its substantial evidence to support its claim for punitive damages.

During the compensatory phase, the jury determined that the Oberlin Parties did not act with libel actual malice, eliminating only Gibsons' ability to recover presumed damages. Because the jury awarded actual damages, the issue of libel actual malice (a precondition to punitive damages) was also submitted to the jury in the punitive phase, where the jury, based on the substantial evidence submitted in the punitive phase, found that the Oberlin Parties acted with libel actual malice and awarded the Gibsons punitive damages.

By filing their motion to bifurcate the case, the Oberlin Parties invited, and, in fact ultimately required, the submission of libel actual malice to the jury in both phases by filing the motion to bifurcate. If the Oberlin Parties did not want two phases of trial, with attendant submission of evidence required in both phases, they could have avoided this situation by not bifurcating the trial.

III. CONCLUSION.

Amici have based their brief on facts not supported in the record and do not assist the Court on matters of law. For the reasons set forth herein, the First Amendment Scholars should not be granted leave to file an amicus curiae brief in this case.

DATED: June 29, 2020

Respectfully submitted,

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EXHIBIT

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APPENDIX A

THE FIRST AMENDMENT SCHOLARS

(For identification purposes)

FLOYD ABRAMS, Senior Counsel at Cahill Gordon & Reindel LLP, was described by Senator Daniel Patrick Moynihan as "the most significant First Amendment lawyer of our age." He is a Visiting Lecturer at the Yale Law School and previously taught at the Columbia and New York University Law Schools and for 15 years at the Columbia Graduate School of Journalism as the William J. Brennan, Jr. Visiting Professor of First Amendment Law. His most recent book is THE SOUL OF THE FIRST AMENDMENT (2017).

DAVID ARDIA teaches at the University of North Carolina School of Law, where he serves as the Reef C. Ivey II Excellence Fund Term Professor of Law and faculty co-director of the Center for Media Law and Policy. He also holds a secondary appointment at the School of Media and Journalism. He is the author of numerous articles on the First Amendment and co-author of the book MEDIA AND THE LAW.

VINCENT BLASI is the Corliss Lamont Professor of Civil Liberties at Columbia University. Between 1998 and 2010, he was also a member of the University of Virginia Law School faculty. He previously held positions at the University of Texas Law School and the University of Michigan Law School and he has visited at Stanford Law School, the University of California, Berkeley, School of Law, and the William and Mary Law School. He is the author of numerous articles on the First Amendment and his books include IDEAS OF THE FIRST AMENDMENT (2006).

CLAY CALVERT is Professor of Law and Brechner Eminent Scholar in Mass Communication at the University of Florida in Gainesville, where he also directs the Marion B. Brechner First Amendment Project. He is the author or co-author of more than 150 law journal articles.

ERWIN CHEMERINSKY is Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley, School of Law. Dean Chemerinsky is the author of more than 200 law review articles and eleven books, including FREE SPEECH ON CAMPUS (2018) (with Howard Gillman). He frequently argues appellate cases, including in the United States Supreme Court. In 2016, he was named a fellow of the American Academy of Arts and Sciences and, in 2017, National Jurist

magazine again named Dean Chemerinsky as the most influential person in legal education in the United States.

DALE COHEN serves as Director of the Documentary Film Legal Clinic at the UCLA School of Law, where he leads a group of student-clinicians providing pro bono legal services to documentary filmmakers. He also teaches the course News Media Law in the Digital Age. He is the co-author of the leading textbook MEDIA AND THE LAW. Professor Cohen also serves as Special Counsel to FRONTLINE, the award-winning PBS documentary series. His prior practice included representation of a wide array of media entities, including the Tribune Company.

LUCY DALGLISH serves as Dean of the Philip Merrill College of Journalism at the University of Maryland. She previously worked as executive director of the Reporters Committee for Freedom of the Press (2000 to 2012) and practiced media law at the Minneapolis law firm of Dorsey & Whitney. Dean Dalglish has received numerous awards, including the Kiplinger Award by the National Press Foundation for her service to journalism, and the Wells Memorial Key, the highest honor bestowed by the Society of Professional Journalists.

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LYRISSA LIDSKY serves as Dean and Judge C. A. Leedy Professor of Law at the University of Missouri School of Law. Dean Lidsky's scholarship focuses on the intersection of Torts and the First Amendment, with a particular emphasis on defamation and other free speech issues in social media contexts. She is co-author of a leading media law casebook, a First Amendment casebook, and a reference book on press freedom and has published dozens of articles in the field. She has also been named co-reporter on the Restatement of Defamation and Privacy.

