Nos. 19CA011563 and
20CA011632
(Consolidated)

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

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

# CROSS-APPELLEES' BRIEF

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## ASSIGNMENT OF ERROR

The trial court erred when it applied the punitive damages cap contained in O.R.C. § 2315.21 to the facts of this case.

## COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. The Due Process and Due Course of Law Clauses of the United States and Ohio Constitutions protect only certain interests in property, and *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 99-104, held that R.C. 2315.21(D) has a rational basis. Plaintiffs identify no property interest in the jury's punitive damages awards and no clear and convincing evidence that the punitive damages cap in R.C. 2315.21, as applied to them, lacks a rational basis. Did the trial court correctly conclude that the jury's punitive damages awards were subject to the caps in R.C. 2315.21(D)?

2. The Ohio Supreme Court held in *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, ¶ 90-95, that R.C. 2315.21(D) does not violate the right to trial by jury because, unlike a prior statute requiring courts to find the amount of punitive damages, the application of a legislative cap to a jury's finding does not abrogate the jury's function. Plaintiffs invoke a pre-*Arbino* decision construing the prior statute to re-argue a position the Ohio Supreme Court rejected. Did the trial court correctly conclude that the jury's punitive damages awards were subject to the caps in R.C. 2315.21(D)?

## I. INTRODUCTION

Oberlin College and Meredith Raimondo's (collectively, Oberlin) appellate brief explained why the record in this free-speech case—arising out of a protest by its students of Gibson's Bakery after a public altercation between a white employee and a black student—requires judgment for Oberlin, or at least a new trial or curtailed damages. Plaintiffs' cross-appeal, on the other hand, substitutes rhetoric for the record in an effort to uncap the punitive damages awards—conflating reductions made to awards so excessive that they violate a

defendant's constitutional rights with reductions mandated by legislative limits imposed to prevent excessive awards. In the process, Plaintiffs ignore the Ohio Supreme Court's guidance in *Arbino* and fail to cite a single case in which any court held that the specific facts of the case satisfied the demanding burden for an "as-applied" constitutional challenge to a punitive damages cap.

Even if Oberlin were not entitled to the relief it seeks on appeal (and it is), Plaintiffs' cross-appeal would be meritless. They admit the Ohio Supreme Court found R.C. 2315.21(D) facially constitutional. *See Arbino*, *supra.* Plaintiffs do not identify a constitutional interest that could allow an as-applied due process challenge, let alone clear and convincing evidence of an existing set of facts that could change *Arbino*'s outcome. On top of that, Plaintiffs' right-to-trial-by-jury argument borders on the sanctionable: Plaintiffs rely on *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (1994), and make the exact argument *Arbino* rejected without informing this Court that *Arbino* rejected it. *Compare* Cross-Appellants' Br. 27-28 (arguing that a punitive damages cap infringes on jury's prerogative to determine the amount of punitive damages under *Zoppo*) *with Arbino*, 2007-Ohio-6948, ¶ 91-92 (rejecting argument that punitive damages amount is part of the jury trial right under *Zoppo* and explaining that *Zoppo* addressed a materially different statute).

If this Court were to reach the cross-appeal, it should reject Plaintiffs' as-applied constitutional challenges and uphold R.C. 2315.21(D). Indeed, the protections afforded free speech under the Ohio Constitution and First Amendment, including the requirement that a court isolate and award only those damages caused by allegedly unprotected conduct (as opposed to protected protest chants), make this case unsuitable for *any* punitive damages award and particularly inapt for an as-applied challenge to Ohio's punitive damages caps.

## II. COUNTERSTATEMENT OF THE CASE

Plaintiffs omit key points in their statement of the case that frame the issue their cross-appeal raises. *Compare* Appellants' Br. 3-4 *with* Cross-Appellants' Br. 1-2.

*First,* Plaintiffs ignore the summary judgment ruling that found the protest chants constitutionally protected. 4/22/19 JE, R. 281, Appellants' Br. Appx. A-21. Since they do not challenge this ruling, it is law of the case that the chants of student protestors are constitutionally protected. This means Oberlin cannot be punished for any conduct that "aided and abetted" the protests themselves. Appellants' Br. 21, 27-28; *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 923 (1982) ("state power" cannot be "exerted to compensate [plaintiffs] for the direct consequences of nonviolent, constitutionally protected activity"). As a result, conduct allegedly "aiding and abetting" the protests, *see, e.g.*, Cross-Appellants' Br. 12, is irrelevant to Plaintiffs' cross-appeal.

*Second,* Plaintiffs fail to mention that the jury found against Plaintiff Gibson Bros., Inc. on its request for punitive damages for tortious interference with business relationships. Tr., Vol. XXIV, 66. Because there is no punitive damages award for tortious interference, Plaintiffs' accusations that Oberlin had the "power and money to bully anyone," Cross-Appellants' Br. 4-6, and supposedly "demanded that [the] Gibsons drop charges against the three students arrested" as a condition of restoring dining hall orders, *id.* at 6-8, do not relate to any punitive damages awarded here and are thus irrelevant to their cross-appeal. *See also id.* at 18-20. For the same reason, so are Plaintiffs' arguments based on after-the-fact internal Oberlin communications expressing thoughts about the altercation, protests, and their aftermath. *See* Appellants' Br. 18.

*Third,* while Plaintiffs note the compensatory and punitive damages phases of the case were bifurcated, Cross-Appellants' Br. 2, they ignore that the jury had to decide constitutional actual malice in the compensatory damages phase of the trial to determine whether Plaintiffs

were entitled to presumed damages. Appellants' Br. 3, 16, 20. Six times, the jury found that Oberlin and Raimondo did not publish the Flyer or Resolution with constitutional actual malice—that is, with actual knowledge that the challenged statements were probably false. Defs.' JNOV Mot., R. 485, Ex. 16. These findings during the compensatory damages phase, under settled constitutional law, bar not only presumed damages but also *punitive* damages. Appellants' Br. 23. A punitive damages phase on all three claims, requiring jurors to revisit their finding of no constitutional malice, thus occurred over Oberlin's objections. Tr., Vol. XXII, 4-13; Tr., Vol. XXIV, 16-17, 20-21.

An incorrect application of damages caps led to a total judgment of $5,174,500 in compensatory damages and $19,874,500 in punitive damages.[1] All told, the judgment now stands at $31,614,531.79, one of the largest, if not the largest, defamation judgments in Ohio history. Defs.' Mot. for New Trial, etc., R. 486, 39-41.

