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

GIBSON BROS., INC., et al.

Plaintiffs-Appellees/Cross-Appellants,

-vs.-

OBERLIN COLLEGE, et al.

Defendants-Appellants/Cross-Appellees.

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

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

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO THE MOTION FOR LEAVE TO FILE AMICUS BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

I. PRELIMINARY STATEMENT

The tradition underpinning the submission of amicus briefs has been forgotten in this case. Amicus Curiae the National Association for the Advancement of Colored People (the "Amicus" or "NAACP") seeks leave to file an *amicus* brief in this case because, without citation to a shred of evidence submitted during trial, it believes the jury verdict in this case is based on Oberlin College students protesting "historically discriminatory treatment of African-Americans" by the Gibsons.[1] (See, NAACP Mt., p. 2). But even a cursory review of the record in this case shows that the NAACP's arguments and assertions have absolutely no basis in law or fact. Therefore, NAACP's Motion for Leave to file an *amicus* brief should be denied for the following reasons:

- ***First***, Amicus does not cite to any evidence or testimony presented at trial.
- ***Second***, Amicus invents "facts" that were not submitted to the jury.

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

- ***Third***, without citing to the record, Amicus claims that the Oberlin Parties[2] were held responsible for student speech and a sanctioned boycott. This is not true. The Oberlin Parties were held liable for actively defaming the Gibsons, intentionally interfering with Gibson's Bakery's business relationships, and causing intentional emotional injury to David Gibson and Grandpa Gibson.

- ***Fourth***, Amicus's claim of historically discriminatory treatment is a smokescreen belied by the Oberlin Parties' admission at the beginning of trial that the three arrested students "got exactly what they deserved" and the students' admissions in open court that their arrests were the result of their criminal conduct and not racist conduct.

- ***Fifth***, even if the Oberlin Parties were held responsible for speech associated with a boycott, a boycott does not grant a license to tell malicious lies about others.

- ***Lastly***, Amicus's arguments regarding statements of opinion are substantially duplicative of the brief submitted by the Oberlin Parties and are flat-out wrong.

II. LAW & ARGUMENT

A. Standard of Review.

The decision to permit amicus curiae is a matter of judicial discretion. *State v. Ioannidis,* 3rd Dist. Allen No. 1-86-52, 1987 WL 13130, *15, *citing Matthews v. Ingleside Hosp., Inc.*, 21 Ohio Misc. 116, 254 N.E.2d 923 (Ohio Com.Pl.1969). A motion for leave to file an amicus brief must identify the applicant's interest and explain why such a brief is desirable, given the briefing to be submitted by the parties. App.R. 17. An amicus curiae's function is to assist the court on matters of law about which the court is doubtful. *City of Lakewood v. State Emp't Relations Bd.*, 66 Ohio App.3d 387, 394, 584 N.E.2d 70 (8th Dist.1990). "The purpose of an amici curiae brief is to assist the court on matters of law about which the court is doubtful." *Id*.

In *Columbus v. Tullos*, the Tenth District held that the purpose of an amicus brief is to provide the court with information on some matter of law in respect to which the court is

[2] "Oberlin Parties" refers collectively to Oberlin College & Conservatory ("Oberlin College") and Dean of Students Meredith Raimondo ("Dean Raimondo").

doubtful or to call attention to a legal matter which has escaped or might escape the court's consideration. *City of Columbus v. Tullos,* 1 Ohio App.2d 107, 108–09, 204 N.E.2d 67 (10th Dist.1964). *See also, Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

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

B. Without any Relevant Citations to the Actual Evidence Submitted at Trial, Amicus Invents Facts to Support a False Narrative that the Gibsons are Racists.

1. Amicus does not cite to any evidence or testimony submitted to the jury during trial.

From the Gibsons review, the NAACP ***did not cite to any evidence submitted to the jury during trial***.[3] For this reason alone, Amicus's motion for leave should be denied. Without a review of or reference to the record evidence, it is impossible for Amicus to provide any assistance to the Court on the relevant legal issues involved in this case.

2. Instead of reviewing the record, the NAACP makes up facts.

Instead of reviewing the record to determine what happened in this case, Amicus, without citation to any evidence submitted during trial, claims that this case is "based on a student-organized boycott in protest of a Gibson's Bakery employee's violent actions against an African-American student ... and the bakery's historically discriminatory treatment of African-Americans." Amicus failed to provide any evidentiary support for this obvious misrepresentation. Had Amicus reviewed the record, it would have discovered that ***none*** of these assertions are true. As such, Amicus has fallen into the Oberlin Parties' scheme – viciously smear the Gibsons with lies.

[3] Indeed, from the Gibsons' review, Amicus only cites to certain pleadings or orders from the

a. The jury held the Oberlin Parties responsible for actively defaming the Gibsons.

Amicus initially claims that the damages awarded by the jury in this case "are based on a student-organized boycott[.]" (NAACP Mt., p. 2). But this is simply not the case. The evidence actually submitted at trial shows that the jury awarded the Gibsons compensatory and punitive damages based on the Oberlin Parties' intentional tortious conduct in defaming the Gibsons, intentionally interfering with Gibson's Bakery's business relationships, and causing intentional emotional injury to David Gibson and Grandpa Gibson:

- Numerous witnesses testified that Dean Raimondo and other Oberlin College administrators handed out ***stacks*** of the defamatory Flyer that falsely accused the Gibsons of: (1) being a racist establishment with a long account of racial profiling and racial discrimination; and (2) accusing the owners of Gibson's Bakery (Grandpa Gibson and David Gibson) of committing the crime of assault. [See, Tr. Trans. Vol. III, p. 104; Tr. Trans. Vol. IV, pp. 15-18; Tr. Trans. Vol. V, pp. 178-79].