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SONJA WEST is the holder of the Otis Brumby Distinguished Professorship in First Amendment Law at the University of Georgia School of Law, a post shared by the law school and Grady College of Journalism and Mass Communication. Her work has been published in numerous law reviews and has garnered many awards, including the Harry W. Stonecipher Award for Distinguished Research on Media Law and Policy and the Franklyn S. Haiman Award for Distinguished Scholarship in Freedom of Expression. She clerked for Supreme Justice John Paul Stevens.

KYU HO YOUM is the Jonathan Marshall First Amendment Chair at the University of Oregon School of Journalism and Communication. Professor Youm's many law review articles have been cited by American and foreign courts, including the House of Lords in Great Britain and the High Court of Australia, on freedom of expression issues. His books include MEDIA LAW AND ETHICS, 5th ed. (2018) (with Roy Moore, et al.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

EXHIBIT
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BRENNAN M. GILMORE, Plaintiff, v. ALEXANDER E. (ALEX) JONES, *et al.*, Defendants.	)	No. 3:18-cv-00017-NKM

BRIEF OF FIRST AMENDMENT AND MEDIA LAW SCHOLARS

I. INTEREST OF AMICI

As *amici curiae*, the signatories to this brief urge the Court to reject the instant Motions to Dismiss and to allow this suit to proceed. Each signatory is a distinguished professor of constitutional and/or media law, with expertise and interest in application of the First Amendment. They file this brief in order to share their perspective on the twin considerations of protection of speech and protection of reputation that are implicated in this case. Ultimately, they urge the Court that the First Amendment does *not* counsel dismissal of this suit. Further, they urge the Court to consider the detrimental effects that dismissal of this case would have on witnesses who seek to come forward with facts others deem inconvenient.

II. INTRODUCTION

On August 12, 2017, in Charlottesville, Virginia, Brennan Gilmore witnessed James Alex Fields, Jr., a neo-Nazi, deliberately drive into a crowd of peaceful protestors, killing Heather Heyer and injuring many others. After hearing that media outlets were suggesting that the attack

was an accident or an act of self-defense, Mr. Gilmore shared his account of the attack with the public via *Twitter*. In response to Mr. Gilmore's eyewitness account, Defendants targeted Mr. Gilmore with publications alleging false and absurd conspiracy theories implicating Mr. Gilmore in the planning of the attack. As a direct result of these statements, Mr. Gilmore has been subject to threats and harassment.

The Defendants' publications, written with the intention of destroying Mr. Gilmore's reputation for the benefit of their own political agenda, are not protected by the First Amendment. While "some false statements are inevitable if there is to be open and vigorous expression of views in public and private conversation," *United States v. Alvarez*, 567 U.S. 709, 718 (2012), the Supreme Court has never endorsed the view that knowingly false statements causing direct, legally cognizable harm to another should be protected. The law of defamation serves to anchor public discourse in truth and protect our system of freedom of expression from knowing or malicious lies about an individual. Indeed, defamation has always involved two interests—protection of speech on the one hand and protection of reputation on the other. Reputation is "a concept at the root of any decent system of ordered liberty" and it should not be treated lightly here. *Rosenblatt v. Baer*, 383 U.S. 75, 93 (1966) (Stewart, J., concurring). To do so would be to grant an undue privilege to untrue statements of facts, maliciously made. And it would do so at the expense of a private individual who stepped forward with newsworthy information in the wake of a troubling event. This would set a dangerous precedent. Further, it is unwarranted by the law. The statements made by the Defendants *were* defamatory. Mr. Gilmore is not a public figure but, even if he were, he has properly pleaded actual malice. The Motions to Dismiss should be rejected.

III. ARGUMENT

A. Protection of reputation is an important societal interest.

The protections afforded to speech under the First Amendment have been much expounded upon. Content-based restrictions on speech are presumed invalid, save for a few "historic and traditional categories of expression," including defamation. *Alvarez*, 567 U.S. at 717 (internal citations omitted). Indeed, defamation law creates and enforces social boundaries about what speech is and is not acceptable. It "exists not merely to validate the dignitary interests of individual plaintiffs" but also "helps to make meaningful discourse possible," and "gives society a means for announcing that certain speech has crossed the bounds of propriety." Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 Duke L.J. 855, 885-86 (2000) (citing Robert C. Post, Constitutional Domains (1995); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691, 713 (1986)). Nor is it a recent innovation—defamation is a feature of ancient laws dating back at least to the ecclesiastical courts of the Middle Ages. Van Vechten Veeder, *The History and Theory of Defamation Law*, 3 Columbia L. Rev. 546 (1903).