## III. COUNTERSTATEMENT OF THE FACTS

Plaintiffs devote a full 17 pages to a "statement of facts" that distorts the record beyond recognition and is largely irrelevant to whether Ohio's punitive damages caps are constitutional as applied. For example:

- *Compare* Cross-Appellants' Br. 8-10, 14-17 (repeatedly claiming that Oberlin had no evidence of "a history of racial profiling" at Gibson's Bakery) *with* Tr., Vol. XIV, 115 (Oberlin heard "very different, differing views from a number of people in a very short period of time") *and* Krislov Dep., R. 181, 429 (Oberlin "heard from very credible people of all races and colors" about "real concern" of "unfair treatment" of minorities at the Bakery) *and* Raimondo Dep., R. 187, 16-

[1] While punitive damages were capped, Appellants' Br. Appx. A-30-32, Oberlin's appeal argues that they were not properly capped. Appellants' Br. 28.

18 (Raimondo heard from people who described "racist" treatment at the Bakery) *and* Reed Dep., R. 188, 17-22 (recounting several racially charged incidents at the Bakery).

- *Compare* Cross-Appellants' Br. 3, 7 (arrested students "confirmed" they were not racially profiled when they pled guilty to shoplifting) *with* Defs.' MSJ, R. 195, Ex. 30, 27 (Aladin said only that he "cannot substantiate the claim that this conflict was derivative of racial prejudice in the Gibson's family") *and id*. at 31 (two other students said Gibson's conduct "*may or may not have been* racially motivated" before judge requires them to say more as part of guilty plea) (emphasis added).
- *Compare* Cross-Appellants' Br. 13-14 (claiming that former Oberlin President Krislov testified that the Resolution was posted in "the best place for maximum visibility") *with* Krislov Dep., R. 181, 210 ("I don't know where it was posted. I don't know how it was posted.") *and* Tr., Vol. XIV, 129 (Krislov never saw the Resolution posted in Wilder Hall).

The counterstatement that follows responds to the most significant distortions of the record—based on the evidence the jury heard and was wrongly prevented from hearing.

### A. Plaintiffs overlook the distinction between a shoplifting arrest and putting a shoplifter in a chokehold.

Plaintiffs repeatedly refer to the students' guilty plea for shoplifting (nine months after the protests), *see* Cross-Appellants' Br. 3, 7, 14, while ignoring the physical altercation right after the shoplifting, under Plaintiffs' chase-and-detain policy, that led to the student protests. This altercation—between Plaintiff David Gibson's son, Allyn Jr., and an unarmed black Oberlin student, Jonathan Aladin—largely occurred outside the Bakery on Tappan Square, during a

national debate over alleged police brutality directed at African Americans. Tr., Vol. III, 147-148; Def's MSJ, R. 195, Ex. 2(C).

No one disputes the shoplifting. *See* Pls.' MSJ Opp., R. 369, Ex. 9(1) (police report). But there are two versions of what happened next. While the police report adopted Allyn Jr.'s version of events whole cloth and painted Aladin as the aggressor, *id.* at p. 2, several eyewitnesses saw and reported it to the police differently.

Those eyewitnesses said Allyn Jr. pushed Aladin to the ground inside the Bakery and attacked him. Def's MSJ, R. 195, Ex. 2(C) (N. Baxter-Green); *see also id.* (R. Perry). Aladin eventually broke free and ran outside to Tappan Square, where he was pursued by Allyn Jr., tackled, and put in a chokehold. *See id.* (N. Baxter-Green, R. Perry, S. Medwid). During the altercation, an eyewitness heard Aladin "saying repeatedly how he didn't feel safe, especially since he was a black man." *Id.* (N. Baxter-Green.) A businessman who observed the public altercation confirmed in a letter to police that "[t]he dark skinned person looked like he was defending himself." *Id.* (S. Medwid). Yet Oberlin police arrested Aladin and two black women who tried to release him from the chokehold, but not Allyn Jr., and omitted the eyewitness accounts from their report. *Id.* (N. Baxter-Green, A. Goelzer, S. Medwid).

Plaintiffs insist the shoplifting inside the Bakery absolves Plaintiffs of any criticism for Allyn Jr.'s later conduct in Tappan Square and somehow precludes witnesses who saw the public altercation from believing it was racially motivated. Cross-Appellants' Br. 14, 16. But a reasonable observer could believe both that the students were guilty of shoplifting *and* that they were subject to racial profiling and/or discrimination in deciding when and how to implement the Bakery's chase-and-detain policy.

### B. Plaintiffs mischaracterize the record on the Flyer and Resolution

The record shows that, after observing the altercation in Tappan Square, Oberlin students wrote the Flyer and Resolution on their own and published both writings before any Oberlin employee saw them. Appellants' Br. 7-8. Plaintiffs contend the Flyer "accused * * * [Plaintiffs] of committing assault." Cross-Appellants Br. 12. But the Flyer made clear that non-party Allyn Jr., not Plaintiffs, was its focus—explaining that a "nineteen y/o young man was apprehended and choked by Allyn Gibson," that "Allyn chased him * * * into Tappan Square," and that "Allyn tackled him and restrained him again until Oberlin police arrived." Pls.' Ex. 263. No one reasonably could have understood the Flyer to refer to Allyn Sr., then in his late eighties (or David Gibson given that it named Allyn), and Plaintiffs presented no evidence that anyone actually understood the Flyer to refer to either of them.

Plaintiffs also are wrong to assert that Raimondo "actively directed and orchestrated" the distribution of the Flyer and that Oberlin knew about the posting of the Resolution in Wilder Hall, Cross-Appellants' Br. 10-14, as discussed below.

#### 1. Oberlin monitored the protests to promote safety and lawful conduct, not to "orchestrate" distribution of the Flyers.

Plaintiffs claim that Oberlin and Raimondo "handed out stacks of Flyers" at the protest and "actively directed and orchestrated the dissemination of the defamatory statements." Cross-Appellants' Br. 11-13. The record does not support this claim.

To begin with, Plaintiffs ignore the reason Raimondo attended the protests. Oberlin's Dean of Students serves as Oberlin's representative at student protests to promote safety and lawful conduct. Defs.' Ex. O-18 at 59; Tr., Vol. XIV, 108. Raimondo thus attended the protest in that role. Tr., Vol. XIII, 14, 133-134; Tr., Vol. XIV, 73. And the protests were indisputably nonviolent. Tr., Vol. XV, 21.

When Raimondo arrived at the protests, they were already under way and a student protestor handed her a copy of the Flyer. Tr., Vol. XIII, 14. Oberlin and Raimondo did not "publish numerous copies of the Flyer." Cross-Appellants' Br. 12. To be sure, Raimondo handed a copy of it to reporter Jason Hawk. Tr., Vol. III, 121; Tr., Vol. XIII, 17. But Hawk said he had no reason to believe Raimondo endorsed what the Flyer said. Tr., Vol. III, 125. And no other witness claimed to have received the Flyer from Raimondo. While a Bakery employee testified that he thought he saw, from inside the store, Raimondo handing flyers to a protestor, Tr., Vol. V, 179, 186, she denied this. Tr., Vol. XIII, 18.