- Using a bullhorn, Oberlin College and Dean Raimondo actively directed and orchestrated the dissemination of the defamatory Flyer, including announcing that additional copies of the defamatory Flyer could be made at Oberlin College administrative offices. [See, Tr. Trans. Vol. IV, p. 28; Tr. Trans. Vol. III, p. 111; Tr. Trans. Vol. V, pp. 178-179, 190; Tr. Trans. Vol. VI, pp. 6-7].

- To further Oberlin College's goal of destroying the Gibson's reputations and their business, Dean Raimondo and her well-oil administrative team set out to prevent photographic evidence of their defamatory conduct by blocking members of the press and the public from taking photographs. [Tr. Trans. Vol. III, pp. 156-157; Tr. Trans. Vol. IV, pp. 4, 15-19].

- For ***more than a year***, Dean Raimondo and Oberlin College published a copy of the defamatory Resolution at a prominent location in an Oberlin College administrative building that continued after the students pled guilty and admitted that racism played no part in this case. [See, Pl. Tr. Ex. 35; Tr. Trans. Vol. IV, p. 55; M. Krislov Dep. Vol. I, pp. 210-211].[4]

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

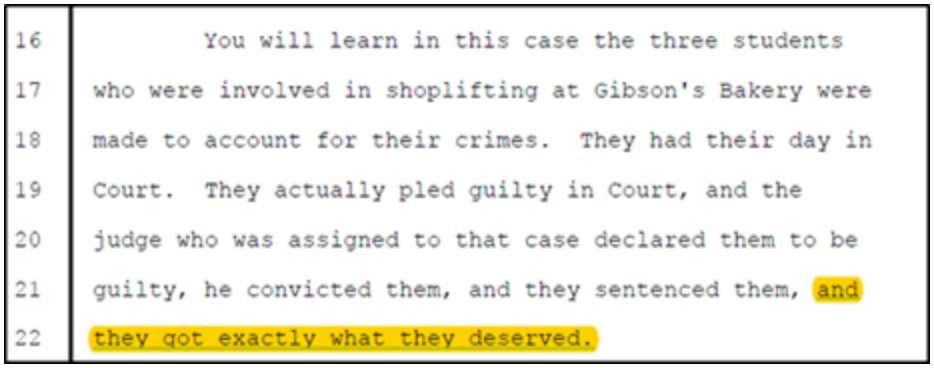
- The jury also learned that Dean Raimondo and Oberlin College forced Bon Appetit, an independent third party, to terminate its business relationship with Gibson's Bakery [See, Pl. Tr. Ex. 55]. Importantly, Oberlin College's own Chief of Staff, Ferdinand Protzman, admitted that the decision to terminate the business was completely unjustified. [See, Tr. Trans. Vol. III, p. 13].

- Despite the fact that the decision to terminate business was completely unjustified, Oberlin College's high-ranking administrators attempted to bully the Gibsons to "drop" criminal charges against three students properly arrested for shoplifting in exchange for a resumption of business between Gibson's Bakery and Bon Appetit, which caused the Gibsons to suffer substantial emotional pain and injuries. [See, Tr. Trans. Vol. X, p. 172; Pl. Tr. Ex. 145; Pl. Tr. Ex. 135; Tr. Trans. Vol. VII, pp. 68-69].

The Oberlin Parties were not punished for a student boycott. Instead, the Oberlin Parties were held responsible by the jury for their independent tortious conduct that destroyed Gibson's Bakery and smeared the Gibsons' name and reputation.

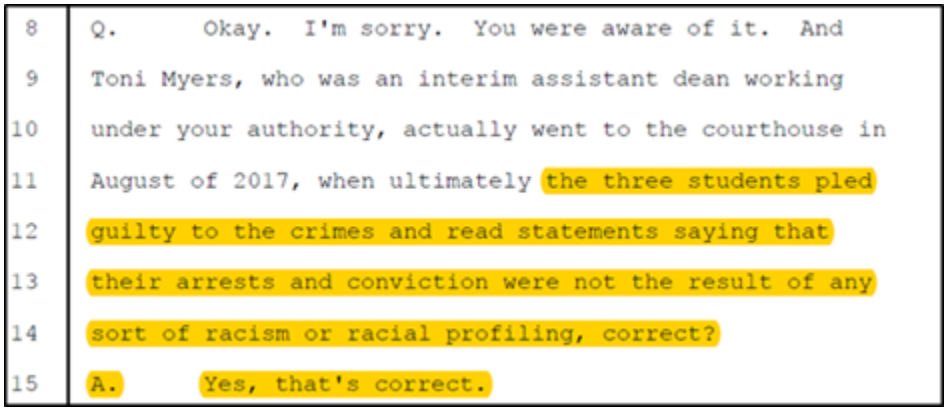
b. The shoplifting incident on November 9, 2016 was not an issue at trial because the Oberlin Parties admitted during opening statements that the shoplifters *"got exactly what they deserved."*

Amicus claims that it has an interest in this case based on a "Gibson's Bakery employee's violent actions against an African-American student[.]" This statement, which is not supported by any citation to the record, is clearly false. The shoplifting incident at Gibson's Bakery on November 9, 2016 ***was not even discussed at trial*** because during opening statements, the Oberlin Parties' then-lead attorney definitively stated that the students arrested for shoplifting ***got exactly what they deserved***:



You will learn in this case the three students who were involved in shoplifting at Gibson's Bakery were made to account for their crimes. They had their day in Court. They actually pled guilty in Court, and the judge who was assigned to that case declared them to be guilty, he convicted them, and they sentenced them, and they got exactly what they deserved.