Defamation law seeks to protect both public and private figures from malicious lies, which debase our entire system of free expression. To do this, defamation law deems certain types of speech beyond the pale—when it comes to public figures, this includes speech uttered with reckless disregard for the truth. For private figures, the law places even more speech beyond the pale—and there are sound reasons behind this, including the fact that private figures do not have the same means and ability to disseminate their own side of the story.

Without defamation law, public discourse "would have no necessary anchor in truth." David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. Rev. 487, 490 (1991). Defamation law thus protects the public, who must ascertain what of the myriad of information

presented to them is accurate. Defamation suits are public and, if successful, exonerating; conduct that does not rise to the level of actionable libel thus maintains a certain amount of credibility. Without defamation law, the ordinary citizen would be left unsure of who and what can be trusted, and those subject to knowing or malicious untruths left without recourse. The press would likewise be impoverished by this state—"[w]ithout libel law, credibility of the press would be at the mercy of the least scrupulous among it." *Id.* Defamation and libel law thus protect legitimate fact-based journalists, who seek to present true information to the public.

Libel and defamation law further serve the interests of the press—and the public—by protecting individuals like the Plaintiff who are injected into public debate. Mr. Gilmore was not a public figure prior to the events in Charlottesville (as discussed below, nor was he a public figure at the time he was defamed). Instead, he was a private citizen who happened to capture something newsworthy—footage of James Alex Fields Jr. deliberately driving his car into a crowd of peaceful protestors—and who then felt comfortable coming forward with that footage. That footage was deemed newsworthy by many news outlets, many of whom welcomed the chance to interview Mr. Gilmore himself. Had Mr. Gilmore known that he could be defamed with no recourse for sharing his footage, he would have had a powerful incentive to stay quiet, depriving the press and the public of an eyewitness account of an important event. Defamation law allows individuals thrust into the public light redress should untruths be spread, and thus encourages them to come forward.

Protection of speech under the First Amendment is a priority of the first order. But in the field of defamation law, it is not and cannot be the only priority. Protection of reputation is an important social good in and of itself. And in a case, such as this, where a private citizen steps forward with information of great public import, that individual's reputation should not be lightly

cast aside. It should be valued as, in Justice Stewart's words, "at the root of any decent system of ordered liberty." *Rosenblatt*, 363 U.S. at 92 (Stewart, J., concurring).

The Supreme Court has written at length about the vital necessity of ensuring that both speech and the press are largely unburdened by states as well as by the Federal Government. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270, 277-78 (1964). But as Justice Stewart wrote in his seminal concurrence in *Rosenblatt*, "[i]t is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws." 383 U.S. at 92 (Stewart, J., concurring). Instead, there is a public interest in the protection of reputation that is as important in its way as effectuating the purposes of the First Amendment. Indeed, "[i]mportant social values . . . underlie the law of defamation. Society has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Id.* It is this countervailing principle that allows courts to consider "the line between speech unconditionally guaranteed and speech which may legitimately be regulated." *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

Protection of reputation is fundamental. As Justice Stewart wrote:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.

Rosenblatt, 383 U.S. at 92 (Stewart, J., concurring). For this reason, protection of individuals against defamation is a protection of individual liberty. Defamation law should not be seen merely as a restraint on speech, but as a safeguard of reputation, an important societal good in and of itself. Further, it is one that should be protected by the federal courts: "[t]he protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Id.* (Stewart, J., concurring).

B. There is no constitutional value in knowing or malicious false statements of fact.

The false statements of fact that were made about Mr. Gilmore were numerous. Defendants said, variously:

- That Mr. Gilmore had links to the Central Intelligence Agency ("CIA") and "various other black ops kind of actors."
- That Mr. Gilmore had foreknowledge the events in Charlottesville were going to happen.
- That Mr. Gilmore was a "deep state shill."
- That Mr. Gilmore had links to George Soros or was even in his pay.
- That Mr. Gilmore had links to the campaigns of Hillary Clinton and Barack Obama.
- That Mr. Gilmore colluded to remove his name from the State Department website.

