Nos. 19CA011563 and
20CA011632
(Consolidated)

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

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GIBSON BROS., INC., et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

OBERLIN COLLEGE, et al.,

Defendants-Appellants/Cross-Appellees.

_____

APPEAL FROM THE COMMON PLEAS COURT
LORAIN COUNTY, OHIO,
CASE NO. 17CV193761

BRIEF OF AMICI CURIAE THE FIRST AMENDMENT SCHOLARS IN SUPPORT OF APPELLANT

June 5, 2020

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INTRODUCTION AND INTEREST OF AMICI

Over the past fifty-five years, the law of defamation in the United States has undergone a dramatic transformation. Prior to 1964, the Supreme Court treated defamation as a category of speech that fell outside of the protections of the First Amendment and that raised no constitutional concerns. This approach left the individual states with vast latitude to fashion defamation law as they saw fit. Some states adopted principles that extended significant protection to allegedly defamatory speech, while others imposed highly punitive regimes resembling strict liability.

All of this changed in 1964 with the Supreme Court's bellwether decision in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964). In that case, the Court "constitutionalized" the law of defamation in deep and important ways. Writing shortly after the decision came down, the eminent legal scholar Harry Kalven wryly observed that the case had the "dizzying consequence" of transmuting torts professors into constitutional law professors overnight. *See* Harry Kalven, *The New York Times Case: A Note on the Central Meaning of the First Amendment*, in FREE SPEECH AND ASSOCIATION: THE SUPREME COURT AND THE FIRST AMENDMENT 84 (1975).

Sullivan focused on the "fault" and "of and concerning" elements of a defamation claim, but in the ensuing years the Court held that the First

Amendment shaped and elevated the proofs necessary as to virtually every element of a defamation claim. And the Court clarified that a plaintiff could not avoid this elaborate constitutional architecture by filing a defamation claim under a different label, like intentional infliction of emotional distress. Over the past five-plus decades, the Supreme Court has worked to develop a complex and carefully calibrated body of law that seeks to strike the proper balance between the protections of the First Amendment on the one hand and the state's interest in protecting reputation through defamation claims on the other.

Amici respectfully submit that in this case the trial court committed serious errors that run afoul of that case law and upset the delicate balance the Supreme Court has labored to achieve. Furthermore, unless corrected, those mistakes will have grave and doctrinally destabilizing implications that extend well beyond this lawsuit. Amici write to assist this court in its considerations and analysis of those errors.

Amici are among the nation's leading First Amendment scholars. They include professors at prestigious universities, colleges, law schools, and journalism schools and others who have written extensively about the law of the First Amendment. They are professionally committed to the correct development, understanding, and application of First Amendment doctrine. A list of amici, with descriptions of their credentials, is included as Appendix A.

ARGUMENT

I. BEFORE 1964, DEFAMATION POSED NO "CONSTITUTIONAL PROBLEM"

Well into the twentieth century, the Supreme Court treated defamation as a category of disfavored speech excluded from the scope of First Amendment protections. This approach was consistent with the common law's antipathy toward libel. *See Curtis Pub. Co. v. Butts*, 388 U.S. 130, 151, 87 S. Ct. 1975, 18 L.Ed.2d 1094 (1967). Thus, in *Chaplinsky v. New Hampshire*, the Court declared that "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words …." 315 U.S. 568, 571-72, 62 S. Ct. 766, 86 L. Ed. 1031.

In time, the Court would re-think every item on this list. Each of these categories of speech would end up receiving much more protection than *Chaplinsky* suggested. And, precisely because defamatory speech can (and often does) address public officials, public figures, and matters of public interest, by 1964 the Court would completely reject the tidy notion that such statements fall entirely outside of the scope of the First Amendment.

II. CONSTITUTIONALIZING DEFAMATION LAW

Sullivan brought the tension between state defamation law and the First Amendment into plain view. In that case, the New York Times had published a full-page advertisement that described how student protestors and Dr. Martin Luther King, Jr. had been met with a "wave of terror" by "truckloads of police" and unnamed others. L. B. Sullivan—an elected Commissioner of the City of Montgomery, Alabama—brought a libel claim against the New York Times and several clergymen whose names appeared on the advertisement.

Although the advertisement did not specifically identify him, Sullivan alleged that he was defamed by it because his duties included supervision of the Montgomery police department. A jury found for Sullivan and awarded him damages of $500,000 and the Supreme Court of Alabama affirmed. The Supreme Court of the United States granted certiorari and reversed.

