Supreme Court of Ohio Clerk of Court - Filed May 13, 2022 - Case No. 2022-0583

No. 2022-0583

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO
CASE NOS. 19CA011563 AND 20CA011632

GIBSON BROS., INC., et al.,

Plaintiffs-Appellees,

v.

OBERLIN COLLEGE, et al.,

Defendants-Appellants.

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND OHIO STATE CONFERENCE OF THE NAACP IN SUPPORT OF OBERLIN COLLEGE, ET AL.

Carl James
Counsel of Record
Ohio Registration: 0034314
4450 Market Street
Youngstown, OH 44124
(330) 782-8301
cjames@bdi-usa.com

Jessica Ring Amunson*
Deanna E. Krokos*
JENNER & BLOCK LLP
1099 New York Avenue NW,
Suite 900
Washington, DC 20001
(202) 639-6000

**Pro hac vice* motions forthcoming

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I. THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS ONE OF PUBLIC AND GREAT GENERAL INTEREST.

This appeal addresses an alarming departure from First Amendment precedent that threatens to upend long-settled protections for free speech and association. The Ninth District's decision, affirming the trial court, allows the imposition of civil liability on Oberlin College for its association with, and support for, students' constitutionally protected protest activities. The Court should accept jurisdiction to restore the important First Amendment protections that are threatened by this decision. Protections against precisely the type of liability imposed here emerged during the civil rights movement and remain a critical safeguard against efforts to suppress the exercise of core First Amendment rights.

Nonviolent protests, including economic boycotts, were critical to securing the social and political reforms our Nation enjoys today. The Montgomery Bus Boycott in 1955—a citywide boycott of buses to protest segregation that lasted 381 days—ignited a groundswell of civil disobedience across the country that changed social and political life in America forever. Boycotts of businesses that maintained segregated facilities became an integral part of the strategy of the civil rights movement.

Student activism also played a key role during the civil rights movement, and student activists frequently led demonstrations on college campuses and in college towns. For example, in 1960 a group of African-American students engaged in a sit-in at Woolworth's in Greensboro, North Carolina to protest the store's white-only lunch counter.[1] This protest grew to at least 200 students within a week, and by the following September there were over 70,000 participants in

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[1] Christopher W. Schmidt, *Why the 1960 Lunch Counter Sit-Ins Worked: A Case Study of Law and Social Movement Mobilization*, 5 Ind. J. L. & Soc. Equality 281, 282 (2017).

similar sit-ins, which sparked a national conversation and led to significant social changes.[2] Likewise, in 1963, 250,000 students in Chicago staged a one-day school walkout to protest segregated schools.[3] Beyond the civil rights movement, student activists have exercised these protected political speech rights to protest matters of public importance and encourage their universities the take meaningful action on issues ranging from immigration policy[4] to apartheid in South Africa.[5]

As these examples show, student activism has a long and storied history, particularly when it comes to protesting against discriminatory action by private business. These efforts were often controversial, and in several instances, opponents sought to stifle protected speech by threatening individuals and organizers with costly civil tort liability. *See, e.g., NAACP v. Overstreet*, 384 U.S. 118 (1966) (per curiam). But courts have repeatedly and emphatically emphasized that boycott, protest, and peaceful political organizing falls within the core of the First Amendment, and as such are "beyond the reach of a damages award." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 926 (1982).

The Ninth District's reasoning flies in the face of that history, and the long-settled protections it established. The damages awarded arise from Oberlin's association with certain of its students who organized a boycott in protest of a Gibson's bakery employee's actions against an

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[2] *See id.* at 283-85.

[3] Melinda D. Anderson, *The Other Student Activism*, Atlantic (Nov. 23, 2015), https://www.theatlantic.com/education/archive/2015/11/student-activism-history-injustice/417129/.

[4] Catherine E. Shoichet & Azadeh Ansari, '*Sanctuary Campus' Protests Target Trump Immigration Policies*, CNN (Nov. 16, 2016), https://www.cnn.com/2016/11/16/politics/sanctuary-campus-protests/index.html.

[5] Nicholas Graham, *Timeline of 1980s Anti-Apartheid Activism at UNC*, For the Record (May 15, 2017), https://blogs.lib.unc.edu/uarms/2017/05/15/timeline-of-1980s-anti-apartheid-activism-at-unc/.

African-American student, the police department's response to the incident, and the bakery's history of discriminatory treatment of African-Americans. The U.S. Supreme Court has recognized that this type of political speech and expression falls within the core of the First Amendment's free speech and free association protections. Because the students' activity cannot give rise to civil liability, by simple logic, any support Oberlin may have provided likewise cannot be the basis for liability and damages.