No witness claimed to have received the Flyer from anyone else attending the protests on Oberlin's behalf. While Raimondo identified a few Oberlin employees "standing by to monitor the protests," Tr., Vol. XIV, 73, Plaintiffs introduced no evidence that these employees handed out Flyers. *Id*. To be sure, an Oberlin resident claimed *another* Oberlin College employee, Julio Reyes, handed him one Flyer that he gave back to Reyes. Tr., Vol. IV, 15. But Plaintiffs introduced no evidence that the College held out Reyes as having authority to pass out Flyers on its behalf, or that this resident believed Reyes had that authority. *See id.* at 19.

Nor did Oberlin and Raimondo "actively * * * direct[] the defamation of the Gibsons." Cross-Appellants' Br. 12. Raimondo did not join the students' chanting during the protests, nor did she create or hold signs. Tr., Vol. III, 122. She used a megaphone briefly to introduce herself and tell students she was there to make sure the protests remained safe; she also told students where they could go to rest, escape the cold, and get food and beverages.[2] *Id.* at 126-127; Tr., Vol. XIII, 62-63. A Gibson's Bakery employee claimed Raimondo also told students where they

[2] Plaintiffs insinuate that Raimondo approved buying gloves for protestors to help them distribute Flyers, Cross-Appellants' Br. 12, but the truth is that an Oberlin student wanted to be reimbursed for buying gloves so their hands would not get cold while protesting. Tr., Vol. XIII, 177. As discussed above, it is law of the case that the protestors' chants are constitutionally protected.

could make copies of the Flyer, but she denied this. Tr., Vol. XIII, 63. In any event, no witness claimed to have seen any Oberlin employee make copies of the Flyer. Tr., Vol. XV, 68-69, 79.

### 2. Plaintiffs introduced no evidence that Oberlin knew students posted the Resolution in the basement of Wilder Hall.

Plaintiffs' assertion that Oberlin "permitted" the Student Senate's Resolution supporting a boycott to remain posted for more than a year not only is legally irrelevant (continued posting is not actionable, *see* Appellants' Br. 16), it also ignores undisputed testimony that neither Oberlin nor Raimondo saw the posted Resolution before Plaintiffs sued. Cross-Appellants' Br. 13-14.

Late in the evening on the first day of the protests, Oberlin's Student Senate passed a Resolution supporting the boycott. Defs.' Ex. A-3; Tr., Vol. XIII, 20. After the Senate emailed the Resolution to the entire student body, one Senator forwarded a copy to Raimondo, who also served as its Faculty Advisor, and then-President Krislov. *Id.* This email did not inform Raimondo or Krislov of any plans to post the Resolution. *Id.*

Eventually, the Resolution was posted in the Student Senate's encased and locked bulletin board in the basement of Wilder Hall. Plaintiffs emphasize that Wilder Hall is "where Dean Raimondo's office is," but they ignore that the student bulletin board is on a different floor—Raimondo's office is on the first floor, the bulletin board is in the basement—next to the student mail room, where Raimondo has no reason to go. Tr., Vol. XIII, 22-23. What is more, the photograph Plaintiffs cite to support their claim that the board is "conspicuous" actually shows the Resolution itself is illegible from a distance. Cross-Appellants' Br. 13, citing Pls.' Ex. 299. Thus, it is no surprise that neither Raimondo nor Krislov knew the Resolution was in the bulletin board case until after Plaintiffs sued Oberlin. *See* Tr., Vol. V, 8-9; Tr., Vol. XIII, 21-23; Tr., Vol. XIV, 128-129.

### C. Oberlin heard competing views, including views affirming the opinions the Flyer and Resolution contained.

Plaintiffs also repeatedly insist that Oberlin heard no complaints about racism at Gibson's Bakery, such that Oberlin's "administrators recklessly disregard[ed] the truth" and were obliged to apologize for the students' claims. Cross-Appellants' Br. 15-16. Yet the record shows Oberlin heard "very different, differing views from a number of people" about the treatment of minority Bakery customers—indeed, people "were coming out of the woodwork." Tr., Vol. XIV, 115; *see also id.* at 119 ("[W]e learned from people who were currently at Oberlin, people who were formerly at Oberlin, some people contacted us.").

Then-President Krislov, for example, had "heard from very credible people of all races and colors that there was real concern that there had been unfair treatment" of people of color at the Bakery. Krislov Dep., R. 181, 429. Oberlin VP of Communications Ben Jones learned that many high school students were at the protests, leading him to conclude that "this was not an isolated incident but a pattern." Pls.' Ex. 63. And, even before the protests, Oberlin administrators were aware of many other racial incidents at Gibson's Bakery. *See* Tr., Vol. XV, 75-78, 80 (black associate dean who felt "uncomfortable" in the Bakery and heard similar concerns from students of color); *see also* Reed Dep., R. 188, 17-22 (describing incidents including a former Bakery employee, after her husband came to visit her at work, being told not to "have your N-word friends coming to your job"; a young girl told to let white customers be served first; and another young black woman "followed" and "closely watched" when shopping at Gibson's Bakery).

Plaintiffs ignore all of this, invoking a single line of deposition testimony from an Oberlin administrator who said during his deposition that he did not think any of Oberlin's senior staff considered Plaintiffs to be racist. Cross-Appellants' Br. 14-15. Yet the same administrator explained at trial that while *he* had neither personally experienced nor personally heard of racism

at Gibson's, he had no conversations with colleagues about racism at Gibson's and thus did not know the "personal opinions" of his colleagues. Tr., Vol. III, 21, 24.[3]

Based on the information available to it, and because it appeared that the students had a reasonable basis for their opinions, Oberlin declined Plaintiffs' demand that it apologize for its students' speech. Tr., Vol. XIV, 153, 209. At the same time, Oberlin made clear it does not condone shoplifting. Tr., Vol. XIV, 145, 188-189.

### D. Raimondo did not terminate Oberlin's relationship with Gibson's Bakery shortly after the altercation that sparked the protests.

Plaintiffs also insinuate that Oberlin terminated its business relationship with Gibson's Bakery within days of the physical altercation that spurred the protests. Cross-Appellants' Br. 18-20. Besides being irrelevant to Plaintiffs' cross-appeal since the jury awarded no punitive damages on the tortious interference claim (*see* p. 3, *supra*), the insinuation is wrong.