The Court began its analysis by noting that the case had to be considered "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks …" *Sullivan*, 376 U.S. at 270. The Court observed that the advertisement at issue, "as an expression of grievance and protest on one of the major public issues of our time, would seem clearly to qualify for the constitutional protection." *Id.* at 271.

The question was whether it "forfeit[ed] that protection by the falsity of some of its factual statements and by its alleged defamation of [Sullivan]." *Id.* The Court concluded it did not.

The Court found that the state defamation law applied by the Alabama courts failed to meet constitutional requirements in two ways. First, the trial judge's instructions to the jury made a finding of liability practically inevitable. The judge instructed that the statements in the advertisement were libelous "per se" and that falsity, malice, and injury were therefore presumed. This left little for the jury to decide apart from finding that the defendants had published the advertisement (an uncontested fact) and that the statement was about (or "of and concerning") the plaintiff—about which more momentarily.

The Court held that this formula for determining fault did not pass muster under the First and Fourteenth Amendments. The Court reasoned that these constitutional provisions required the plaintiff to meet a substantially higher burden of proof. To that end, it adopted "a federal rule" that prohibited the plaintiff, in that case a public official, from recovering damages unless he proved "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. Because Sullivan had failed to provide clear and convincing proof that the defendants acted with actual malice, the jury verdict could not stand. As explained

further below, the Court later extended the reach of the actual malice requirement in significant ways.

The fault element of defamation cases was not, however, the only one that the Court constitutionalized. As noted, the advertisement in question did not identify Sullivan by name. At trial, Sullivan argued that his claim nevertheless satisfied the "of and concerning" requirement of libel law because any reference to police activities—or even to activities that readers might believe involved the police—reflected on him as the Commissioner who oversaw the department. The then-existing Alabama law supported his argument.

Of course, such an argument dramatically and unpredictably expands liability and admits of no logical limitations. For example, as the Court observed, it can transmute one thing (e.g., criticism of the government) into something else altogether (e.g., criticism of an individual). *Id.* at 292. The Supreme Court held that such evidence—the only kind relied upon by Sullivan—was "constitutionally insufficient to support a finding that the statements referred to [him]." *Id.*

In the decades that followed *Sullivan*, the Supreme Court clarified the meaning and application of the actual malice doctrine and more generally constitutionalized the tort of defamation. In *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L.Ed.2d 125 (1964), the Court held that the actual malice standard applied with equal force to criminal libel prosecutions; in *Rosenblatt v. Baer*, 383

U.S. 75, 86 S.Ct. 669, 15 L.ed2d 597 (1966), the Court reiterated its constitutionalization of the "of and concerning" element in the context of an alleged "group libel," stressed that proof of negligence did not show actual malice, and clarified the meaning of "public official"; in *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the Court extended the actual malice requirement beyond public officials to public figures; in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Court clarified the meaning of the "reckless disregard" prong of actual malice to mean that the defendant had a subjective awareness that the challenged publication was probably false; in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court divided "public figures" into general purpose and limited purpose categories; in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988), the Court applied the actual malice standard to a public figure plaintiff's claim for intentional infliction of emotional distress; and, most recently, in *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 134 S. Ct. 852, 187 L.Ed.2d 744 (2014), the Court held that the actual malice standard requires proof of knowledge of *material* falsity.

The Court did not, however, limit its constitutionalization of defamation to cases involving public officials and public figures. Thus, *Gertz* also constitutionalized the damages element of the tort, holding that states cannot

permit recovery of presumed or punitive damages absent proof of actual malice. And the Court made clear that strict liability in defamation cases had come to an end: states cannot, consistent with the First Amendment, impose liability without fault.

The Court also constitutionalized the falsity element of the tort. Thus, in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S. Ct. 1558, 89 L.Ed.2d 783 (1986), the Court held that under the First Amendment a private-figure plaintiff cannot recover damages in a defamation case based on speech that addresses a matter of public concern unless he or she can prove that the speech was false. The Court acknowledged that this allocation of the burden of proof would mean that some false speech would go unpunished, but recognized that the Constitution demands such an approach to afford speech the breathing space it requires.