A. The Ninth District's Decision Fails to Account for the Longstanding First Amendment Precedent Foreclosing Civil Liability for Protected Speech.

During the civil rights movement, opponents of civil rights attempted to use state tort law to undermine the NAACP and other civil rights organizations through costly litigation with the ultimate aim of excessive damages awards. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) and *NAACP v. Claiborne Hardware*, 458 U.S. 886, 927 (1982), the U.S. Supreme Court recognized this tactic for what it was: an attempt to silence and intimidate civil rights leaders through the misuse of the court system. In response, the Court sharply limited the circumstances under which civil liability could arise from First Amendment activity. For the very reasons the U.S. Supreme Court rejected liability for the *New York Times* and the NAACP over thirty years ago, the damages award entered against Oberlin must be reversed.

The Ninth District affirmed a damages award based on Oberlin's support or participation for certain of its students' creation and distribution of a flyer and a Student Senate resolution describing the incidents underlying the students' protest. The label attached to the plaintiffs' causes of action—whether defamation, intentional infliction of emotional distress, or tortious interference with business relationships—is irrelevant, because Oberlin's civil liability stems from students' protected First Amendment activity.

"[I]n cases raising First Amendment issues [courts] have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Scott v. Ross*, 151 F.3d 1247, 1250 (9th Cir. 1998) (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *N.Y. Times Co.*, 376 U.S. at 285)). Here, there is no doubt the damages award intrudes on constitutionally protected activity.

B. The U.S. Supreme Court Has Rejected State Damages Awards That Inhibit Demonstrators' First Amendment Rights.

In May of 1962, a 14-year-old African-American boy complained that the owner of a market "had accused him of stealing merchandise and had thereafter slapped and kicked him." *NAACP v. Overstreet*, 384 U.S. at 118 (Douglas, J., dissenting) (per curiam). The boy's mother contacted the Savannah Branch of the NAACP, which helped organize a boycott of the store. *Id.* at 118–19. The store owner sued the NAACP on the theory that the Savannah Branch encouraged the picketing that was the "proximate cause" of others' misconduct and the national NAACP could be held liable on an agency theory. *Id.* at 119. The jury found for the plaintiffs, and the Supreme Court of Georgia upheld the jury's award of $80,000 in damages against the NAACP.

The U.S. Supreme Court initially granted certiorari, but then reversed and dismissed the case before it was heard. 384 U.S. at 118 (dismissing the writ of certiorari as improvidently granted) (per curiam). Dissenting from the dismissal, Justice Douglas, joined by three others, argued the case posed no less of a threat to the rights of political association and free speech than had prior cases criminally punishing protected speech. *Id.* at 122-23. Justice Douglas observed that "[j]uries hostile to the aims of an organization in the educational or political field, unless carefully confined by meticulous instructions and judicial supervision, can deliver crushing verdicts that may stifle organized dissent from the views and policies accepted by the majority." *Id.* at 123.

This case sent a message to opponents of civil rights: they could stifle criticism of racial inequality by seeking hefty damages awards against the NAACP and other civil rights groups. After *Overstreet*, civil rights organizations engaged in protests and boycotts faced burdensome, costly litigation. *See, e.g., S. Christian Leadership Conf., Inc. v. A.G. Corp.*, 241 So. 2d 619 (Miss. 1970). And by 1964, southern officials had brought nearly $300 million in libel actions against out-of-state newspapers in an attempt to quell criticism of segregation and negative coverage of southern politicians.[6]

The U.S. Supreme Court effectively reversed *Overstreet* in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).[7] In 1965, African-American residents of Claiborne County, Mississippi delivered a petition to local government officials listing grievances regarding racial discrimination. A second petition was circulated in 1966, signed by the local Field Secretary of the NAACP, Charles Evers, and more than 500 local community members.[8] Receiving no response, the NAACP local chapter unanimously approved a boycott of the town's white merchants, which lasted more than three years.[9]

In 1969, the boycotted merchants sued the NAACP, Mr. Evers, and 144 individuals who participated in the boycott. The merchants asserted three theories of liability: malicious interference with business, violation of Mississippi's ban on secondary boycotts, and violation of Mississippi's restraint-of-trade law, and were awarded over $1 million in damages.[10]

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[6] *See* Elena Kagan, *A Libel Story:* Sullivan *Then and Now,* 18 L. & SOC. INQUIRY 197, 200 (1993).
[7] *See Tsilimos v. NAACP*, 187 Ga.App. 554, 555, 370 S.E.2d 816 (1988) (recognizing that "[t]he holding reached by the Supreme Court in *Overstreet* is no longer tenable").
[8] Barbara Ellen Cohen, *The Scope of First Amendment Protection for Political Boycotts: Means and Ends in First Amendment Analysis:* NAACP v. Claiborne Hardware Co., 1984 Wis. L. Rev. 1273, 1276-77 (1984).
[9] *Id.* at 1277.
[10] *Id.* at 1279.

