Nos. 19CA011563 and
20CA011632
(Consolidated)

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
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

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF OBERLIN COLLEGE, ET AL.

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**pro hac vice* motion pending

The National Association for the Advancement of Colored People (NAACP), through undersigned counsel and pursuant to App. R. 17, move this Court for leave to file a brief *amicus curiae* in support of defendant-appellants, Oberlin College, et al. Defendant-appellants Oberlin College, et al. consent to the filing of the brief. Plaintiff-appellees Gibson Bros. Inc., et al. do not consent. The NAACP is conditionally filing the brief at the same time as this motion in accordance with the rule.

As set forth in its brief, the NAACP is the nation's largest and oldest 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.

The issues presented in this case are directly relevant to the work of the NAACP. The damages awarded to the plaintiffs in this case are based on a student-organized boycott in protest of a Gibson's bakery employee's violent actions against an African-American student, the police department's response to the incident, and the bakery's historically discriminatory treatment of African-Americans. Not only are these issues at the core of the NAACP's mission to eradicate racial injustice, the NAACP also has a longstanding commitment to defend its right and the rights of all people to engage in free speech. Most relevant here, the NAACP successfully litigated *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), defending its

(and others') right to boycott certain businesses in response to racial injustice. The NAACP believes their experience and expertise in these areas could aid the Court's consideration of the case.

For these reasons, the NAACP respectfully request this Court grant the motion and permit them to file their brief and appear *amicus curiae* in support of defendant-appellants Oberlin College, et al.

Dated: June 5, 2020

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The National Association for the Advancement of Colored People (NAACP) is the nation's largest and oldest 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 in every state in the United States to eliminate racial hatred and discrimination in all forms.

The NAACP has a longstanding commitment to defending its right and the rights of all people to engage in free speech. 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, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982), defending its (and others') right to boycott certain businesses in response to racial injustice. The 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 of the case.

STATEMENT OF THE CASE AND ASSIGMENT OF ERROR

Amicus curiae hereby adopt by reference the Statement of the Case and Facts and Assignments of Error set forth in the Merit Brief of Defendants-Appellants/Cross-Appellees Oberlin College, et al.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Amicus curiae hereby adopt by reference the Statement of the Issues Presented for Review set forth in the Merit Brief of Defendants-Appellants/Cross-Appellees Oberlin College, et al.

SUMMARY OF ARGUMENT

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, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *NAACP v. Claiborne Hardware*, the 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 apply where First Amendment activity was concerned.

For the very reasons the Supreme Court rejected liability for the *New York Times* and the NAACP over thirty years ago, the jury's verdict against Oberlin must be reversed. The Gibsons' primary complaint is that Oberlin is associated with certain of its students that organized a boycott of the Gibsons' bakery in protest of a bakery employee's violent actions against an African-American student, the police department's response to the incident, and the bakery's historically discriminatory treatment of African-Americans.[1] Even if Oberlin *did* provide support to its students—a point that was heavily contested—it cannot be held liable for a simple reason: boycotts like the one concerning the bakery that "vindicate rights of equality and of freedom" are a core First Amendment-protected activity. The Supreme Court has made this point emphatically and repeatedly in cases including *Claiborne*. Given that the students' activity cannot form the basis for civil liability, by simple logic, any support Oberlin may have provided to the students likewise cannot be the basis for liability and damages.

[1] The plaintiffs in this case are Gibson Bros., Inc., Lorna Gibson as executor of the estate of David R. Gibson, and Allyn W. Gibson. Throughout the brief, *amicus curiae* refers to the plaintiffs collectively as the "Gibsons."

ARGUMENT

I. Peaceful Protests, Especially By Students, Have Played A Vital Role In This Country's Civil Rights History.

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. The Freedom Rides of 1961 resulted in over four hundred protestors being arrested and eventually led President John F. Kennedy to de-segregate vehicles and services under the jurisdiction of the Interstate Commerce Commission. The Birmingham campaign—a coordinated effort that included boycotts, sit-ins, and marches—paved the way for the landmark Civil Rights Act of 1964. The 1965 march from Selma to Montgomery, which included over 25,000 people, led to the passage of the Voting Rights Act. These peaceful, protected exercises of the freedoms of speech, assembly, and association brought indispensable changes to American society, changes that form a core component of our identity today.