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L.Ed.2d 1 (1990), the Court then acknowledged the logical consequence of *Hepps*: as a matter of constitutional law, a plaintiff cannot pursue a defamation claim based on public-interest speech where the statement at issue is not the *kind* of statement that can be proved true or false. This includes statements that are not verifiable as true or false as well as those that constitute "rhetorical hyperbole," "vigorous epithets," "loose [and] figurative language," "lusty and imaginative

expression," and subjective viewpoints and assessments. *Id.* at 16-20. To use an example offered by the Court, we may agree or disagree with the opinion that someone is abysmally ignorant because they embrace the philosophy of Marx and Lenin, but we cannot prove that opinion to be true or false so it is constitutionally protected. *Id.* at 20.

Amici respectfully submit that the trial court here made a number of decisions that are plainly inconsistent with this body of doctrine.

III. ERRORS IN THE COURT BELOW

Amici will not address every error made by the trial court, but will instead focus on three that are particularly clear and especially dangerous if they are allowed to stand and become embedded in appellate precedent. As we will discuss, the risks to First Amendment doctrine posed by these errors extend far beyond this individual case and far beyond the law of defamation, for example implicating principles of academic freedom.

A. The Court Erred in its "Aiding and Abetting" Instruction

The elements of a defamation claim include that the defendant must have "published" the statement at issue. "Publication" is a term of art meaning that the defendant communicated the defamatory statement to someone other than the person who has been defamed. *See* Restatement of Torts (Second) Section 577(1). A person is liable for someone *else's* publication of a defamatory statement if the

speaker is acting as that person's agent or servant or where the person has directed or procured them to publish it. *Id.* at Comment f. Simply put: "The plaintiff must, of course, establish that the defendant made the allegedly defamatory statement at issue." Robert D. Sack, *Sack on Defamation, Libel, and Related Problems*, at 2-98 (2019).

As the history recited above shows, there is a significant tension between defamation claims and First Amendment freedoms. Such claims are justified only insofar as they advance the state interest in compensating those whose reputations have been wrongfully injured. But there is *no* state interest in punishing someone for a statement they did not make or direct someone else to make. The absence of publication thus implicates concerns that go to the very heart of the state's authority to recognize a claim for defamation.

In this case, Oberlin students authored and, as a matter of well-settled defamation law, "published" the statements at issue. They wrote and circulated the flyer and the resolution and, as Amici understand the record, no trial evidence supported the extraordinary proposition that they did so as agents of Oberlin or because Oberlin ordered them to do it. Under established defamation principles, the trial court should have dismissed the defamation claims against Defendants on that basis.

Unfortunately, over Defendants' objection the Plaintiffs persuaded the trial court to adopt an unconventional jury instruction that allowed the jury to find the publication element satisfied here. Under that instruction, the jury could conclude that the Defendants published the student flyer and resolution if it thought that they had "aided and abetted" the speech. Transcript at 15-16. That instruction, which went on to include an expansive description of what aiding and abetting means, came not from the carefully calibrated body of Supreme Court case law discussed above but from a from a generic definition in a law dictionary. *Id.*

The court therefore instructed the jury that "one who requests, procures, or aids and abets another to publish libelous statements is liable as well as the publisher. *To aid and abet means to encourage, assist, or facilitate the act or to promote its accomplishment*." *Id.* (emphasis supplied). Amici respectfully submit that this instruction—and particularly the definition of aiding and abetting—was inconsistent with both the law of defamation and the law of the First Amendment in numerous ways.

First, the instruction's definition of "aiding and abetting" differs significantly from libel law's definition of "publication." As noted, publication means that the defendant communicated the statement to a third person, or had an agent or servant do so, or otherwise directed or procured someone to do so. The

court's instruction has a vastly broader scope, extending to any act by which someone in any way encouraged, assisted, or facilitated the speech at issue.

Second, as outlined above, the Supreme Court has meticulously analyzed the various elements of a defamation claim through the lens of the First Amendment to ensure they meet constitutional standards. That decades-long process did not include a consideration of aiding and abetting, for the simple reason that it is not part of defamation law. The trial court imported the concept from a different body of doctrine, as articulated in a generic law dictionary, with no attendant assurances of sensitivity to constitutional concerns.

Third, in the context of a First Amendment case, the aiding and abetting instruction given by the trial court raises serious constitutional problems. Under the definition provided to the jury, liability would attach to an individual who did nothing more than give a "thumbs up" in response to a statement or tell other members of an audience to "be quiet" so the speaker could be heard. Those communications constitute "encouragement," "assistance," or "facilitation."