During the first day of the protests, Raimondo learned students were angry that Gibson's food was served in Oberlin's dining halls, making her worry about escalating tensions on campus. Tr., Vol. XIII, 72-74. As a result, she asked Oberlin's director of dining not to serve Gibson's Bakery products that Oberlin had already bought and paid for. *Id.* at 74-75. Oberlin then continued to place and pay for orders from Gibson's for four more days. *Id.* at 75-76.

On November 14, Oberlin's administration decided to temporarily suspend dining hall orders, while continuing to allow departments and students to use Oberlin funds and Obie dollars to buy from Gibson's Bakery. Tr., Vol. XIII, 88-89; Tr., Vol. XIV, 141-143, 212-213. This

[3] At trial, Plaintiffs relied on a so-called "study" of shoplifting arrests at Gibson's Bakery over a five-year period. Pls.' Ex. 269. But the "study" was simply a compilation of data pulled by the police department *after* the protests, in response to a request from "a media member"—not an attempt to prove or disprove that Plaintiffs engaged in racist business practices or racial profiling. Tr., Vol. XV, 35, 47-48. In any event, the data pull revealed that 14 of 18 juveniles arrested for shoplifting during that period were black (78%)—a high percentage in a county like Lorain in which only 9% of the population is black. *Id.* at 47. Thus, it is not surprising that many high school students joined Oberlin students during the protests. Pls.' Ex. 63.

meant that Gibson's Bakery products were not bought for the dining halls through the last week of January 2017. Tr., Vol. V, 152; Tr., Vol. XIII, 99-100. Oberlin resumed ordering from Gibson's Bakery for the dining halls when students returned for the spring semester in February 2017. Tr., Vol. V, 162; Tr., Vol. XIV, 151-152; Defs.' Trial Ex. A-2.[4]

### E. The students who pled guilty were required to declare that the Bakery's conduct was not racially motivated.

Plaintiffs double down on their belief that the students' guilt absolves them from any charges of racism by claiming that the arrested students "confirmed" they were not racially profiled when they pled guilty. Cross-Appellants' Br. 3, 7. Not only did the guilty pleas occur some nine months after the protests (making them irrelevant to Oberlin's state of mind during the protests), Plaintiffs' contention ignores substantial evidence that the students were coerced to make statements they did not believe to avoid jail time.[5]

In December 2016, the three students arrested after the November 2016 altercation reached a plea agreement with local prosecutors in which they would plead guilty to misdemeanors. Compl. ¶¶ 31-32. Although Plaintiffs, the students, and the prosecutor's office all supported the plea deal, the presiding judge rejected it. *Id*. He issued a judgment entry relaying his belief that Plaintiffs had been coerced into supporting the deal because of the protests and

[4] Plaintiffs falsely claim, without citing the record, that Oberlin demanded the Gibsons "drop charges" against the students arrested for shoplifting. Cross-Appellees' Br. 6. Equally false is their suggestion that Raimondo asked Plaintiffs to call Oberlin *instead of* the police if a student is caught shoplifting. Tr., Vol. XIII, 111-112. While a witness testified that Oberlin "wanted to be called *first*," Tr., Vol. VII, 69 (emphasis added), this meant only that Oberlin wanted a "heads-up" to arrange to meet the student at the jail. Protzman Dep., R. 233, 260, 268.

[5] Plaintiffs claim that Oberlin provided what they falsely describe as a "limousine" to transport Aladin to meet with his criminal lawyer "rather than correcting the defamatory statements," Cross-Appellants' Br. 12, even though helping a student exercise his constitutional right to counsel well after the protests has no connection to any issue before this Court.

suspension of Oberlin's dining hall orders. *Id*. The judge threatened to force the case to go to a public trial. *Id*.

Eight months later (and six months after Oberlin resumed ordering from Gibson's Bakery), the students and Lorain County prosecutors reached another plea deal—this time conditioned on the students' agreeing to recite a prepared statement about the Gibson family's racial motivations. Def.'s MSJ Ex. 30, R. 195, 24, 26, 33. At sentencing, Aladin then recited, "I cannot substantiate the claim that this conflict was derivative of racial prejudice in the Gibsons' family." *Id.* at 27. One female student (Lawrence) then said "the employees of Gibson's actions *may not* be racially motivated," the other (Whettston) said Allyn Jr.'s conduct "*may or may not have been* racially motivated." *Id*. at 31 (emphasis added). But before the judge would accept their plea, the two female students had to revise their statements. *See id.* at 32 (Whettston stating that "it may not have been racially motivated—it was not racially motivated"); *id.* at 33 (Lawrence "indicating" non-verbally in response to the judge's question "do you agree * * * that there was no racial motivation, that the store owner was acting within his rights; is that correct").

An Oberlin employee attending the sentencing, incensed at what she viewed as an "egregious process," expressed her outrage in a text to a colleague, stating that, after some time had passed, she hoped to "rain fire and brimstone" on Gibson's Bakery. Tr., Vol. XIV, 37-39; Pls.' Ex. 206.

### F. Oberlin tried to present evidence of what it heard about the altercation and the effect of Gibson's Bakery's business practices on black customers, but the trial court wrongly excluded that evidence.

The trial court excluded all evidence that conflicted with Plaintiffs' version of the altercation and Oberlin's state of mind with respect to racial profiling and discrimination issues involving the Bakery. Their assertion that Oberlin presented no evidence on these subjects

ignores the trial court's incorrect and one-sided application of the rules of evidence. Cross-Appellant's Br. 17.

First, Plaintiffs assert that Oberlin had no reason to believe they had a history of racism, citing testimony by their friends who said that they did not believe the Gibsons were racist. Cross-Appellants' Br. 17-18. But Oberlin repeatedly attempted to introduce evidence that many in the community had a far different view of the Bakery's business practices and their impact on black customers. *E.g.*, Tr., Vol. XIII, 7-10; Tr., Vol. XIV, 115-117; Tr., Vol. XV, 75-78; Tr., Vol. XVII, 4-42, 78. Even though this evidence concerned Oberlin's state of mind with respect to the truth or falsity of the challenged statements in the Flyer and Resolution, the trial court excluded it under a flawed interpretation of the hearsay rule and because Oberlin did not separately argue that the students' opinions were "true." *Id.*

Second, while Plaintiffs were allowed to present their version of the altercation, the trial court barred Oberlin from introducing the conflicting information it had received about what actually happened, ostensibly because doing so would "relitigate" the criminal case. Tr., Vol. XIV, 116, 134, 138. Yet it can both be true that the students were guilty of shoplifting (the only issue necessarily adjudicated in the criminal case) and that a black student was physically assaulted in a manner that a white shoplifter would not have been—or, at a minimum, that reasonable observers might reach that conclusion, as they did here. Appellants' Br. 26.