Student activism was also a key part of the civil rights movement. 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 whites-only lunch counter.[2] This protest grew to at least 200 students within a week,[3] and by the following September there were over 70,000 participants in similar sit-ins, which together sparked a national conversation and led to significant social changes.[4] Likewise, in 1963, 250,000 students in Chicago staged a one-day school walkout to protest segregated schools.[5]

This tradition of student activism is not limited to the civil rights movement. In the 1980s, student protestors at Howard University, Harvard, Columbia, and the University of North Carolina (among many others) put pressure on their universities to end business ties with companies that profited from apartheid in South Africa.[6] In November 2016, hundreds of students staged a walk-out on their campuses to protest the Trump administration's immigration policies and called on their universities to become "sanctuary campuses."[7] As a result, multiple universities

[2] 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).
[3] *Id*. at 283.
[4] *See id*. at 284-85.
[5] Melinda D. Anderson, *The Other Student Activism*, Atlantic (Nov. 23, 2015), https://www.theatlantic.com/education/archive/2015/11/student-activism-history-injustice/417129/.
[6] Nicholas Graham, *Timeline of 1980s Anti-Apartheid Activism at UNC*, For the Record (May 15, 2017), https://blogs.lib.unc.edu/uarms/index.php/2017/05/timeline-of-1980s-anti-apartheid-activism-at-unc/.
[7] 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.

instituted policies limiting their cooperation with immigration authorities.[8] As these examples show, student activism has a long and storied history, particularly when it comes to protesting against discriminatory action by private business. As the following section demonstrates, courts have recognized that this behavior falls within the core of the First Amendment's free speech and free association protections.

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

a. During The Civil Rights Movement, States Attempted To Suppress Protected Speech Through The Imposition Of Civil Tort Liability.

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. 118, 118, 86 S.Ct. 1306, 16 L.Ed.2d 409 (1966) (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 (Douglas, J., dissenting). 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

[8] Shannon Najmabadi, *How Colleges Are Responding to Demands That They Become 'Sanctuary Campuses'*, Chron. Higher Educ. (Dec. 2, 2016), https://www.chronicle.com/article/How-Colleges-Are-Responding-to/238553/.

liable if the jury thought the local branch was its "agent." *Id.* at 119 (Douglas, J., dissenting). 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 United States Supreme Court initially granted certiorari, but then reversed and dismissed the case before it was heard.[9] Dissenting from the dismissal, Justice Douglas, joined by four others, wrote that the case presented no less of a threat to the rights of political association and free speech than had prior cases imposing criminal liability on protected speech. *Id*. at 122-23 (Douglas, J., dissenting). 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.* (Douglas, J., dissenting).

This case sent a message to opponents of the civil rights movement: they could stifle criticism of racial inequality by seeking hefty damages awards against the NAACP and other civil rights groups. After *Overstreet*, lawsuits were filed against the NAACP in Virginia and Pennsylvania based on protest activity, and against the Southern Christian Leadership Conference for organizing a boycott of merchants in

[9] 384 U.S. at 118, 86 S.Ct. 1306 (dismissing the writ of certiorari as improvidently granted) (per curiam).

Mississippi in response to police brutality against members of the African-American community. *See S. Christian Leadership Conference, Inc. v. A.G. Corp*., 241 So.2d 619 (Miss.1970). In addition, 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.[10]

b. The Supreme Court Ended The Possibility Of Civil Liability Based On Protected Boycotts In *Claiborne Hardware*.

The Supreme Court effectively reversed *Overstreet* in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (per curiam).[11] In 1965, African-American residents of Claiborne County, Mississippi drafted and delivered a petition to local government officials listing grievances regarding racial discrimination in their town. A second petition was circulated in 1966, this time signed by the local Field Secretary of the NAACP, Charles Evers, along with more than 500 signatures of local community members.[12] When no satisfactory response to their demands was received, the NAACP local chapter approved (by unanimous vote) a boycott of the white merchants in the town. Barbara Ellen Cohen, *The Scope of First Amendment Protection for Political Boycotts:*

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[10] *See* Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L.&Soc.Inquiry 197, 200 (1993).
[11] *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").
[12] 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 (1984).

Means and Ends in First Amendment Analysis: NAACP v. Claiborne Hardware Co., 1984 Wis.L.Rev. 1273 (1984). The boycott lasted more than three years. *Id*. at 1277.

In 1969, the boycotted merchants sued the NAACP, Mr. Evers, as well as 144 individuals who participated in the boycott. *Id*. 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. *Id*. at 1279. The merchants were awarded over $1 million in damages.