If this is what the instruction means, then it leads to absurd results and it is unconstitutionally overbroad in its reach. (For a discussion of the overbreadth doctrine, *see, e.g., New York v. Ferber*, 458 U.S. 747, 769-770, 102 S. Ct. 3348, 73 L. Ed. 2d 113 (1982).) If this is *not* what the instruction means, then it is unclear what it *does* mean—and under those circumstances the instruction is

unconstitutionally vague. (For a discussion of the vagueness doctrine, *see, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2994, 33 L.Ed.2d 222 (1972).) The terms of the instruction simply do not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id.*

Consider this: if the legislature of the State of Ohio passed a statute holding an individual liable for in any way "encouraging, assisting, or facilitating" someone else's defamatory speech, then that law would undoubtedly be struck down as unconstitutionally vague and overbroad. It makes no difference that the state action here comes in the form of a jury instruction rather than a statute. Recall that *Sullivan* itself involved jury instructions.

The constitutional difficulties do not, however, end there. In this case, the inapposite "aiding and abetting" instruction worked to penalize a college and one of its administrators for somehow encouraging, assisting, or facilitating student speech. This instruction, like the flawed instruction in *Sullivan*, made liability practically inevitable, because that's what colleges and universities do: they encourage, assist, and facilitate student speech in countless ways and view doing so as a core value of the academic freedom they enjoy.

The Supreme Court has held that "Our nation is deeply committed to safeguarding academic freedom …. That freedom is therefore a special concern of the First Amendment." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385

U.S. 589, 603, 87 S. Ct. 675, 17 L.Ed.2d 629 (1967). College and university campuses are "peculiarly the marketplace of ideas," *id.*, where institutions cultivate the "uninhibited, robust, and wide-open" exchange of ideas and opinions that *Sullivan* celebrated, *Sullivan*, 376 U.S. at 270. Institutions of higher education therefore have a First-Amendment-based *right* to encourage, assist, and facilitate their students in speaking—the precise conduct the "aiding and abetting" instruction makes a premise for liability. In short, the "aiding and abetting" instruction told the jury that it could punish the Defendants for doing something that the First Amendment protects.

For all of these reasons, Amici respectfully submit that the trial court plainly erred in its instruction to the jury. Even if Plaintiffs had satisfied the publication element, however, it still would have been improper to send this case to the jury. That is because, as a matter of law, the students' statements were not actionable in defamation anyway.

B. The Students' Statements Were Non-Actionable

As noted above, in *Hepps* and *Milkovich* the Supreme Court made clear that when the speech at issue in a defamation case involves a matter of public interest and concern, the plaintiff bears the burden of proving it factually false. This doctrine effectively insulates from liability those kinds of speech that do not lend themselves to such proof, as well as "loose and figurative language," "rhetorical

hyperbole," "vigorous epithets," and expressions of subjective viewpoints. In this case, the trial court correctly concluded that the students had engaged in such constitutionally protected speech when they chanted at the protest that Plaintiffs were racists and complained that one of their number had been "assaulted" on a public square. But the court inexplicably concluded that they were *not* doing so when they made essentially the same charge in their flyer and in their resolution.

In determining whether a statement can be proved factually false, courts generally rely upon a multiple-factor contextual analysis that actually pre-dates *Hepps* and *Milkovich* and that is exemplified by the foundational D.C. Circuit *en banc* decision in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984). *See* Sack, *supra*, at 4-19–4-22. Courts differ as to the sequence in which they consider the factors and whether they count them as three or four. *Id.* But a general pattern unquestionably emerges from the case law.

In determining whether this doctrine renders a statement non-actionable as a matter of law, courts typically analyze (a) the "common usage or meaning of the specific language of the challenged statement itself," *Ollman*, *750* F.2d at 979; (b) the "statement's verifiability"—that is, whether the statement is "capable of being objectively characterized as true or false," *id.*; (c) the "full context of the statement," looking at the "other language" surrounding the specific words at issue, *id.*; and finally (d) the "broader context or setting in which the statement appears,"

id., such as the circumstances under which the statement was made or the social or cultural context of the statement.