[Tr. Trans. Vol. II, p. 130 (emphasis added)]. Dean Raimondo further testified during trial that the three students admitted that their arrests were not the result of racial profiling:



Q. Okay. I'm sorry. You were aware of it. And Toni Myers, who was an interim assistant dean working under your authority, actually went to the courthouse in August of 2017, when ultimately the three students pled guilty to the crimes and read statements saying that their arrests and conviction were not the result of any sort of racism or racial profiling, correct?

A. Yes, that's correct.

[Tr. Trans. Vol. V, p. 32 (emphasis added)].

By the Oberlin Parties' own admissions, the three students arrested for shoplifting were not subjected to racial profiling or discrimination and were lawfully arrested and prosecuted for stealing from the Gibsons. By arguing that this case is about the shoplifting incident, the NAACP is creating a false narrative that has no relationship to the facts submitted during trial.

c. Not a shred of evidence was admitted at trial showing that the Gibsons have a history of racism or racial profiling. Instead, numerous community members and even Oberlin College's own administrators testified that the Gibsons do not have a history of racism or racial profiling.

Amicus's most egregious accusation is that the Gibsons "historically" discriminated against people of color. (Amicus Mt., p. 2). Again, this claim is not supported by any citation to the record and for good reason: during trial the Oberlin Parties ***did not submit any evidence indicating that the Gibsons had a history of racial profiling or discrimination or even committed a single act of racial profiling or discrimination***. In fact, numerous Oberlin College upper-level administrators admitted that the Gibsons did ***not*** have a history of racial profiling or discrimination, including Chief of Staff Ferdinand Protzman:

19	"Question, Did the college privately challenge
20	the protesters' statement?"
21	"Answer, I don't think we did in part because I
22	don't think any of us thought the Gibsons are racists?"

[See, Tr. Trans. Vol. III, p. 23]. The evidence was not limited to admissions from Oberlin College's own administrators. Numerous persons of color from the Oberlin community testified during trial that the Gibsons do not have a history of racial profiling or racial discrimination. [See, Cross-Appeal Brief, Sec. III(C)(5)].[5]

Perhaps most indicative of the Oberlin Parties' disdain for the Gibsons, on November 11, 2016, an Oberlin College employee, Emily Crawford, contacted the College's high-ranking administrative team to inform them that persons of color ("POC") knew the Gibsons did not have a history of racial profiling or discrimination:

From: Emily Crawford <ecrawfor@oberlin.edu>
Subject: Re:
Date: November 11, 2016 at 11:42:47 AM EST
To: Ben Jones <bjones@oberlin.edu>

i have talked to 15 townie friends who are poc and they are disgusted and embarrassed by the protest. in their view, the kid was breaking the law, period (even if he wasn't shoplifting, he was underage). to them this is not a race issue at all and they do not believe the gibsons are racist. they believe the students have picked the wrong target.

the opd, on the other hand, IS problematic. i don't think anyone in town would take issue with the students protesting them.

i find this misdirected rage very disturbing, and it's only going to widen the gap btw town and gown.

and sure you can share if you want.

[Pl. Tr. Ex. 63 (emphasis added)]. Oberlin College's high-ranking administrators recklessly disregarded this critical information, including Tita Reed, the Special Assistant to the President for Community and Government Relations:

[5] In their Cross-Appeal Brief, the Gibsons outlined the testimony of the numerous persons of color who came forward to testify during trial.

> On Fri, Nov 11, 2016 at 12:25 PM Tita Reed <treed@oberlin.edu> wrote:
>
> Doesn't change a damned thing for me.

[Id. (emphasis added)].

3. If Amicus had reviewed the record, it would have discovered that the Oberlin Parties' campaign to smear and destroy the Gibsons was intended to deflect from allegations of racism against Oberlin College and to also put into motion Oberlin College's plan to acquire the Gibsons' real property.

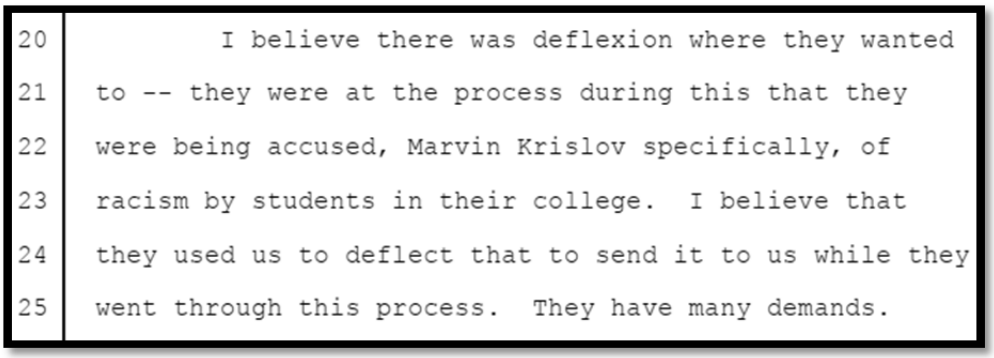
Had the NAACP dug a little deeper into the record at trial, it would have discovered that Oberlin Parties, despite their claims of inclusion and multi-culturalism, have a recent history fraught with accusations and claims of racism. For instance, during the 2015-2016 academic year, students of color issued a 14-page list of demands to Oberlin College and its administrators:

> Oberlin College and Conservatory is an unethical institution. From capitalizing on massive labor exploitation across campus, to the Conservatory of Music treating Black and other students of color as less than through its everyday running, Oberlin College unapologetically acts as unethical institution, antithetical to its historical vision. In the 1830s, this school claimed a legacy of supporting its Black students. However, that legacy has amounted to nothing more than a public relations campaign initiated to benefit the image of the institution and not the Africana people it was set out for. Along the same lines stated by UNC Chapel Hill students in their 2015 document "A Collective Response to Anti-Blackness," you include Black and other students of color in the institution and mark them with the words "equity, inclusion and diversity," when in fact this institution functions on the premises of imperialism, white supremacy, capitalism, ableism, and a cissexist heteropatriarchy. Oberlin College and Conservatory uses the limited number of Black and Brown students to color in its brochures, but then erases us from student life on this campus. You profit off of our accomplishments and invisible labor, yet You expect us to produce personal solutions to institutional incompetencies. We as a College-defined "high risk," "low income," "disadvantaged" community should not have to carry the burden of deconstructing the white supremacist, patriarchal, capitalist system that we took no part in creating, yet is so deeply embedded in the soil upon which this institution was built.

[Pl. Tr. Ex. 257]. Interestingly, Oberlin College's enrollment practices give credence to the arguments made by the students issuing the demands. For the 2017-2018 academic year, Oberlin

College's enrollment was only five (5%) percent African American,[6] while the national average for baccalaureate institutions was three times higher.[7]

The jury heard from David Gibson, who aptly connected the dots surrounding Oberlin Parties' nefarious motivations, when asked why he believed the Oberlin Parties refused to retract their defamatory statements:

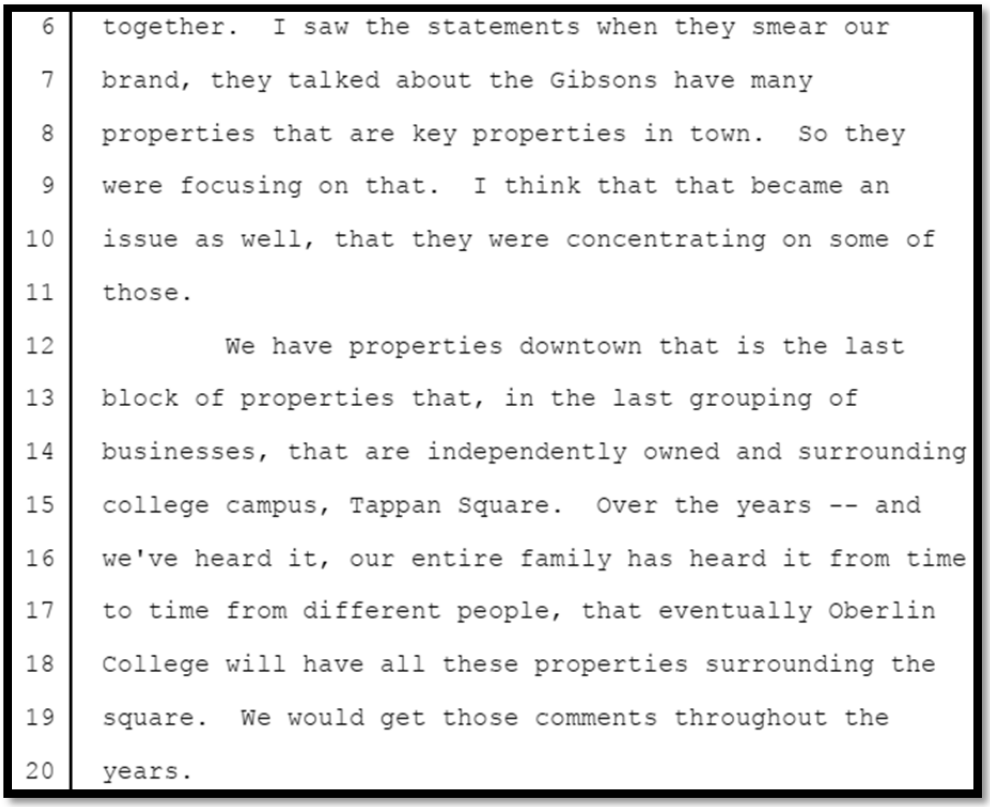


I believe there was deflexion where they wanted to -- they were at the process during this that they were being accused, Marvin Krislov specifically, of racism by students in their college. I believe that they used us to deflect that to send it to us while they went through this process. They have many demands.

***

[6] Oberlin College's enrollment data was pulled from the National Center for Education Statistics, the primary federal entity for collecting and analyzing data related to education in the United States. *See,* https://nces.ed.gov/ipeds/datacenter/institutionprofile.aspx?unitId=204501 (last visited June 25, 2020).