And the statements, taken together, connoted an even bigger falsehood: that Mr. Gilmore was a CIA agent who participated in planning the attack in Charlottesville. Mr. Gilmore has been harmed by these verifiably false statements of fact in ways that were eminently predictable.

Readership of the Defendants' publications, for instance, shared his parents' address online and sent him threatening and harassing messages. As a direct result of Defendant's statements, Mr. Gilmore has been subject to hate mail, death threats, hacking attempts, and harassment. Amended Complaint ¶¶ 151-156, ECF No. 29. He was even physically accosted in the street. Amended Complaint ¶ 158. His career as a Foreign Service Officer has been compromised; he has lost potential partners and clients in his most recent business venture; and

his social and romantic relationships have been polluted by the content that comes up in a Google search of Mr. Gilmore's name. Amended Complaint at 3, ¶ 184-85.

One way in which courts can distinguish between protected speech and speech that is unduly damaging to reputation is by examining the truth of the statements at issue. False speech does not serve the public interest the way that true speech does. And indeed, "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.'" *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) (citing *N.Y. Times Co.*, 376 U.S. at 270).[1] Nor can Defendants excuse themselves from making false statements on the basis that it is merely "connotation" or "opinion." A statement that contains a "provably false factual connotation" is actionable. *WJLA-TV v. Levin*, 564 S.E.2d 383, 392 (Va. 2002); *see also Hatfill v. N.Y. Times Company*, 416 F.3d 320, 331 (4th Cir. 2005) ("A defamatory charge may be made expressly or by inference, implication, or insinuation." (internal quotations omitted)); *Carwile v. Richmond Newspapers*, 82 S.E.2d 588, 592 (Va. 1954) ("[I]t matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory."). And opinion itself is no defense—as the Supreme Court has recognized, "expressions of 'opinion' may often imply an assertion of objective fact." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990).

Likewise, despite the claims of Defendants, repetition is not a defense. "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted." *Goldwater v. Ginzburg*, 414 F.2d 324, 337 (2d Cir. 1969).

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[1] In *Alvarez*, the Court clarified that this does not mean false statements receive no First Amendment protection. But it did so in the context of, essentially, invalidating a statute for overbreadth—the statute in question sought "to control and suppress all false statements [on the subject of military honors] in almost limitless times and settings." It did not do away with defamation law in that opinion, and instead clarified merely that in defamation law, the lies in question must be reckless or knowing.

The Defendants' attempt to parse their words to avoid the clear connotations of them should not be allowed. Not only are the ultimate implications of their words clear—that Mr. Gilmore participated in planning the Charlottesville attacks—they contain numerous explicit falsehoods that are equally damaging to Mr. Gilmore (for example, assertions that he, a State Department official, is connected to the CIA). Ruling for Defendants in this case would set a dangerous precedent. It would allow unscrupulous news organizations to couch their language as "opinion" and to mask their meaning with implication and insinuation, leaving readers clear as to the message but avoiding all liability for defamatory remarks. This should not be allowed and, in fact, *is* not allowed. Courts have rejected attempts, like that by the Defendants, to avoid liability through insinuation. *See WJLA-TV*, 564 S.E.2d at 392; *see also Hatfill*, 416 F.3d at 331; *Carwile*, 82 S.E.2d at 592.

In sum, the statements at issue in this case have all the hallmarks of unprotected speech. There is no social value in permitting the falsehoods that have harmed Mr. Gilmore's reputation and career to stand. The Defendants' arguments to the contrary should be rejected.

C. Mr. Gilmore is not a public figure.

Defendants argue that Mr. Gilmore is a limited-purpose public figure. This is not true. As Defendants point out, the test for limited public purpose figures is clear:

> (1) the plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public figure status at the time of the alleged defamation.

Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982). Defendants are wrong that Mr. Gilmore passes this test. "A libel defendant must show more than mere newsworthiness to

justify application of the demanding burden of *New York Times*." *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167-68 (1979). Defendants here have failed to do that.