Third, these rulings prevented jurors from hearing the context surrounding the litany of emails and text messages—exchanged by Oberlin employees *after* the Flyer and Resolution were published—relied on by Plaintiffs in their cross-appeal. Cross-Appellants' Br. 20. For example, Plaintiffs focus on an email chain in which a senior administrator, upon hearing that some members of the community (including people of color) believed the Gibsons were not racists, said it "doesn't change a damned thing for me." Pls.' Ex. 63. Plaintiffs then assert that this same

administrator "testified at trial that she, as a person of color, had never experienced any racism from David Gibson or Gibson's Bakery[.]" Cross-Appellants' Br. 16. But Plaintiffs fail to disclose that this administrator explained at deposition that, while she personally had not experienced racism, she was very much aware of several others who believed they had. Reed Dep., R. 188, 17-22. That was testimony the jury should have heard.

The trial court also allowed Plaintiffs to present other emails sent well after the protests, while improperly refusing to permit Oberlin to place them in context. *See, e.g.*, Tr., Vol. V, 45-46 (Raimondo texts 10 months after protests referring prospectively, among other things, to "unleash[ing] the students"); Pls.' Ex. 145 (email opining on Gibson's "audacity and arrogance" in demanding apology given conflicting views about the altercation and Plaintiffs' business practices); Pls.' Ex. 86 (Raimondo stating she is "so sick of" a faculty member supportive of Plaintiffs and consistently critical of Oberlin more generally); Pls.' Ex. 134 (B. Jones email opining "F*** 'em" after commenting on Plaintiffs' "price gouging on rents and parking" and other "predatory behavior" unrelated to protests); Pls.' Exs. 135, 140 (email chain discussing parameters of a possible resolution with Plaintiffs). These emails elicit a decidedly different reaction when placed in context of information their authors then possessed—but were barred from testifying about—on other incidents of racial profiling at Gibson's Bakery and what happened, according to eyewitnesses, during the Tappan Square altercation.

### G. The trial court's fundamental error gives Plaintiffs a second bite at the actual malice apple and jurors whose passions have been inflamed change their mind.

At the end of the compensatory damages phase, the jury unanimously found, six times, that Plaintiffs had not proven that Oberlin published the Flyer and Resolution with constitutional actual malice—that is, with actual knowledge of their probable falsity. *See* p. 4, *supra.* As

Oberlin's appellate brief shows, an independent review of the record confirms the jury was correct. Appellants' Br. 17-20.

Still, the trial court allowed the case to proceed to the punitive damages phase on all claims, reasoning that the "actual malice" the jury had found lacking related only to liability for compensatory damages for defamation, i.e.:

> was defined specifically as the malice associated with the publication necessary for a defamation claim, basically knowledge of falsity or a reckless disregard. That standard is different than the common law actual malice that is required for punitive damages.

Tr. Vol. XX, 9-10. It is, however, well settled that the constitutional malice the jury found lacking related not *just* to defamation liability, but *also* barred Plaintiffs from recovering punitive damages. *See* Appellants' Br. 3, 16, 20. On top of that, differences between the kinds of malice do not (and cannot) allow constitutional malice to be retried. *See id.* at 17. Yet the trial court ultimately required jurors to consider what it called "libel actual malice" a second time, Tr., Vol. XXIV, 57-59, necessarily signaling to the jury that they got it wrong the first time. Appellants' Br. 17.

Even though the trial court had already found the protest chants constitutionally protected speech, Plaintiffs' opening statement in the punitive damages phase equated allegations of racism during a peaceful and lawful protest with armed violence. Tr., Vol. XXIII, 8-9 ("Defamatory words can be as damaging as guns that shoot bullets. And many commentators say they can be even more damaging, because a bullet, as long as it doesn't kill you, can be removed or treated."). Defense counsel promptly objected, pointing out that jurors should not even be allowed to consider constitutional malice a second time. *Id.* at 9. The trial court not only denied the objection, but admonished defense counsel not "to interrupt his opening any more on this

issue." *Id.* Plaintiffs then repeatedly called words "weapons" during opening statement and closing arguments. *Id.* at 10, 14; Tr., Vol. XXIV, 24, 39.

Plaintiffs offered no new evidence in the punitive damages phase about Oberlin's knowledge of the probable truth or falsity of the Flyer or Resolution. Rather, they used a "demonstrative aid" during opening statement to describe a "pathway" to punitive damages. Tr., Vol. XXIII, 17-19. The trial court overruled Oberlin's objection to this "pathway," which incorrectly suggested jurors could "infer" constitutional actual malice if "the defendant fails to investigate." Tr., Vol. XXIII, 18. Plaintiffs then urged jurors to find constitutional actual malice the second time around based either on a failure to investigate, Oberlin's "aid[ing] and abett[ing]" of the students, *id.* at 20, or survey results purportedly showing "not one person admitted or suggested the Gibsons were racist," *id.* at 24. The first argument is legally wrong (Appellants' Br. 18-19); the second rests on a liability theory the Ohio Supreme Court has rejected, *id.* at 16, and seeks to unconstitutionally punish protected activity (*id.* at 24; *Claiborne Hardware*, 458 U.S. at 916-918); and the third is factually wrong—although jurors could not know this since all evidence of the conflicting views Oberlin learned had been wrongly excluded. *See* p. 14, *supra.*

After being instructed by the trial court to revisit its earlier finding, inflamed by argument equating allegations of racism during a peaceful protest to weapons and armed violence, and misled about the "pathway" for awarding punitive damages, the jury reversed course and found that Oberlin had published the statements with "libel actual malice."

## IV. LAW AND ARGUMENT

As a matter of constitutional law, Plaintiffs' punitive damages awards depend on a showing of constitutional actual malice. Appellants' Br. 17-19, 23. In its appeal, Oberlin explained why the jury's finding of no constitutional actual malice in the compensatory damages

phase of trial is binding,[6] correct under the independent review of the record required to ensure the verdict does not infringe on protected speech,[7] and, at the very least, bars Plaintiffs' punitive damages award. *Id*. The punitive damages awards thus should be *vacated*, not uncapped. But even if Plaintiffs were allowed a second bite of the constitutional actual malice apple, the awards would have to be capped under R.C. 2315.21(D). Appellants' Br. 28.