[7] The data for the national enrollment statistics was pulled from the National Center for Education Statistics and compiled by Data USA, a joint venture aimed at providing educational statistics in a digestible format. *See,* https://datausa.io/profile/university/oberlin-college#:~:text=Enrollment%20by%20Race%20%26%20Ethnicity&text=The%20enrolled%20student%20population%20at%20Oberlin%20College%20is%2064.1%25%20White,American%20Indian%20or%20Alaska%20Native. (last visited June 25, 2020).



together. I saw the statements when they smear our brand, they talked about the Gibsons have many properties that are key properties in town. So they were focusing on that. I think that that became an issue as well, that they were concentrating on some of those.

We have properties downtown that is the last block of properties that, in the last grouping of businesses, that are independently owned and surrounding college campus, Tappan Square. Over the years -- and we've heard it, our entire family has heard it from time to time from different people, that eventually Oberlin College will have all these properties surrounding the square. We would get those comments throughout the years.

[See, Tr. Tran. Vol. X, pp. 206-208].

C. Boycotts do not Provide a License to Tell Malicious Lies about Others.

Throughout its brief, Amicus claims that defamation liability cannot attach to statements associated with a boycott. This argument is faulty for three reasons:

1. The Oberlin Parties were held responsible for their independent tortious conduct, not for assisting a student boycott.

As explained in detail above, the Oberlin Parties were held responsible for defaming the Gibsons, interfering with Gibson's Bakery's business relationships, and intentionally causing emotional harm to David Gibson and Grandpa Gibson. The Oberlin Parties ***were not found liable by the jury for student speech at a protest***. *See, supra* Sec. II(B)(2)(a).

2. Even if the Oberlin Parties were held responsible for participating in a boycott (they were not), a boycott does not shield a person from defamation liability.

The gist of Amicus's arguments is that participating in a boycott somehow protects a person from his or her defaming of another. [NAACP Br., pp. 10-12]. There are three major flaws with this argument:

First, the Oberlin Parties were ***not*** held responsible for participating in a boycott.

Second, *New York Times v. Sullivan* (which Amicus relies upon for such an absurd proposition) does not establish an impenetrable shield against defamation liability and damages merely because the defamer may have also been boycotting the victim. In fact, *Sullivan* did not involve a boycott, but instead involved a defamation claim brought against a newspaper by a public official and related to a story about that official's official conduct. *New York Times Co. v. Sullivan*, 376 U.S. 254, 256, 84 S.Ct. 710, 713, 11 L.Ed.2d 686 (1964) ("We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."). Moreover, if *Sullivan* had indeed created such a broad-sweeping liability shield, then the United States Supreme Court would not have needed to adopt the actual malice standard enunciated therein. *Id*. at 283 ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable."). Instead, the Court would have simply said – a person cannot be liable for his or her defamatory statement so long as the statements were made during a boycott. It said nothing of the sort because a boycott was not at issue.

Third, as Justice Stewart acknowledged several decades ago, the First Amendment is not a shield for "careless liars" who aim to destroy the reputations of others:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.
>
> We use misleading euphemisms when we speak of the New York Times rule as involving 'uninhibited, robust, and wideopen' debate, or 'vehement, caustic, and sometimes unpleasantly sharp' criticism. What the New York Times rule ultimately protects is defamatory falsehood. No matter how gross the untruth, the New York Times rule deprives a defamed public official of any hope for legal redress without proof that the lie was a knowing one, or uttered in reckless disregard of the truth.
>
> That rule should not be applied except where a State's law of defamation has been unconstitutionally converted into a law of seditious libel. The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

Rosenblatt v. Baer, 383 U.S. 75, 92–93, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966) (Justice STEWART, concurring).

3. Amicus' reliance on the *Overstreet* and *Claiborne Hardware* cases is misplaced.

Amicus's claimed interest relies primarily on two United States Supreme Court opinions: *Natl. Assn. for Advancement of Colored People v. Overstreet*, 384 U.S. 118, 86 S.Ct. 1306, 16 L.Ed.2d 409 (1966) and *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982). However, these cases dealt solely with holding an advocacy group liable based solely on the actions of third-parties. Because the evidence in our case proved

that the Oberlin Parties committed overt acts of defamation, the *Overstreet* and *Claiborne* decisions are distinguishable.

a. *Overstreet*, an unbinding four-Justice dissent, established that an advocacy group could not necessarily be held liable solely for the actions of third-parties, but it did not say that the advocacy group was immune from its own intentional tortious conduct.

In *Overstreet*, a young African American child alleged that a store owner had mistreated him. *Overstreet*, 384 U.S. at 118–26. The child accused the store owner of accusing him of theft and physically slapping and kicking him. *Id*. Thereafter, local members of the community, with support from the Amicus picketed the store. *Id*. The occurrence of the events giving rise to the picketing remained in dispute, creating the first major distinction with our case. In our case, the three students accused of theft pled guilty, admitted their guilt, and stated in open court that the employee of Gibson's Bakery did nothing wrong and that no racial profiling or discrimination occurred. Thus, the animus towards the Gibsons was misdirected from the very outset of this case.