First, Mr. Gilmore did not have access to effective channels of communication. Mr. Gilmore, like everyone with an Internet connection, had access to *Twitter*; he posted one video that was retweeted by a variety of sources and which became popular. That does not mean that he had an effective channel of communication by which to disseminate his side of the story once he was defamed. At minimum, that would depend on Mr. Gilmore's actual followers—the audience that would likely see the tweets in question—and is not appropriate for resolution at the motion to dismiss stage. To hold otherwise would require finding that this prong of the limited public figure test is satisfied by everyone with a social media account, thereby rendering it meaningless.

Nor does the fact that Mr. Gilmore was interviewed by national media about a single event mean that he had access to those channels of communication in order to rebut defamatory statements later on. Mr. Gilmore was a citizen on the spot who was interviewed in news stories about a discrete event. He is not a public figure whose utterances *are* news; nor is he a member of the media with his own platform. In short, Mr. Gilmore has no more platform to put out his side of the story than does any private citizen.

Likewise, Mr. Gilmore did not seek to influence events. Instead, he presented a recording and an eyewitness account. His tweet identified the event as terrorism—a gloss on events that he shared with Attorney General Jeff Sessions,[2] but hardly an attempt at persuasion. Mr. Gilmore's actions should be viewed not as an attempt to influence but rather as an attempt to inform. Indeed, Mr. Gilmore's conduct is exactly the type of conduct that the law should

[2] Charles Savage & Rebecca Ruiz, *Sessions Emerges as Forceful Figure on Condemning Charlottesville Violence*, N.Y. Times (Aug. 14, 2017), https://www.nytimes.com/2017/08/14/us/politics/domestic-terrorism-sessions.html.

encourage. If an eyewitness to events knew he could be deemed a public figure merely by coming forward and stating what he knew, there would be a powerful disincentive to refrain from coming forward at all. Mr. Gilmore behaved precisely as we would hope one in his position would behave—he shared footage and an eyewitness account in order to inform his fellow citizens about a newsworthy event he happened to witness. That should not be deemed sufficient to transmute a private figure into a public one; nor should it be considered an attempt to influence the outcome of the controversy at hand. Certainly it should not be deemed sufficient to rule that Mr. Gilmore attempted to influence events at the motion to dismiss stage of the lawsuit.

The Supreme Court has declined to adopt rules that would, for instance, "sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the 'public official' category beyond all recognition." *Gertz*, 418 U.S. at 351. And, in fact, the Court held in that case that "an attorney was not a public figure even though he voluntarily associated himself with a case that was certain to receive extensive media exposure." *Wolston*, 443 U.S. at 167. Here, Defendants would have every eyewitness to a crime who told their story to news organizations cast as a public figure. This, like the proposed rule in *Gertz*, would distort the public figure rule beyond all meaning and should be rejected.

D. Mr. Gilmore has properly pleaded actual malice.

Even if this Court finds that Mr. Gilmore is a limited purpose public figure, Mr. Gilmore has established that the statements in question were made with actual malice. The Supreme Court has made clear that "neither lies nor false communications serve the ends of the First Amendment," and that the actual malice standard represents the line between false statements about public figures that are protected and those that are not. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). As noted, the false statements made by Defendants are numerous

and—in point of fact—absurd. Mr. Gilmore has met his burden to plead that they were made with actual malice.

Actual malice "requires at a minimum that the statements were made with reckless disregard for the truth," *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989), such that the defendant "in fact entertained serious doubts as to the truth of his publication," *St. Amant*, 390 U.S. at 731, and that there were "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *Id.* at 732. Nor are professions of good faith sufficient, as the Court found in *St. Amant:*

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation.

Id.

At the motion to dismiss stage, the showing required of the defendant's state of mind is only that the allegations are plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Mr. Gilmore has met that burden, alleging sufficient facts to support an inference that the defendants failed to investigate their allegations against Mr. Gilmore; that Defendants departed from the most basic journalistic standards of accuracy for factual reporting; that Defendants harbored ill will toward "psy-ops" and the "Deep State" and actors allegedly connected with those actions and entities; and that Defendants entertained serious doubts as to the veracity of their claims.