The Supreme Court reversed. Considering liability for Mr. Evers first, the Court held that civil liability cannot stem from protected First Amendment activity. 458 U.S. at 918, 102 S.Ct. 3409. 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 for which the state could not award compensation. *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 then turned to the question of liability for the NAACP. Because the NAACP's liability was derived solely from Evers' liability, the Court recognized that the NAACP could only be responsible for Evers' conduct that it specifically ratified. *Id*. at 930-31. However, there was no evidence that the NAACP authorized or ratified any of the few incidents of violence that occurred in connection with the boycott. *Id*. at 931. Quoting with approval a paragraph from Justice Douglas's dissenting opinion in *Overstreet*, 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*. Moreover, the Supreme Court held the state may only legitimately impose damages for the consequences of illegal, violent conduct. *Id*. at 918. "[I]t may not award compensation for the consequences of nonviolent, protected activity." *Id.* 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.

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, 84 S.Ct.

710, 11 L.Ed.2d 686 (1964), the Supreme Court affirmed the protections of the First Amendment for civil rights activists in the face of civil liability for libel.

The plaintiffs—three Commissioners of the City of Montgomery, Alabama—filed a defamation suit which arose out of a 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 went on to contend that students were wrongfully expelled from Alabama State College, that "truckloads of police" ringed the college campus, and, when the students protested, their 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 258.

Some of the statements in the advertisement were demonstrably false. For example, the campus 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 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 possibility 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. That truth is an available defense to libel was not sufficient: 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 the plaintiff to prove actual malice before liability could be imposed for libel against public officials. *Id*. at 279–80.[13]

III. Oberlin Cannot Be Held Liable Based On An Association With, Or Support For, The First Amendment-Protected Activity Of Its Students.

Upholding liability for Oberlin College in this case would be a sharp departure from the long-settled understanding of the First Amendment discussed above and upend the protections for free speech that the NAACP has worked to secure for over

[13] 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, 94 S.Ct. 2997, 3009, 41 L.Ed.2d 789 (1974)).

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.

In this case, the Plaintiffs were awarded damages from Oberlin for the college's support or participation in a protest organized by its students. Plaintiffs also were awarded damages from Oberlin for the students' creation and distribution of a flyer describing the assault of the student and the police response and referencing the bakery's prior history of racial discrimination. *See* Def.'s-Appellants' Appendix at A-2-3, A-30-31. The label attached to the plaintiffs' causes of action—whether defamation, intentional infliction of emotional distress, or tortious interference with business relationships—is irrelevant if Oberlin's civil liability stems from students' protected First Amendment activity. And it does. *See infra* Part II.A-B. *Cf. N.Y. Times Co.*, 376 U.S. at 269, 84 S.Ct. 710 ("[L]ibel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.").

Courts sensibly tread carefully when imposing liability in connection with otherwise-protected speech. *Scott v. Ross*, 151 F.3d 1247, 1249–50 (9th Cir.1998) ("Just as *New York Times Co. v. Sullivan* … protects freedom of speech by narrowly circumscribing the reach of state libel law, *Claiborne Hardware* limits derivative

liability to protect freedom of association."). As the Supreme Court has noted: "[I]n cases raising First Amendment issues we 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.'" *Id.* at 1250 (quotation marks omitted) (internal quoting *N.Y. Times Co.*, 376 U.S. at 285, 84 S.Ct. 710). Here, there is no doubt the jury's damages award intrudes on constitutionally protected activity.

a. Oberlin Cannot Be Held Civilly Liable Based On Its Association With, Or Support For, A Protected Boycott.

It is undisputed that advocating for, and engaging in, a boycott is protected First Amendment activity. *Claiborne*, 458 U.S. at 907, 102 S.Ct. 3409; *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 426, 110 S.Ct. 768, 107 L.Ed.2d 851 (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 damages under state law 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, 120 S.Ct. 862, 145 L.Ed.2d 708 (2000) (Scalia, J., dissenting from a denial of cert.).

The Oberlin students organized a protest outside of Gibson's bakery to, among other things, protest the use of force by an employee of the bakery against an African-American student, the police department's response at the scene, 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 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 jury's verdict makes a mockery of long-understood constitutional protections for speech. 528 U.S. at 1100, 120 S.Ct. 862.

b. Oberlin Cannot Be Held Civilly Liable For Defamation On The Basis Of Protected Opinion Expressed By Its Students.

Oberlin likewise cannot be held liable based on its publication of students' speech if that speech is protected opinion. *See Vail v. Plain Dealer Publ'g Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182 (1995). The court below found that statements in the students' flyer and the Student Senate resolution were not protected opinions and therefore allowed the Gibsons' libel claims to go forward to the jury. Specifically, the court determined that the following statements were verifiable fact: "that the Plaintiffs are racists, that the Plaintiffs have a long account and a history of racial

profiling and discrimination, and statements that the Plaintiffs committed crimes of assault." Def.'s-Appellants' Appendix at A-20-21.