**A. Standard of review.**

Plaintiffs' cross-appeal overlooks the heavy burden they face. Cross-Appellants' Br. 23. To begin with, all statutes enjoy "a strong presumption of constitutionality." *Ruther v. Kaiser*, 134 Ohio St.3d 408, 2012-Ohio-5686, ¶ 9. To overcome this presumption, Plaintiffs must "present[] clear and convincing evidence of a presently existing set of facts that make the statute unconstitutional and void when applied to those facts." *Groch v. Gen. Motors Corp*., 117 Ohio St.3d 192, 2008-Ohio-546, ¶ 181, quoting *Harold v. Collyer*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 38. The inquiry is one "of legislative power, not legislative wisdom." *Ruther*, 2012-Ohio-5686, ¶ 9, quoting *State ex rel. Bowman v. Allen Cty. Bd. of Commrs.*, 124 Ohio St. 174, 196 (1931).

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[6] Plaintiffs rely almost exclusively on evidence introduced during the compensatory damages phase of trial in an effort to show that Oberlin acted with malice. See Cross-Appellants' Br. 6-21. Yet the jury's finding of no constitutional malice in that phase means jurors necessarily rejected the argument that this evidence showed Oberlin knew the publications probably were false before they were published. Because the trial court could not send constitutional malice back to the jury, Appellants' Br. 17, this finding controls and any evidence suggesting otherwise is not credited on appeal. *Cunningham v. Hildebrand*, 142 Ohio App.3d 218, 227 (8th Dist.2001) (court cannot enter a judgment "inconsistent with interrogatory answers").

[7] The independent review required by the First Amendment comes into play only to *protect* speech and thus cannot be employed to question the jury's initial finding that Oberlin and Raimondo did not publish with constitutional actual malice. *See, e.g., Planned Parenthood Assn./Chicago Area v. Chicago Transit Auth.*, 767 F.2d 1225, 1229 (7th Cir.1985); *Multimedia Publg. Co. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir.1993); *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988).

Plaintiffs present no clear and convincing evidence of an existing set of facts that makes the punitive damages cap in R.C. 2315.21(D) unconstitutional as applied to them. For the most part, their cross-appeal is a general attack on the use of "mathematical formulas," which are part and parcel to the application of all damages caps. Cross-Appellants' Br. 24-26, 28. This general attack has nothing to do with the facts here and thus falls within the class of facial constitutional challenges foreclosed by the Ohio Supreme Court's ruling in *Arbino* that the punitive damages caps in R.C. 2315.21(D) are constitutional on their face. *See Arbino*, 2007-Ohio-6948, ¶ 90-95, 99-104 (rejecting facial challenges based on the right to trial by jury and due process clause). Other flaws in Plaintiffs' arguments are addressed below.

### B. Revised Code 2315.21(D) does not violate due process as applied to Plaintiffs.

#### 1. Plaintiffs have no constitutionally protected interest in the punitive damages awards.

Plaintiffs' claim that R.C. 2315.21(D) is unconstitutional as applied under the due course of law/due process clauses of the Ohio and United States Constitutions fails at the threshold because they identify no constitutionally protected interest in their punitive damages awards. The first step in any due process argument is showing a deprivation of "life, liberty, or property." U.S. Constitution, Fourteenth Amendment; *see also* Ohio Constitution, Article I, Section 16 ("every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law").[8] Yet Plaintiffs ignore this step. Cross-Appellants' Br. 23-27.

Perhaps Plaintiffs ignore the need to identify a protected property interest because it is settled they have no such interest in any particular common law remedy. The United States Supreme Court long ago observed that a plaintiff "has no property, in the constitutional sense, in

[8] The Ohio Supreme Court has "equated the Due Course of Law Clause in Article I, Section 16 of the Ohio Constitution with the Due Process Clause of the Fourteenth Amendment to the United States Constitution." *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, ¶ 15.

any particular form of remedy[.]" *Gibbes v. Zimmerman*, 290 U.S. 326, 332 (1933). A corollary of this holding is that a legislature may not only "alter or abolish a common-law cause of action," but also "modify any associated remedy." *Arbino*, 2007-Ohio-6948, ¶ 132 (Cupp, J., joined by Stratton, O'Connor, and Lanzinger, JJ., concurring); *accord Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 fn. 32 (1978) ("Constitution does not forbid * * * the abolition of old [rights] recognized by the common law"). Plaintiffs thus have no vested interest in any particular remedy, and the General Assembly has plenary power to alter those remedies.

But even if Plaintiffs had a property interest in *other* remedies, they would have no interest in punitive damages awards. Punitive damages are unique because, unlike other remedies, they do not compensate. *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, ¶ 78; *Arbino*, 2007-Ohio-6948, ¶ 97. They are "private fines." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001); *Arbino*, 2007-Ohio-6948, ¶ 97. The Ohio Supreme Court has thus recognized a "philosophical void between the reasons we award punitive damages and how the damages are distributed," explaining that the "community makes the statement, while the plaintiff reaps the monetary award." *Dardinger*, 2002-Ohio-7113, ¶ 188.

Since punitive damages are a community statement, it follows that the community, through its elected representatives in the legislature, may alter or limit that statement. Plaintiffs thus have no property interest in the jury's punitive damages awards. *Gibbes*, 290 U.S. at 332; *Arbino*, 2007-Ohio-6948, ¶ 132; *Duke Power Co.*, 438 U.S. at 88 n. 32. And without this interest, Plaintiffs' due process argument falls flat. *Accord Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex.Ct.App.1998) (rejecting plaintiffs' as-applied constitutional challenge and explaining that since "the statutory cap on punitive damages affects only public punishment interests, it does not infringe upon any constitutional right held by plaintiffs]").

### 2. R.C. 2315.21(D) has a rational basis and is constitutional as applied to Plaintiffs.

Yet even if Plaintiffs had a property interest in the punitive damages awards, their due process challenge would still fail. Plaintiffs concede the rational basis test applies. Cross-Appellants' Br. 23. This test requires courts to uphold the statute if it has a real and substantial relation to the general welfare and is neither arbitrary nor unreasonable. *Arbino*, 2007-Ohio-6948, ¶ 99-104. The Ohio Supreme Court already upheld R.C. 2315.21(D) under this test in *Arbino*; there is no clear and convincing evidence of an existing set of facts here that could alter that conclusion.

#### a. The punitive damages cap has a real and substantial relation to the General Assembly's goal of making the civil justice system more predictable.

Plaintiffs start off on the wrong foot by misstating the scope of the General Assembly's goals. They insist the only purpose of R.C. 2315.21(D) was to avoid "occasional multiple awards * * * that have no rational connection to the wrongful actions or omissions of the tortfeasor." Cross-Appellants' Br. 24. But the cap serves a far broader legislative goal—the "goal of making the civil justice system more predictable," which, as *Arbino* explained, "is logically served by placing limits that ensure that punitive damages generally cannot exceed a certain dollar figure." *Arbino*, 2007-Ohio-6948, ¶ 102.