Of course, states remain free to grant *greater* protection to speech than the First Amendment provides and Ohio has done so here. In *Vail v. The Plain Dealer Pub. Co.*. 72 Ohio St.3d 279, 649 N.E.2d 182 (1995), the Ohio Supreme Court recited the four factors discussed above as the constituent parts of a "totality of the circumstances" standard derived from Section 11, Article I of the Ohio Constitution. The court observed that this "fluid" Ohio test extends protection to speech that the First Amendment does not, specifically noting that the Supreme Court "reached a different conclusion" in *Milkovich* than the Ohio Supreme Court had reached in *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986), on the same facts.

In our view, however, the identical result follows regardless of which version of the four-factor test one applies. Every one of these factors indicates that the students' charges in the flyer and resolution were non-actionable.

Let's start with (a) and (b). In common usage, the term "racist" means different things to different people and often comes to us through a highly personal lens and heavily weighted with subjective judgments. Inconsistency exists even within dictionary definitions. Tellingly, Merriam-Webster suggests that looking at dictionaries is a waste of time: "When discussing concepts like racism … it is

prudent to recognize that quoting from a dictionary is unlikely to either mollify or persuade the person with whom one is arguing." *See Synonyms for racism*, *Miriam-Webster*, available at https://www.merriamwebster.com/dictionary/racism#synonyms.

In current public discourse, we encounter on a daily basis fresh debates about how to define the term and whether certain conduct qualifies as "racist." To take just one recent example, when a woman put up a display this past Halloween that showed cartoon figures in nooses, an impassioned viral argument ensued about whether she had engaged in a racist act. *See* Annie Correal, *She Hung Nooses on Halloween. What Happened Next Was Surprising*, New York Times, November 15, 2019. A term that resists even the simple act of definition obviously does not admit of the more complex project of proving its truth or falsity.

For precisely this reason, courts have recognized that terms like "racial and religious bigotry" are "imprecise concepts which cannot be proven true or false as statements of fact." *Carto v. Buckley*, 649 F.Supp. 502, 508 (S.D.N.Y. 1986). The trial court apparently believed that a different analysis applied because the students referred to a "long account" of it, but this is not the case. An imprecise concept does not become more precise simply because someone says it has happened before. "A history of abysmal ignorance" is no more provably true or false than is "abysmal ignorance."

A consideration of the broader context, as factors (c) and (d) require, only reinforces this conclusion. The overall language of the flyer, for example, is rhetorically heated: "DON'T BUY … This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." Trial Exhibit 263. The students made these statements in conjunction with a public protest—where "rhetorical hyperbole" and "vigorous epithets" commonly serve as the primary forms of expression. That protest took place against the backdrop of an ongoing national exchange of competing viewpoints about racism—particularly with respect to law enforcement. In short, to borrow a phrase from *Sullivan*, these statements were part of "an expression of grievance and protest on one of the major public issues of our time," *Sullivan*, 376 U.S. at 271, and receive the highest level of protection under the First Amendment; they reflect a viewpoint, not a data point; and they cannot be proved objectively true or false.

Finally, Amici submit that the students' accusation that Allyn D. Gibson, a non-party in the lawsuit, had "assaulted" a member of their community is non-actionable for the same reasons. In context, the word "assault" amounted to nothing more than the students' subjective interpretation of a set of complex events that had happened the day before. No sensible person would have understood it in a technically legal or objectively factual sense.

Again, context matters. The flyer was a protest polemic, not a legal brief. It was written by undergraduate students, not prosecutors. It did not say that the police had charged the younger Mr. Gibson with anything—to the contrary, its point was that police brought assault charges against the arrested students. And it went into circulation the day after the events, while people were still acquiring information and long before any judicial proceeding had resolved the question of whether the students had violated any law.

C. The Court Erred In Allowing the Jury to Consider Punitive Damages

At the liability / compensatory damages stage of the trial, the jury determined that Defendants had not acted with actual malice and expressly indicated as much in an interrogatory response. Under *Gertz*, this conclusively established that the jury could not award punitive damages and eliminated any need for further proceedings on that issue. *Gertz* holds that a plaintiff in defamation cases (whether a public official, public figure, or private figure) cannot recover punitive damages absent clear and convincing proof of actual malice, and the jury had decided that such proof did not exist here.

Nevertheless, the trial court elected to conduct a punitive damages phase and to submit the issue of actual malice to the jury for a *second* time. This approach deprived Defendants of the critical constitutional protection that *Gertz* affords them. It also vaporized a no-actual-malice determination that was plainly correct,

given that the Defendants neither made nor directed the making of the statements, and so could hardly have done so knowing that they were false or entertaining serious subjective doubts about their truth.