Additionally, the *Overstreet* opinion is a four-Justice dissent and is not binding on any court, including this Court. Regardless, the dissenting Justices acknowledged that the primary tortfeasors who actually harmed the plaintiff-store owner could be held liable for their wrongful conduct: "Respondent has suffered economic loss as a result of the conduct of those who blocked his sidewalk and threatened his customers. I assume that nothing in the Constitution bars recovery for his injuries from those individuals. The courts below found that the Branch was responsible for these injuries, and no questions as to that aspect of the case are now before us." *Id*. at 119. What the dissent took issue with was equating the tortfeasors' liability with the Amicus without any evidence proving the Amicus "authorized or ratified" the tortious conduct.

Id. at 122 ("To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it."). *See id*. at 126 ("This record discloses no specific authorization or ratification by petitioner of the acts which the Georgia courts found tortious. Nor is there any evidence of any participation by petitioner in such conduct."). Nothing of the sort occurred in this case or is likely to occur. Instead, the jury heard evidence that the Oberlin Parties actively defamed the Gibsons and actively supported others in defaming the Gibsons, or at a minimum, ratified that conduct. As a result, Amicus cannot state that *Overstreet* gives it a valid interest in the present case because the two cases are starkly different from one another.

b. *Claiborne* did not involve defamation and furthermore, acknowledged that the First Amendment would not protect all activities of a boycott, including violence and defamation.

In *Claiborne*, a boycott of white merchants in Claiborne County, Mississippi took place in 1966 and was organized in part by the Amicus and its local branch. *Claiborne*, 458 U.S. at 886-87. The purpose of the boycott was to correct undisputed racial inequality by the store merchants. *See id*. While the boycott was generally peaceful, there were several acts and threats of violence. *Id*. Several white merchants who had their businesses damaged by the boycotts brought suit against those who participated in the boycotts and the civil rights organizations who aided the boycotts. *Id*.

Initially, it must be noted that *Claiborne* did not involve defamation in any respect. Moreover, the United States Supreme Court merely noted that non-violent portions of boycotts, but not violent portions, are protected speech. *Id*. at 911. However, the protected portions of the boycott did not provide some sort of shields for other unprotected portions, specifically the violent actions during the boycott. *Id*. at 912 ("The presence of protected activity, however, does

not end the relevant constitutional inquiry."). The First Amendment does not protect all forms of speech or conduct. It does not protect violence. *Id*. at 916 ("The First Amendment does not protect violence."). Likewise, the First Amendment does not protect defamation, even when one claims the defamation occurred during otherwise protected conduct, such as a boycott. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46, 122 S.Ct. 1389, 1399, 152 L.Ed.2d 403 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation…"). *See In re IBP Confidential Business Documents Litigation*, 755 F.2d 1300, 1313 (8th Cir.1985), on reh'g, 797 F.2d 632 (8th Cir.1986) (acknowledging that defamatory speech does not become protected speech merely because it was uttered during other protected conduct, such as during the course of petitioning the government).

c. The late-Justice Antonin Scalia's dissent in *Cloer v. Gynecology Clinic, Inc.* recognized that a state could prohibit a defendant from seeking to destroy business while acting with malice towards the business, even if the tool of destruction was a boycott.

Moreover, the late-Justice Scalia's dissent to the certiorari denial in *Cloer v. Gynecology Clinic, Inc.*, 528 U.S. 1099, 120 S.Ct. 862, 145 L.Ed.2d 708 (2000), cited by Amicus, does not say that boycotting is fully protected by the First Amendment, even when dealing with targeting defamation. In fact, the late-Justice Scalia acknowledged that a state could target unlawful actions committed by the tortfeasor, which has to include defamation, otherwise defamation would never be actionable. In fact, he said quite the opposite by acknowledging that a state could prohibit a defendant from seeking to destroy business while acting with malice towards the business. *Cloer*, 528 U.S. 1099, 120 S.Ct. 862, Mem-863 ("It may well be that an attempt, by lawful persuasion, to harm someone's business out of sheer malice, or in order to capture his clientele, can be made illegal."). In our case, the jury heard evidence that Oberlin Parties

defamed the Gibsons while acting with animus, hatred, and ill will towards the Gibsons. As such, the late-Justice Scalia would very likely reject Amicus's attempt to transform defamation into a lawful form of persuasion.

Justice Scalia's dissent is consistent with the *Claiborne* decision, because the *Claiborne* Court was concerned with holding a group responsible for the wrongful conduct of those with whom it associates. To balance the concerns of protecting victims of tortious conduct with concerns about chilling free speech and association, the Court struck a reasonable balance: "Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims." *Claiborne*, 458 U.S. 886, at paragraph 2(b) of the syllabus.

While proof that Amicus possessed unlawful goals or held a specific intent to further the illegal aims was lacking in *Claiborne*, the undisputed evidence adduced at trial in this case proved that the Oberlin Parties defamed the Gibsons and possessed the specific intent to cause the greatest amount of harm to the Gibsons. Thus, the case before this Court does not involve the imposition association liability and thus, does not impact Amicus's operations. As a result, Amicus has failed to demonstrate a sufficient interest in this case and its proposed amicus brief should be rejected and stricken.

B. Revealing that it is a Friend of the Oberlin Parties Rather than a Friend of the Court, Amicus' Arguments Regarding Statements of Opinion Merely Duplicate the Briefing of the Oberlin Parties.