The U.S. Supreme Court reversed. Considering liability for Mr. Evers, the Court held that civil liability cannot stem from protected First Amendment activity. 458 U.S. at 918. Withholding patronage from white establishments in Claiborne County to "challenge a political and economic system that had denied [the protestors] the basic rights of dignity and equality," was plainly nonviolent, protected activity. *Id.* "To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his 'threats' of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damages award." *Id.* at 926– 27.

The Court further found that because the NAACP's liability was derived solely from Evers' liability, the NAACP could only be responsible for any unlawful conduct that it specifically ratified. *Id.* at 930-31. Quoting Justice Douglas's *Overstreet* dissent, the Court wrote "[t]o impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment." *Id.* at 931. Moreover, the Court held the state may only legitimately impose damages for the consequences of illegal, violent conduct, and "not award compensation for the consequences of nonviolent, protected activity." *Id.* at 918. Even if the NAACP had authorized some of Evers' conduct, it could only have been held liable for damages stemming directly from illegal conduct, not from the overall economic impact of the boycott. The Ninth District decision fails to explain why the U.S. Supreme Court's decision in *Claiborne* is not controlling.

C. *New York Times Co. v. Sullivan* Likewise Rejected the Possibility for Civil Liability Arising out of Protected Speech.

As with boycotts, the standard for the imposition of civil liability for defamation is intentionally high because of the possibility that over-enforcement will chill protected speech. In

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the U.S. Supreme Court affirmed First Amendment protections for civil rights activists facing civil liability for libel.

The plaintiffs—three Commissioners of the City of Montgomery, Alabama—filed a defamation suit concerning full-page advertisement published in the *New York Times* entitled, "Heed Their Rising Voices." *Id.* at 256. The advertisement, paid for by civil rights organizers, began by stating, "[a]s the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." *Id.* It further stated that students were wrongfully expelled from Alabama State College, that "truckloads of police" ringed the campus, and, when students protested, the dining hall was "padlocked in an attempt to starve them into submission." *Id.* at 257. The advertisement also recounted incidents of intimidation and violence against Dr. Martin Luther King, Jr., saying that the "Southern violators" had attempted to bomb Dr. King's house and assault him, and that the police "ha[d] arrested him seven times." *Id.* at 257-58.

Portions of the advertisement were demonstrably false. The dining hall was never "padlocked," only a few students were expelled (and for other reasons), and Dr. King was arrested four times, not seven. *Id.* at 258-59. Nonetheless, the U.S. Supreme Court found the imposition of civil liability for libel constitutionally impermissible. As the Court observed, "the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct." *Id.* at 283. Alabama's statute, which did not require the jury to find actual malice before awarding general damages, "abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments." *Id.* at 268. Without a rule protecting speech, the risk of a crippling damages award would cause would-be critics to make

only statements which "steer far wider of the unlawful zone." *Id.* at 279 (quotation marks omitted). That truth is an available defense was insufficient: requiring the defendant to prove the truth of what he said would dampen the vigor and limit the variety of public debate. *Id.* To protect speech, the Court required proof of actual malice before liability could be imposed for libel against public officials. *Id.* at 279–80.[11]

II. THE INTEREST OF THE NAACP AND ITS OHIO CHAPTER AS *AMICI CURIAE* IN THIS CASE.

The National Association for the Advancement of Colored People ("NAACP") and the Ohio State Conference of the NAACP ("Ohio NAACP") participate as *amici curiae* in support of Oberlin's petition for jurisdiction.

The NAACP is the nation's largest civil rights grassroots organization. Since its founding in 1909, the NAACP has worked to fulfill this nation's twin commitments to the First Amendment and to the equal treatment of all persons. As the country's largest and oldest civil-rights organization, the NAACP led and supported leaders of the civil rights movement, who often resorted to peaceful civil disobedience in the face of intransigent and violent white supremacy. Despite the civil rights movement's accomplishments, much work remains today. The NAACP continues to work to eliminate racial hatred and discrimination in all forms.