CONCLUSION

Over half a century, the Supreme Court of the United States has worked to craft an intricate body of doctrine to accommodate the tension between the interests protected by defamation law and the values enshrined in the First Amendment. Amici respectfully submit that the trial court departed from that doctrine in numerous, constitutionally perilous ways: in its unprecedented approach to the publication element of defamation; in its misunderstanding and misapplication of the doctrine that insulates from liability statements that cannot be proved true or false; and in its decision to allow the jury to consider punitive damages after finding no actual malice. Correction of these errors is imperative not only to a just and doctrinally sound outcome in this case, but to the preservation of the right of every citizen to engage in debate on matters of public concern that is "uninhibited, robust, and wide-open."

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served on June 4, 2020, via email, pursuant to App.R. 13(C)(6) of the Appellate Rules of Civil Procedure, upon the following:

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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.

ERIC M. FREEDMAN serves as the Siggi B. Wilzig Distinguished Professor of Constitutional Rights at the Maurice A. Deane School of Law at Hofstra University. He is the author or co-author of numerous articles and several books, including GROUP DEFAMATION AND FREEDOM OF SPEECH (1995). He is a member of the American Law Institute, a fellow of the American Bar Foundation, and a director of and counsel to the National Coalition Against Censorship.

SUSAN GILLES serves as the John E. Sullivan Professor of Law at Capital University Law School. Her areas of expertise include media law, torts, and civil procedure. She is the author of numerous articles in the First Amendment field. Prior to joining Capital, she served as a litigator with the firm of Baker & Hostetler.

DAVID A. GOLDBERGER is Professor Emeritus of Law at the Ohio State University Moritz College of Law. Professor Goldberger has argued First Amendment cases before the Supreme Court of the United States, including *McIntyre v. Ohio Elections Commission* (which invalidated an Ohio statute prohibiting distribution of anonymous, non-libelous campaign literature) and *National Socialist Party of America v. Village of Skokie* (which obligated state courts to provide expeditious review of injunctions against public assemblies).

GAUTAM HANS serves as Assistant Clinical Professor of Law at Vanderbilt University Law School, where he teaches a legal clinic focused on First Amendment issues. Professor Hans previously served as a Clinical Fellow at the University of Michigan Law School. Prior to returning to academia, Professor Hans was policy counsel and director at the Center for Democracy and Technology in San Francisco.

RONNELL ANDERSEN JONES serves as the Lee E. Teitelbaum Endowed Chair and Professor of Law at the University of Utah S.J. Quinney College of Law and is an Affiliated Fellow at Yale Law School's Information Society Project. Her scholarly work has appeared in numerous books and leading law journals. Professor Jones graduated first in her law school class and clerked for the Honorable William A. Fletcher on the Ninth Circuit Court of Appeals and for Justice Sandra Day O'Connor on the United States Supreme Court.

JANE KIRTLEY is the Silha Professor of Media Ethics and Law at the Hubbard School of Journalism and Mass Communication at the University of Minnesota, and directs The Silha Center for the Study of Media Ethics and Law. Professor Kirtley is also an affiliated faculty member at the University of Minnesota Law School, and has held visiting professorships at Suffolk University and Notre Dame Law schools. She was the Executive Director of the Reporters Committee for Freedom of the Press from 1985-1999. She is the author of numerous publications in the First Amendment field, including the MEDIA LAW handbook published by the U.S. State Department in 2013.

DANIEL T. KOBIL serves as Professor of Law at Capital University Law School. Professor Kobil teaches constitutional law and has researched and published in the field of First Amendment Law. His work has been cited by a number of journals and courts, including the United States Supreme Court. He also is a frequent contributor to newspaper, television, and radio reports on constitutional issues.

RONALD J. KROTOSZYNSKI, JR. is the John S. Stone Chairholder of Law and Director of Faculty Research at the University of Alabama School of Law. Professor Krotoszynski is the author of numerous articles and several books in the First Amendment field, including THE FIRST AMENDMENT: CASES AND THEORY and THE DISAPPEARING FIRST AMENDMENT. Prior to joining the faculty at Alabama, Professor Krotoszynski served on the law faculty at Washington and Lee University and, prior to that, on the law faculty of the Indiana University School of Law-Indianapolis.