Amicus's claim that the Oberlin Parties' defamatory statements are protected opinions is not supported by Ohio law or the facts in evidence. Instead, it is a repeat of arguments asserted

by the Oberlin Parties both before the trial court and during this appeal. Amicus's opinion defense should be rejected for two reasons:

1. Amicus briefs that submit duplicative arguments should be rejected out of hand.

Amicus briefs that duplicate arguments of the parties must be rejected out of hand. In addressing duplicative amicus briefs, Chief Judge Posner noted that:

> **The bane of lawyers is prolixity and duplication**, and for obvious reasons is especially marked in commercial cases with large monetary stakes. In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, **we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal**.

Ryan v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063–64 (7th Cir.1997).

This is especially true in this case. During dispositive motion and post-trial briefing, the parties in this case dedicated dozens of pages and enormous amounts of time to arguing about Ohio's protection of opinion statements in defamation cases. [See, Defs March 1, 2019 MSJ, pp. 13-17; see, Plfs March 15, 2019 Resp. in Opp. to MSJ, pp. 57-79]. This practice has continued on appeal. Oberlin College dedicated more than ten (10) percent of its appellate brief to arguing the opinion issues. [See, Appellants Br., pp. 12-16]. Amicus's proposed brief simply echoes Oberlin Parties' arguments, citing several of the same authorities. There is no real discussion of how the jury's verdict has any impact beyond the Oberlin Parties' own private interests.

2. Like the Oberlin Parties, Amicus' opinion arguments are wrong.

Further, like the Oberlin Parties' opinion defense raised before the trial court, Amicus's opinion defense quickly falls apart when one actually examines the entirety of the defamatory statements at issue and the context in which such statements were made, as Ohio law requires. For the reasons to be discussed below, all of the defamatory statements at issue suggest they are

supported by verifiable facts, such as a "LONG ACCOUNT of RACIAL PROFILING," and are therefore not opinions.

a. Ohio uses a totality-of-circumstances test to test whether a statement is verifiable and thus not an opinion.

Ohio has adopted a totality of the circumstances test to determine whether a statement is an opinion or a statement of fact. In describing the test, the Ohio Supreme Court has stated:

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

Vail v. The Plain Dealer Publishing Co., 72 Ohio St.3d 279, 282, 649 N.E.2d 182 (1995), *citing Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). No one factor is dispositive. *Id*. Instead, the test is "fluid." *Id.* Here, the circumstances plainly reveal that Oberlin Parties' defamatory statements do not constitute mere "opinions."

b. In Ohio, merely being called a racist (without allegations of profiling or discrimination) is sufficient for a claim a defamation.

In fact, under Ohio law, a publication stating that someone is "racist," in and of itself, can constitute actionable defamation under Ohio law. *Lennon v. Cuyahoga Cty. Juvenile Court*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587, ¶¶ 26, 30 ("In the instant case, the specific language used is unambiguous. One co-worker told another co-worker that appellant was a racist."). The court, in *Lennon*, acknowledged that branding someone a racist can be defamatory on its face and "weighs heavily toward actionability, as we cannot think of a scenario in which these words are not pejorative." *Id*. at ¶ 30. Here, former President Marvin Krislov agreed that being called a racist is one of the worst, most damaging things one may be called. [Tr. Trans. Vol. XIV, p. 179]. ***David Gibson confided with President Krislov that over-90-year-old***

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

c. Oberlin Parties' defamatory statements were not mere allegations of racism, but included allegations of a "LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" and the commission of the crime of assault.

The defamatory Flyer, for example, stated: "This [Gibson's Bakery] is a RACIST establishment **with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION.**" (Emphasis added.) [Pl. Tr. Ex. 263]. Amicus focuses on the portion of this sentence preceding the word "with." However, the statement submits that the claim is supported by a "LONG ACCOUNT" of racial profiling and discrimination. After all, a "long account" suggests that there exists a documented record, and compilation, of a pattern of racial profiling and discrimination events. This makes the entire statement, and each subpart, verifiable, thereby weighing heavily in favor of a determination that they are (false) statements of fact rather than protected opinions. *See Lennon*, 2006-Ohio-2587, ¶ 30.

Likewise, the defamatory Student Senate Resolution expressly prefaces its defamatory remarks by announcing "we find it important to share a few key facts" before going on to state that "Gibson's has a history of racial profiling and discriminatory treatment of students and

residents alike." [Pl. Tr. Ex. 35]. Again, the publication suggests that its conclusions are based on verifiable facts, thus eliminating the argument that it offers mere opinions.

The defamatory Flyer and Resolution go even further to claim an owner of Gibson's Bakery violently assaulted a member of the Oberlin community. Thus, Oberlin Parties accused Gibsons of committing a crime. R.C. 2903.13 (criminalizing assault). None of these statements is ambiguous, thereby undercutting any claim that they are mere opinions. *See id*. These statements by the Vice President and Dean of Students are impactful and highly influential. This is not surprising, as students, faculty, staff, and the community undoubtedly expect an institution of higher learning—which has tremendous resources—to base its public statements on facts, research, and analysis rather than mere off-the-cuff "water-cooler chitchat."

d. Allegations of racism towards customers, racial profiling, racial discrimination, and criminal conduct are all capable of verification.

Contrary to Amicus's claim, Oberlin Parties' statements are verifiable. The defamatory statements suggested the claim of racism was supported by known, undisclosed facts, including a "long account" of racial profiling and racial discrimination. This strongly supports holding the statements were verifiable.