Throughout its history, the NAACP has withstood efforts by opponents to chill its activities through civil litigation and has safeguarded the rights protected by the First Amendment. Most relevant here, the NAACP successfully litigated *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), defending the right to boycott certain businesses in response to racial injustice. The

[11] The actual malice standard has been extended beyond public figures and also applies if the plaintiff is a "[limited purpose] public figure" and the alleged defamatory publication involved an issue of public concern. *See, e.g.*, *Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP*, 759 F.3d 522, 529 (6th Cir.2014) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 352 (1974) (alteration in original)).

NAACP has a long history of defending the First Amendment and Equal Protection rights of all citizens, and thus has a strong interest in legal issues raised in this case. It believes its experience and expertise in these areas could aid the Court's consideration.

The Ohio State Conference of the NAACP ("Ohio NAACP") is a nonpartisan, nonprofit membership organization that serves as an arm of the NAACP. The Ohio NAACP has over thirty active adult chapters, college chapters, and youth councils in Ohio and more than 7,000 members across the state. The Ohio NAACP's mission is to ensure the political, democratic, educational, social, and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination.

III. STATEMENT OF THE CASE AND FACTS

Amici curiae hereby adopt by reference the Statement of the Case and Facts and Assignments of Error as set forth by Defendants-Appellants Oberlin College, et. al.

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Amici curiae support Oberlin's overall petition for jurisdiction, but offer this brief primarily in support of Proposition of Law No. 1.

Proposition of Law No. 1:

The constitutional protection of opinion speech applies equally to oral and written statements during protests, regardless of the tort theory. A viewpoint or interpretation of events that is protected when spoken is also protected when expressed in writing.

Upholding liability for Oberlin College in this case would be a sharp departure from the long-settled understandings of the First Amendment discussed above, and well as the broader protections for speech and opinion provided by the Ohio Constitution. *See Vail v. Plain Dealer Publ'g Co.*, 72 Ohio St.3d 279, 281, 1995-Ohio-187, 649 N.E.2d 182 (recognizing the Ohio Constitution contains a "separate and independent guarantee of protection for opinion"). This

result would upend the protections for free speech that the NAACP has worked to secure for over sixty years. As the history above demonstrates, civil liability—when not carefully circumscribed—can easily become an impermissible limitation on free speech. This is especially true for speech about racial justice that is core to the NAACP's mission, but, as this case demonstrates, is often controversial.

It is undisputed that advocating for, and engaging in, a boycott is protected First Amendment activity. *Claiborne*, 458 U.S. at 907; *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 426 (1990) (efforts to publicize a boycott, explain the merits of its cause, and to lobby local officials were fully protected by the First Amendment). Allowing individuals to recover civil damages based on protected boycott activity "would outlaw many activities long thought to be protected by the First Amendment[, like] routine picketing by striking unions, ... and the civil-rights boycotts directed against businesses with segregated lunch counters in the 1960's." *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099, 1100 (2000) (Scalia, J., dissenting from denial of certiorari).

The evidence in the record showed that Allyn Gibson posted statements on social media such as, "not my fault most black ppl around my area suck" and "People spit at me and call me racist at least a few times a month. 100 % of those people deserve to die. **** them all to hell."[12] The Oberlin students organized a protest outside of Gibson's bakery to protest the use of force by an employee of the bakery against an African-American student, the police department's response and previously-reported discriminatory treatment of African-Americans at Gibson's. The Oberlin Student Senate passed a resolution calling for students to stop supporting Gibson's bakery for

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[12] Clay LePard, *Judge Unseals New Evidence in Gibson Bakery Lawsuit Against Oberlin College*, ABC News 5 Cleveland (Sept, 30, 2021), https://www.news5cleveland.com/news/local-news/oh-lorain/judge-unseals-new-evidence-in-gibson-bakery-lawsuit-against-oberlin-college.

similar reasons. These actions are plainly protected by the First Amendment. Association with, and support for, those protests by some university administrators cannot make Oberlin responsible for the boycott any more than the NAACP's association with Charles Evers could have transformed it into a proper defendant in *Claiborne*. *See supra*. The damages award upends core constitutional protections for speech. 528 U.S. at 1100.