First, Mr. Gilmore alleges that the Defendants failed to adequately investigate or conform to basic journalistic standards of accuracy for factual reporting. Defendants failed to reach out to

Mr. Gilmore, either to confirm each publication's statements and conclusions or for a response to the allegations contained in each publication. Nor did any of the Defendants independently fact-check, update, or correct the facts they alleged in their publications. Amended Complaint ¶¶ 52-55, 72-77, 93-95, 114-18, 135-40. Second, Mr. Gilmore alleges that the Defendants harbored animosity and ill-will against him for his political leanings, pointing to evidence that defendants labeled him in their publications as part of the "Deep State" and a participant in a "psy-op," as well as to previously-published articles authored by Defendants claiming that other national tragedies were hoaxes created by the government to push a leftist agenda. Amended Complaint ¶¶ 57, 79, 97, 119-20, 141. Although failure to investigate, a departure from journalistic standards, and evidence of ill will do not on their own support a finding of actual malice, proof of all three supports such a finding. *See Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d. 862, 871-72 (W.D. Va. 2016); *see also Harte-Hawks Commc'ns, Inc.*, 491 U.S. at 692 ("[a]lthough failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of truth is in a different category." (internal citations omitted)).

Mr. Gilmore goes further, alleging sufficient facts to support an inference that Defendants twisted the truth to conform to a preconceived narrative about the violence in Charlottesville, and that Defendants harbored doubts as to the veracity of their own reporting. First, Mr. Gilmore alleges that the Defendants inserted Mr. Gilmore into a preconceived narrative that the events in Charlottesville were a "psy-op" staged by individuals and government entities, and that George Soros, the State Department, and the Democratic Party were behind the attack. Among other facts, Mr. Gilmore points to previous articles by Defendant Creighton labeling the counter-protestors in Charlottesville as "Soros-backed" (Amended Complaint ¶ 59); Defendant Hoft's previously authored articles claiming that the "Deep State" plans to oust President Trump and

that the State Department would attempt to overthrow the U.S. Government (Amended Complaint ¶ 79); previously published articles by *InfoWars* and *Free Speech Systems* claiming that national tragedies were "inside jobs" created by the government to push a leftist agenda (Amended Complaint ¶ 98); and that Defendant Wilburn used select facts, misinterpreted information about Mr. Gilmore's professional history, and relied on unverified and false testimony of an anonymous Charlottesville police officer he found on the Internet (Amended Complaint ¶ 143).

As evidence indicative of the Defendants' doubts as to the truth of their claims, Mr. Gilmore points out that in authoring each publication, the Defendants disavowed the simplest (and factually accurate) explanation for the events in Charlottesville: that Mr. Gilmore's witnessing of Fields' attack was a coincidence unrelated to his employment at the State Department. Amended Complaint ¶¶ 60, 82, 100, 122, 144. Mr. Gilmore also pointed to the fact that Defendant Hoft exclusively relied on screenshots from an anonymous, disreputable Reddit post as his "research" (Amended Complaint ¶ 77); that while Defendant Jones stated in his video *Breaking: State Department/CIA Orchestrated Charlottesville Tragedy* that he "did the research," the referenced research seems to be limited to Google screen shots and it is dubious what, if anything, the screen shots revealed (Amended Complaint ¶ 117); and that Defendant Wilburn and the Defendants associated with AllenWest.com noted that the factual claims made in their article were "unverified" (Amended Complaint ¶ 144). But a defendant's assertion that the statements at issue were published with a belief that they were true is not sufficient to defeat a defamation action. *St. Amant*, 390 U.S. at 732.

By presenting evidence that Defendants twisted true facts about Mr. Gilmore's employment history with false, unverified assertions for which defendants had ample reason to

doubt the veracity, Mr. Gilmore has presented a plausible inference that the Defendants entertained serious doubts as to the truth of the statements and implications published in their articles. *See id.* at 731 (evidence that the defendant in fact entertained serious doubts as to the truth of his publication "shows reckless disregard for truth or falsity and demonstrates actual malice."); *Biro v. Conde Nast*, 807 F.3d 541, 546 (2d Cir. 2015) ("reliance on anonymous or unreliable sources without further investigation may support an inference of actual malice."). Here, at the motion to dismiss stage, this Court must "accept as true all of the allegations contained in a complaint," *Ashcroft*, 556 U.S. at 678, and find that Mr. Gilmore has met his burden to establish actual malice. To find otherwise would be to countenance a shocking departure from journalistic standards which resulted in putting forth allegations so absurd that only a "reckless man would have put them in circulation." This court should reject such an outcome.

IV. CONCLUSION

This Court should reject the Motions to Dismiss filed by each Defendant and allow this suit to proceed.

Respectfully submitted,

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June 19, 2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2018, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: June 19, 2019

/s/ Michael B. Hissam
Michael B. Hissam