Moreover, accusing a business of being a racist establishment or a business owner of being a racist can be verified. In fact, the Oberlin City Police Department went down that very path when it conducted a statistical review of the racial makeup of shoplifting arrests at Gibson's Bakery. Shortly after the shoplifting incident and the demonstrations, the Oberlin City Police Department conducted a statistical analysis of apprehended shoplifters at Gibson's Bakery. [Pl. Tr. Exh. 269]. That study sought to determine the racial makeup of apprehended shoplifters. [*Id*.]. The study revealed that the majority of apprehended shoplifters were not racial minorities.

[*Id*.]. Of the 40 adults arrested for shoplifting at Gibson's Bakery from 2011 through November 14, 2016, 32 were Caucasian. [*Id*.]. The existence of this law enforcement study weighs heavily in favor of Gibsons' position on verifiability.

Further, claiming someone commits discrimination based on a particular characteristic, such as race or disability, is verifiable. Despite Amicus's attempt to argue otherwise, supporting Amicus's opinion argument completely undermines all disability or employment discrimination laws. Indeed, courts throughout Ohio, both state and federal, routinely hear cases involving discrimination, including racial discrimination. *See Williams v. Spitzer Auto World Amherst,* Inc., 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 14[8]. A claim for racial discrimination within an employment context must rely upon evidence of actual discrimination, meaning the plaintiff must prove that he or she was discriminated against based on his or her race. *Id*. at ¶ 15 ("Plaintiffs may show that they were the victims of a discriminatory practice by either direct evidence or indirect evidence…"). Regardless of which approach the plaintiff chooses (direct or indirect evidence of discrimination), the trier of fact is tasked with examining the evidence to verify the discriminatory act took place. With regard to the indirect approach, "a plaintiff may make a prima facie showing of discrimination by establishing that he (1) was a member of a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and that (4) a comparable nonprotected person received better treatment." *Id*. at ¶ 16, *citing Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir.1992); *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civ. Rights Commission,* 66 Ohio St.2d 192, 197, 421 N.E.2d 128 (1981); *Marbley v. Metaldyne Co.*, 9th Dist. Summit No. 21377, 2003-Ohio-2851, ¶¶ 7-13;

[8] "It is an unlawful discriminatory practice for any employer to 'discharge without just cause, to refuse to hire, or otherwise to discriminate against [a] person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment[,]' on the basis of, among other things, race. R.C. 4112.02(A)."

Dunlap v. Tennessee Valley Auth., 519 F.3d 626, 629–31 (6th Cir.2008). The point here is that racial discrimination cases are subject to verification through direct or indirect evidence. As a result, Oberlin Parties' accusations that Gibsons discriminate based on race is verifiable, and thus, is not an opinion.

Amicus attempts to shift the Court's attention away from something every can agree upon (racial discrimination can be verified) by claiming that "public accusations of racism are nearly always considered protected opinions[.]" [Brief, p. 19]. There is a major issue with this claim – it does not rely upon any Ohio cases which hold that being called a racist or being accused of committing racial profiling or discrimination can never be actionable defamation. As discussed above, Ohio courts have stated otherwise.

Likewise, claiming someone profiles based upon race can be verified. For instance, claims of racial profiling are brought with regard to use of preemptory strikes on prospective jurors. *See Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 676 N.E.2d 872 (1997); *State v. Hicks*, 6th Dist. Wood No. WD-02-44, 2004-Ohio-2780, ¶¶ 17-20. Courts do not merely decide those claims on a mere allegation of illegal profiling. Instead, they undertake an intensive analysis to verify whether an improper intent lay behind the preemptory strike, meaning they attempt to verify the claim of profiling or discrimination. *Id*.

Additionally, accusing someone of a crime, such as assault, can be verified. *Jorg v. Cincinnati Black United Front*, 1st Dist. No. C-030032, 153 Ohio App.3d 258, 792 N.E.2d 781, ¶ 18 (1st Dist.2003); *Condit v. Clermont Cty. Rev.*, 110 Ohio App.3d 755, 759–62, 675 N.E.2d 475 (12th Dist.1996) (acknowledging that accusations of criminal misconduct can be verified through a trial).

Finally, it should be noted that the Oberlin Parties have separately claimed that the libelous statements at issue are mere opinions. (See, Oberlin Parties Br., pp. 12-16). Gibsons will fully address why, under Ohio's totality-of-the-circumstances, Oberlin Parties' defamatory statements are statements of fact, not opinions. The fact that Oberlin Parties spend about five (5) pages discussing opinion is further proof that Amicus's brief need not be accepted by this Court. Instead, Oberlin Parties' opinion should rest on fall on their own brief, subject to the Court's page restrictions.

II. CONCLUSION

There are certain universal truths recognized within our society, such as that defamation is not protected speech or that theft is wrong. Oberlin Parties recognized during trial that the three arrested students "got exactly what they deserved." And noted Akron Beacon Journal columnist Bob Dyer recognized that Oberlin Parties' conduct "is the ultimate example of modern-day bullying" and that they also got what they deserved[9]. For the foregoing reasons, the NAACP should not be granted leave to file an amicus curiae brief in this case and its filed brief should be struck from the record.

[9] *See*, https://www.beaconjournal.com/news/20190619/bob-dyer-oberlin-college-got-what-it-deserved (last visited June 26, 2020).

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Respectfully submitted,

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