Likewise, Oberlin cannot be held liable based on its publication of students' speech if that speech is protected opinion. *See Vail*, 72 Ohio St.3d at 281; *see also Jorg v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶ 9 (1st Dist.) ("Under the Ohio Constitution statements of opinion are protected speech and are not actionable"). The trial court and the Ninth District wrongly found that statements in the flyer and the Student Senate resolution were not protected opinions. Specifically, the Ninth District determined that the statements that the bakery had a "long account" or "history of racial profiling and discrimination" were verifiable fact. *See Gibson Bros., Inc. v. Oberlin College*, 2022-Ohio-1079 ¶¶ 33-34, 37 (9th Dist.).

That determination raises serious concerns. Given that these statements occurred in the context of a protest advocating for equality and racial justice, the court "must make an independent examination of the whole record, so as to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression." *N.Y. Times Co.*, 376 U.S. at 285 (internal quotation marks omitted). The Ninth District's determination that statements describing a "long account" or "history" of racial discrimination implied verifiable fact hardly gives assurance that the judgment in this case will not intrude on free expression. To the contrary; these statements arose in the context of the ongoing student boycott and reflected the protected statements of student protestors. Properly understood in context, the statements in the flyer and Student Senate resolution

constitute the "highly charged political rhetoric" that lies at the core of the First Amendment. *Claiborne*, 458 U.S. at 926–27.

The context in which a statement was made is particularly important to the First Amendment analysis. Given the importance of safeguarding the right to free speech and assembly, courts in Ohio and elsewhere have held that statements made during a boycott, including written protest literature, will often be understood as opinionated advocacy rather than defamatory fact. *See, e.g.*, *Jorg* at ¶ 20 ("Considering the allegedly defamatory statements in the context of the entire letter, we are convinced that the average reader would be unlikely to infer that the statements were meant to be factual. The entire letter was a call to action and meant to cause outrage in the reader.").

The Ninth District's reasoning that the students' allegations regarding racism and the Gibsons' prior discriminatory behavior should be considered verifiable fact not only misunderstands discourse about racism but would stifle such discourse if allowed to stand. As courts have noted, "what constitutes racism," is subject to intense public debate and "incapable of objective verification." *Jorjani v. N.J. Inst. of Tech.*, No. 18-CV-11693, 2019 WL 1125594, at *6 (D.N.J. Mar. 12, 2019).

Public accusations of racism and racial insensitivity are nearly always considered protected opinion, *see Taylor v. Metzger*, 706 A.2d 685, 703 (N.J. 1998). Recognizing "the chilling effect" of a contrary holding, "most courts do not find words of bigotry or racism to constitute actionable defamation, thus protecting the freedom to express even unpopular, ugly and hateful, political, religious, and social opinions." 706 A.2d at 703 (internal quotation marks omitted); *see also Squitieri v. Piedmont Airlines, Inc.*, 17CV441, 2018 WL 934829, at *4 (W.D.N.C. Feb. 16, 2018) (citing *Stevens v. Tillman*, 855 F.2d 394, 400–02 (7th Cir. 1988) ("Statements indicating that

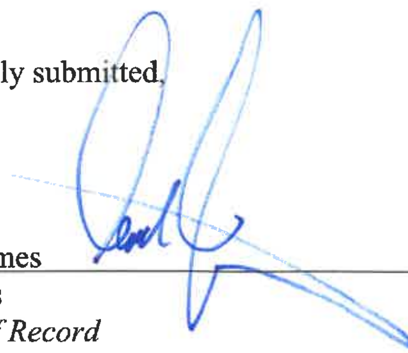
Plaintiff is racist are clearly expressions of opinion that cannot be proven as verifiably true or false.")); *Martin v. Brock*, No. 07C3154, 2007 WL 2122184, at *3 (N.D. Ill. July 19, 2007) (accusation of racism is nonactionable opinion in Illinois); *Covino v. Hagemann*, 627 N.Y.S.2d 894, 895-96 (N.Y. Sup. Ct., Richmond Cnty. 1995) (dismissing defamation claim based on statement that plaintiff was "racially insensitive," observing "an expression of opinion is not actionable as a defamation, no matter how offensive, vituperative, or unreasonable it may be" and "[a]ccusations of racism and prejudice" are routinely understood as non-actionable expressions of opinion).