In short, the General Assembly "found that the uncertainty and subjectivity associated with the civil justice system were harming the state's economy." *Id.* ¶ 101; *see also* Am.Sub.S.B. No. 80, Section 3(A)(1)-(3) (detailing the state's interest in making the civil justice system more predictable). The punitive damages cap addresses this problem by limiting "the subjective process of punitive-damages calculation, something the General Assembly believed was contributing to the uncertainty." *Arbino*, 2007-Ohio-6948, ¶ 101; *see also* Am.Sub.S.B. No. 80, Section 3(A)(4)(a)-(d) (explaining why the cap was "urgently needed" to restore predictability).

Because Plaintiffs fail to grapple with the policy goals the General Assembly pursued, their arguments miss the mark and their due process challenge fails. Cross-Appellants' Br. 24-26.

Plaintiffs' arguments also fail on their own terms. Even if the goal were only to eliminate awards with no rational connection to the wrongful acts, the punitive damages cap could still be constitutionally applied here for at least two reasons. First, under rational basis review, legislative "perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979), cited with approval in *T. Ryan Legg Irrevocable Trust v. Testa*, 149 Ohio St.3d 376, 2016-Ohio-8418, ¶ 73.[9] So a statute does not become constitutionally suspect simply because its classification is somewhat overinclusive. *Id.* Thus, even if there were a rational connection between $33 million in punitive damages and Oberlin's allegedly wrongful acts, this connection would not make the cap unconstitutional as applied.

Second, the $33 million awarded here bore no rational relation to Oberlin's allegedly constitutionally malicious acts. At trial, Plaintiffs urged jurors to find constitutional actual malice based on a failure to investigate, "aid[ing] and abett[ing]" students, and a false narrative that no one suggested to Oberlin that Plaintiffs' business practices were viewed as racist. Tr., Vol. XXIII, 18, 20, 24. Each argument is legally or factually wrong, or urges an unconstitutional penalty for protected activity. Appellants' Br. 18-19, 24; *Claiborne Hardware*, 458 U.S. at 916-918; *see also* p. 22, *supra*.

Plaintiffs add to this list on appeal Oberlin's supposed "bullying and cruel attacks," Cross-Appellants' Br. 21, 26, but—rhetoric aside—the jury did *not* award punitive damages for

[9] While *T. Ryan Legg Irrevocable Trust* applied the rational basis test to an equal protection challenge, this test is the same under the due process and equal protection clauses. *E.g.*, *Ferguson v. State*, 151 Ohio St.3d 265, 2017-Ohio-7844, ¶ 43 (the due process rational basis test "is the same analysis we applied in our equal-protection review").

tortious interference and Plaintiffs do not (and cannot) explain how emails they never received, sent after the student writings were published, could establish constitutional malice.

Plaintiffs instead seek to confuse the issue by conflating *common law* actual malice (requiring proof of callousness, ill will, or hatred) with *constitutional* actual malice (knowledge of the probable falsity of a statement at the time of publication). Cross-Appellants' Br. 8-9, 14-15. But Oberlin's conduct could only be found "wrongful" for punitive damages purposes if Plaintiffs established *constitutional* actual malice. Appellants' Br. 23. Plaintiffs' focus on a series of instances in which Oberlin administrators, in after-the-fact internal communications, used profane language to punctuate their thoughts about the incident and, especially, its aftermath—which, at most, would be probative of common law malice—thus misses the mark.

But even if these communications could show malice in a relevant sense, $33 million for emails and texts never sent to Plaintiffs is exactly the kind of grossly excessive and arbitrary punishment the cap is designed to limit. *Cf. State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (holding that when compensatory damages are "substantial," a ratio in which punitive damages are "perhaps only equal to compensatory damages, can reach the outermost limit").

Plaintiffs next argue that the United States Supreme Court's refusal to adopt "a bright-line mathematical formula" in *State Farm*, and *BMW of N. Am. v. Gore*, 517 U.S. 599 (1996), is a reason to find R.C. 2315.21(D) unconstitutional as applied to them. Cross-Appellants' Br. 25, 28-29. Besides being a facial challenge in disguise that *Arbino* already rejected (*see* p. 19, *supra*), the argument has two more flaws.

The first is that it turns the *Gore* guideposts on their head—applying them not as a shield against an unconstitutionally excessive award, but as a sword to justify a higher amount of punitive damages. The *Gore* guideposts enforce a *defendant's* due process right to be free from

excessive or arbitrary punishment. *State Farm*, 538 U.S. at 416. "[E]lementary notions of fairness * * * dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a state may impose." *Id.* at 417, quoting *Gore*, 517 U.S. at 574. Because these guideposts protect a defendant's constitutional rights, they do not (and cannot) establish a constitutional floor below which a plaintiff's punitive damages award may not fall.[10]

The second flaw flows from the first. Since the *Gore* guideposts simply provide a backstop for unconstitutional excessiveness, the Court has repeatedly emphasized state power to limit punitive damages awards. State "legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards," the United States Supreme Court has explained, with "[a] good many States * * * enact[ing] statutes that place limits on the permissible size of punitive damages awards." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001); *see also Gore*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."), cited with approval in *Arbino*, 2007-Ohio-6948, ¶ 94.

Thus, as the General Assembly recognized when enacting R.C. 2315.21(D), the cap actually implements the United States Supreme Court's guidance. *See* Am.Sub.S.B. No. 80, Section 3(A)(4)(c).

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[10] Plaintiffs not only try to misappropriate a defendant's due process right to be free from excessive punishment, they also ignore the free speech rights of Oberlin and its students. This case concerns student speech on a matter of public concern during constitutionally protected protests, and Plaintiffs had no evidence that challenged statements in the student writings—as opposed to protected protest chants and a general "hostile environment"—caused them actual injury. Appellants' Br. 20-21. Since a state cannot "award compensation for the consequences of * * * protected activity," *Claiborne Hardware*, 458 U.S. at 918, Plaintiffs' compensatory awards are unconstitutionally speculative. The lack of valid compensatory damages awards means there is no basis for *any* punitive damages awards, let alone uncapped awards. *See, e.g., Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 650 (1994) (proof of "compensable harm stemming from a cognizable cause of action" is a prerequisite for punitive damages).

### b. The punitive damages cap is neither arbitrary nor unreasonable as applied to Plaintiffs.

Plaintiffs also claim the punitive damages cap is arbitrary and unreasonable. Cross-Appellants' Br. 26-27. *Arbino* already held it is neither. *Arbino*, 2007-Ohio-6948, ¶ 103. Once again, Plaintiffs have no clear and convincing evidence of an existing set of facts that make the cap arbitrary or unreasonable as applied to them.