The court's determination raises serious concerns. *First*, 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, 84 S.Ct. 710 (internal quotation marks omitted). Here, the court determined that the phrase "long account" implies "undisclosed facts supporting the statements in the flyer" rendering the statements as "damaging as an assertion of fact." Def.s'-Appellants' Appendix at A-10 (capitalization omitted). This reading of the flyer hardly gives assurance that the judgment in this case will not intrude on free expression. To the contrary, "highly charged political rhetoric" lies at the core of the First Amendment. *Claiborne*, 458 U.S. at 926–27, 102 S.Ct. 3409. The court's interpretation invites courts to find an implication of (actionable) undisclosed facts in almost any scenario where an average reader or listener would understand a statement to be a "highly charged" (non-actionable) statement of opinion. That reverses the normal First Amendment standard.

The context in which a statement was made is particularly crucial in 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 v. Cincinnati Black United Front*, 153 Ohio App.3d 258, 2003-Ohio-3668, 792 N.E.2d 781, ¶ 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.").

Second, the plaintiffs' argument that allegations of racism should be considered verifiable fact not only misunderstands discourse about racism but would stifle such discourse if allowed to stand. Plaintiffs suggest that because civil rights laws provide a mechanism for verifying claims of discrimination, those claims are also "verifiable" in the defamation context. Pl.'s MSJ Opp. at 60 ("Claiming someone commits discrimination based on a particular characteristic, such as race or disability, is verifiable. . . . Courts throughout Ohio, both state and federal, routinely hear cases involving discrimination, including racial discrimination."). Of course, actual discriminatory conduct—hiring or firing someone based on race or sex, or refusing to rent a home to someone based on religion or national origin—are actions that can be verified through the appropriate legal process. *See, e.g.*, *Mengistu v. Miss. Valley State Univ.*, 716 Fed.App'x 331, 333–35 (5th Cir.2018). In such

cases, imposing liability for discriminatory conduct generally requires the plaintiff to first make a prima facie case of intentional discrimination, at which point the burden shifts to the employer to rebut the case with evidence that it would have made the same decision regardless of race. The plaintiff then has the opportunity to show that the employer's rationale is pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

But the traditional *McDonnell Douglas* burden-shifting analysis has no relevance in a defamation case. While Title VII defines a subset of discriminatory conduct that is actionable under federal law, it does not define the universe of conduct people may find offensive or discriminatory. As courts have noted, "what constitutes racism," is itself subject to intense public debate and "incapable of objective verification." *Jorjani v. N.J. Inst. of Tech.*, D.N.J. No. 18-CV-11693, 2019 WL 1125594, at *6 (Mar. 12, 2019). While there is an agreed-upon definition of conduct that rises to the level of *illegal discrimination* under civil rights laws, individuals have—and are entitled to—different opinions about whether particular conduct is *racist*.

Thus, while it is true that "racial discrimination in the workplace, is a mundane issue of fact, litigated every day in federal court," *Taylor v. Carmouche*, 214 F.3d 788, 793 (7th Cir.2000), public accusations of racism are nearly always considered protected opinion, *see Taylor v. Metzger*, 152 N.J. 490, 526, 706 A.2d 685 (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." 152 N.J. at 526 (internal quotation marks omitted); *see also Stevens v. Tillman*, 855 F.2d 394, 400–02 (7th Cir.1988) (concluding accusation of racism was not actionable because it was an opinion); *Squitieri v. Piedmont Airlines, Inc.*, W.D.N.C. No. 3:17CV441, 2018 WL 934829, at *4 (Feb. 16, 2018) ("Statements indicating that Plaintiff is racist are clearly expressions of opinion that cannot be proven as verifiably true or false."); *Martin v. Brock*, N.D.Ill. No. 07C3154, 2007 WL 2122184, at *3 (July 19, 2007) (accusation of racism is nonactionable opinion in Illinois); *Covino v. Hagemann*, 165 Misc.2d 465, 467, 627 N.Y.S.2d 894 (N.Y.Sup.Ct., Richmond Cty. 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" have routinely been found to constitute 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 accusations 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 employee's termination *and* defamation). This body of case law draws precisely the distinction between fact and opinion the trial court misunderstood.

CONCLUSION

For the foregoing reasons, and the reasons in the defendant-appellants' brief, the decision of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count provision set forth in Ninth District Local Rule 7(E)(2). This brief is printed using Times New Roman 14-point typeface using Microsoft word processing software and contains 4,645 words.

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