Indeed, courts have held that an expression that someone is "racist" is a statement of opinion not cognizable as defamation *even* when that accusation is made in parallel to employment suits or disciplinary hearings. *See, e.g.*, *Frascatore v. Blake*, 344 F.Supp.3d 481, 498 (S.D.N.Y. 2018) (defendant's statement that he had "experienced the effects of racism firsthand" during an encounter with a police officer was a non-actionable statement of opinion, even though the officer went through parallel civilian disciplinary proceedings); *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶ 31 ("[W]e find that appellant's being called a racist was a matter of one employee's opinion and thus is constitutionally protected speech, not subject to a defamation claim," in a suit for both racial discrimination in an employee's termination *and* defamation). This body of caselaw draws precisely the distinction between fact and protected opinion the trial court, and the Ninth District, misunderstood. The Ninth District's interpretation invites courts to find an implication of (actionable) undisclosed facts in almost any scenario where the average reader or listener would understand a statement as a "highly charged" (non-actionable) statement of opinion. That approach departs from the First Amendment standard.

V. CONCLUSION

These issues are of public and great general interest and present substantial questions of constitutional law. For the foregoing reasons, and the reasons stated in the Defendants-Appellants' brief, the Court should accept jurisdiction and reverse the judgment of the Ninth District.

Respectfully submitted,



/s/ Carl James
Carl James
Counsel of Record
Ohio Registration: 0034314
4450 Market Street
Youngstown, OH 44124
(330) 782-8301
cjames@bdi-usa.com

Jessica Ring Amunson*
Deanna E. Krokos*
JENNER & BLOCK LLP
1099 New York Avenue NW,
Suite 900
Washington, DC 20001
(202) 639-6000

**Pro hac vice* motions forthcoming

CERTIFICATE OF SERVICE

A copy of the foregoing was served on May 13, 2022 per S.Ct.Prac.R. 3.11(C)(1) by email to the following:

Terry A. Moore (0015837)
Jacqueline Bollas Caldwell (0029991)
Owen J. Rarric (0075367)
Matthew W. Onest (0087907)
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.
4775 Munson Street, N.W.
P.O. Box 36963
Canton, OH 44735-6963
Tel: 330.497.0700
Fax: 330.497.4020
tmoore@kwgd.com / jcaldwell@kwgd.com
orarric@kwgd.com / monest@kwgd.com

Attorneys for Plaintiffs-Appellees Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson

Lee E. Plakas (0008628)
Brandon W. McHugh (0096348)
PLAKAS | MANNOS
200 Market Avenue North, Suite 300
Canton, OH 44702
Tel: 330.455.6112
Fax: 330.455.2108
lplakas@lawlion.com
bmchugh@lawlion.com

James N. Taylor (0026181)
JAMES N. TAYLOR CO., L.P.A.
409 East Ave., Suite A
Elyria, OH 44035
Tel: 440.323.5700
taylor@jamestaylorlpa.com

Additional Attorneys for Plaintiffs-Appellees Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson

Benjamin C. Sassé (0072856)
Elisabeth C. Arko (0095895)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
Tel: 216.592.5000
Fax: 216.592.5009
benjamin.sasse@tuckerellis.com
elisabeth.arko@tuckerellis.com

Attorneys for Defendants-Appellants Oberlin College and Dr. Meredith Raimondo

Ronald D. Holman, II (0036776)
Julie A. Crocker (0081231)
TAFT STETTINIUS & HOLLISTER LLP
200 Public Sq., Suite 3500
Cleveland, OH 44114-2302
Tel: 216.241.2838
Fax: 216.241.3707
rholman@taftlaw.com
jcrocker@taftlaw.com

Richard D. Panza (0011487)
Matthew W. Nakon (0040497)
Rachelle Kuznicki Zidar (0066741)
WICKENS HERZER PANZA
35765 Chester Rd.
Avon, OH 44011-1262
Tel: 440.695.8000
Fax: 440.695.8098
RPanza@WickensLaw.com
MNakon@WickensLaw.com
RZidar@WickensLaw.com
Seth D. Berlin (PHV #21649-2020)
Joseph Slaughter (PHV #21599-2020)
BALLARD SPAHR LLP
1909 K St., NW
Washington, D.C. 20006
Tel: 202.661.2200

Fax: 202.661.2299
berlins@ballardspahr.com
slaughterj@ballardspahr.com

Additional Attorneys for Defendants-Appellants Oberlin College and Dr. Meredith Raimondo

/s/ Carl James
Carl James
Counsel of Record
Ohio Registration: 0034314
4450 Market Street
Youngstown, OH 44124
(330) 782-8301
cjames@bdi-usa.com

Jessica Ring Amunson*
Deanna E. Krokos*
JENNER & BLOCK LLP
1099 New York Avenue NW,
Suite 900
Washington, DC 20001
(202) 639-6000

**Pro hac vice* motions forthcoming