GREGG P. LESLIE serves as the executive director of the First Amendment Clinic at Arizona State University's Sandra Day O'Connor College of Law, and is also a

Professor of Practice at the school. Leslie previously served as legal defense director and staff attorney with the Reporters Committee for Freedom of the Press for 23 years. In that capacity, he edited and regularly contributed to the committee's quarterly magazine, *The News Media & The Law*.

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.

BRIAN MURCHISON serves as the Charles S. Rowe Professor of Law at the Washington & Lee University School of Law. His teaching and scholarship focus on administrative law, mass media law, jurisprudence, torts, and contemporary problems in law and journalism. He is the author of numerous articles in the First Amendment field and his work has appeared in a variety of legal and scholarly publications.

LEONARD M. NIEHOFF serves as Professor from Practice at the University of Michigan Law School, where he teaches courses in First Amendment and Media Law. He is the author of more than 100 articles, many in the First Amendment and media law fields, is co-author of the book RIGHTS AND LIABILITIES OF PUBLISHERS, BROADCASTERS, AND REPORTERS, and is currently writing a book on the First Amendment (with Thomas Sullivan) for Cambridge University Press. He is the principal author of the brief and accepts responsibility for any errors.

MARY-ROSE PAPANDREA is the Samuel Ashe Distinguished Professor of Constitutional Law and Associate Dean for Academic Affairs at the University of North Carolina School of Law. She is the author of numerous articles on media law and First Amendment topics and is a co-author of the casebook MEDIA AND THE LAW. She clerked for Associate Justice David H. Souter of the United States Supreme Court.

JONATHAN PETERS serves as Assistant Professor at the Grady College of Journalism and Mass Communication at the University of Georgia and holds an affiliate faculty position in the School of Law. He has published many articles in the First Amendment field and is coauthor of THE LAW OF PUBLIC COMMUNICATION, a

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STEVEN H. SHIFFRIN is the Charles Frank Reavis Sr., Professor of Law Emeritus at Cornell Law School. Professor Shiffrin is the author of numerous articles and many books about the First Amendment, including WHAT'S WRONG WITH THE FIRST AMENDMENT? and THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE, winner of the Thomas J. Wilson Award. He is also a coauthor of two leading casebooks, CONSTITUTIONAL LAW, 12th ed., 2015, and THE FIRST AMENDMENT, 6th ed., 2015.

PAUL M. SMITH serves as Professor from Practice at the Georgetown University Law Center. Until 2017, Professor Smith practiced at Jenner & Block LLP. His active appellate practice included oral arguments in 21 Supreme Court cases. Chambers USA has repeatedly named Professor Smith one of the country's leading lawyers in appellate litigation, media law, and First Amendment litigation, and, in 2010, the National Law Journal named him one of the "Decade's Most Influential Lawyers." He clerked for Supreme Court Justice Lewis F. Powell, Jr.

GEOFFREY STONE is the Edward H. Levi Distinguished Service Professor at the University of Chicago. Professor Stone is the author of numerous articles and many books on the First Amendment, including THE FREE SPEECH CENTURY (2018), PERILOUS TIMES: FREE SPEECH IN WARTIME (2004), and ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (2002). He is also an editor of two leading casebooks, CONSTITUTIONAL LAW (8th ed. 2017) and THE FIRST AMENDMENT (6th ed. 2020). He clerked for Justice William J. Brennan, Jr.

NADINE STROSSEN is the John Marshall Harlan II Professor of Law, Emerita at New York Law School. From 1991 through 2008, she served as President of the American Civil Liberties Union. She is the author of numerous articles and many books in the First Amendment field, including HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP and SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES. *The National Law Journal* has named Professor Strossen one of "The 100 Most Influential Lawyers in America."

E. THOMAS SULLIVAN is President Emeritus and Professor of Political Science at the University of Vermont. Prior to becoming President, he served as Provost and Senior Vice President for Academic Affairs at the University of Minnesota. He also served as dean of the law schools at the University of Minnesota and the University of Arizona. He is the author of eleven books and more than 50 articles, and is

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STEPHEN WERMIEL serves as Professor of Practice of Law at the American University Washington College of Law. He teaches courses in constitutional law, First Amendment, and the Supreme Court. He writes a monthly column on SCOTUSblog and is co-author of multiple books, including THE PROGENY: JUSTICE WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN (2014). Wermiel covered the U.S. Supreme Court as a reporter for the *Wall Street Journal* from 1979 until 1991.

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.)