Plaintiffs argue that $33 million is the "necessary magnitude" of punitive damages, because Oberlin has substantial assets and issued a statement after the compensatory damages phase of trial that it "regretted that the jury did not agree with the clear evidence our team presented." Tr., Vol. XXIII, 139-140; Cross-Appellants' Br. 27. Yet Plaintiffs do not (and cannot) explain why an expression of regret after a loss makes conduct that already occurred any more blameworthy. And even if Oberlin could access the assets Plaintiffs tout (and it largely cannot),[11] it is settled that, under the *Gore* guideposts protecting *defendants'* rights, "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm*, 538 U.S. at 427. Just as wealth cannot raise the ceiling and excuse an unconstitutional punitive damages award, it also cannot raise the floor and somehow make a punitive damages cap unconstitutional as applied to a defendant with substantial assets.

Indeed, it is telling that the only appellate decision Plaintiffs cite that even considers an as-applied challenge to the punitive damages cap, *Rieger v. Giant Eagle, Inc.*, 8th Dist. Cuyahoga No. 105714, 2018-Ohio-1837, *reversed* a trial court finding of unconstitutionality. *See* Cross-Appellants' Br. 26. Without elaborating on the right allegedly violated, the Eighth District found "the punitive damages cap of R.C. 2315.21 is constitutional as applied to the instant case."

[11] While Plaintiffs repeatedly call Oberlin a "billion-dollar institution," Cross-Appellants' Br. 4-5, 24, 25, 27, the record showed Oberlin operated at a loss for several years and can only access $59 million in endowment funds. Tr., Vol. XXIII, 78, 81, 86-88, 95, 157.

2018-Ohio-1837, ¶ 41. Because it declines to specify the alleged constitutional right and was later reversed (on other grounds), *Rieger* has no relevance here beyond the observation that no Ohio appellate court has ever upheld an as-applied challenge to R.C. 2315.21(D).[12]

"At some point, the General Assembly must be able to make a policy decision to achieve a public good." *Arbino*, 2007-Ohio-6948, ¶ 61. The punitive damages cap does just that by "strik[ing] a balance between imposing punishment and ensuring that lives and businesses are not destroyed in the process." *Id.* ¶ 103. The particulars of that balance are issues for the General Assembly, not a court applying the rational basis test. *See id.* ¶ 113 (explaining that "[i]ssues such as the wisdom of damages limitations and whether the specific dollar amounts available under them best serve the public interest are not for [the judiciary] to decide").

R.C. 2315.21(D) is constitutional as applied to Plaintiffs.

### C. The punitive damages cap does not violate Plaintiffs' right to trial by jury.

Equally flawed is Plaintiffs' argument that the cap as applied to them violates their right to trial by jury, Cross-Appellants' Br. 27-28, which is yet another facial challenge in disguise. Plaintiffs cite no evidence to support their argument, let alone clear and convincing evidence of a set of existing facts that could make applying the punitive damages cap unconstitutional under Article I, Section 5 of the Ohio Constitution.

*Arbino* held that the punitive damages cap does not violate the right to trial by jury because, even if punitive damages were a "fact" found by the jury, applying the cap does not invade the jury's fact-finding role. *Arbino*, 2007-Ohio-6948, ¶¶ 90-95. After all, enforcing a

[12] The Ohio Supreme Court later found that the Eighth District erred by affirming the denial of the defendant's motion for directed verdict and entered judgment for the defendant. *See Rieger v. Giant Eagle, Inc.*, 157 Ohio St.3d 512, 2019-Ohio-3745, ¶ 20.

legislative limit on the amount of recoverable punitive damages "does not abrogate the established function of the jury" to determine punitive damages in the first instance. *Id.* ¶ 92.

In short, unlike telling jurors to revisit a finding already made on constitutional actual malice, *see* Appellants' Br. 17, applying the punitive damages cap simply conforms the ensuing judgment to the law and does not require a court or jury to reexamine facts already found. *Arbino*, 2007-Ohio-6948, ¶ 119, 134 (Cupp, J., joined by Stratton, O'Connor, and Lanzinger, JJ., concurring) (explaining that "a primary purpose of the trial by jury was to safeguard the rights of citizens, not against legislative overreaching, but from judicial bias and judicial reexamination of jury-determined facts," and "[l]egislative action * * * may alter or limit what damages the law makes available").

Plaintiffs cite no Ohio case decided after *Arbino* that holds otherwise. Cross-Appellants' Br. 27-28. They insist that the amount of punitive damages is "within the right to trial by jury" under *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552 (1994). Cross-Appellants' Br. 27. But *Arbino* addressed this very argument and limited *Zoppo* to its facts, explaining that *Zoppo* addressed a very different "statute that required trial courts to determine the amount of punitive damages to be awarded, even if the jury was the trier of fact." *Arbino*, 2007-Ohio-6948, ¶ 92. R.C. 2315.21(D), on the other hand, "does not have this effect; it still permits the trier of fact to determine punitive damages." *Id*. *Zoppo* thus does not support Plaintiffs' as-applied challenge, and Plaintiffs should have informed this Court that their argument was already addressed and rejected in *Arbino*.

Beyond this, Plaintiffs cite only a federal case finding a Tennessee punitive damages cap facially unconstitutional under Tennessee's right to trial by jury. *Lindenberg v. Jackson Natl. Life Ins. Co.*, 912 F.3d 348, 364-370 (6th Cir.2018). But Plaintiffs have not asserted a facial constitutional challenge, and another court's interpretation of Tennessee's constitution carries no

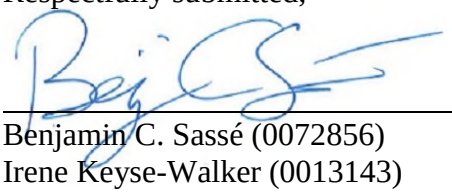
weight here. *E.g.*, *State v. Bostick*, 6 N.E.3d 658, 2013-Ohio-5784, ¶ 16 (9th Dist.) ("Unless and until the Ohio Supreme Court revisits and reverses its holding * * *, we are bound to follow the law as it currently stands.").

Plaintiffs' right to trial by jury has not been violated.

## V. CONCLUSION

For reasons explained in Appellants' Brief, this Court should reverse and direct the entry of judgment for Oberlin on all claims. Alternatively, this Court should remand for a new trial on all remaining issues, or at least remit and properly cap the excessive compensatory and punitive damages awards and vacate the attorney fees enhancement. In any event, the punitive damages cap is not unconstitutional as applied.

Respectfully submitted,

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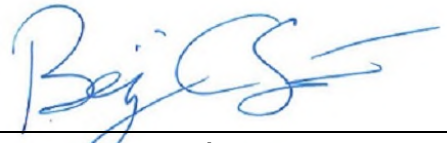

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