

Nos. 19CA011563 and  
20CA011632  
(Consolidated)

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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.*

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

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

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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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## APPENDIX A

### THE FIRST AMENDMENT SCHOLARS

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