IN THE SUPREME COURT OF OHIO

GIBSON BROS, INC., et al., Plaintiffs-Appellees, v. OBERLIN COLLEGE, et al., Defendants-Appellants.	)	CASE NO. 2022-0583 APPEAL FROM THE COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY, CASE NOS. 19CA011563; 20CA011632

MEMORANDUM IN SUPPORT OF JURISDICTION OF *AMICI CURIAE* NATIONAL COALITION AGAINST CENSORSHIP, AND DEFENDING RIGHTS & DISSENT IN SUPPORT OF OBERLIN COLLEGE, ET AL.

Kevin T. Shook
(Ohio Bar No. 0073718)
Frost Brown Todd LLC
10 West Broad Street,
Suite 2300
Columbus, OH 43215
Tel: (614) 464-1211
kshook@fbtlaw.com
Fax: (614) 464-1737

Ryan W. Goellner
(Ohio Bar No. 0093631)
Frost Brown Todd LLC
301 E. Fourth Street,
Suite 3300
Cincinnati, OH 45202
Tel: (513) 651-6840
rgoellner@fbtlaw.com
Fax: (513) 651-6981

Attorneys for Amici Curiae National Coalition Against Censorship, and Defending Rights & Dissent

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

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

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 #21649-2022)
Joseph Slaughter (PHV #21599-2022)
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

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are a collection of nonpartisan, nonprofit organizations dedicated to promoting and protecting civil liberties and free speech, especially for our Nation's institutions of higher education. Each individual amicus curiae's interest is as follows:

1. National Coalition Against Censorship ("NCAC") is an alliance of more than 50 national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding, NCAC has worked to protect the First Amendment rights of artists, authors, students, readers, and the general public. NCAC has a longstanding interest in opposing viewpoint-based censorship and is joining in this brief to urge the Court to preserve the protections of the First Amendment. The views presented in this brief are those of NCAC and do not necessarily represent the views of each of its participating organizations.

2. Defending Rights & Dissent ("DRAD") is a national not-for-profit public education and advocacy organization based in Washington, DC. The mission of the organization is to make real the promise of the Bill of Rights for everyone. DRAD was founded by activists, including civil rights activists, who were persecuted by the infamous House Un-Americans Activities Committee. As a result, while we cherish the entire Bill of Rights, it devotes particular attention to protecting the right to political expression. DRAD strongly supports the rights of people to engage in collective action and political protest to build a more just world. As DRAD know the right to protest is imperative to securing social change, it opposes curtailments and limitations of that right.

II. EXPLANATION OF WHY THIS IS A CASE OF SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND PUBLIC AND GREAT GENERAL INTEREST

Amici curiae urge this Court to accept Oberlin College's jurisdictional appeal over this case to resolve important conflicts over speech protections under the First Amendment and Ohio law. This case raises substantial constitutional questions, including (A) the essential role free expression on college campuses plays in promoting American discourse on contested issues; (B) the extent of First Amendment protections for Ohio colleges that permit the publication of student opinions on racism; and (C) how significant monetary liability for that underlying student speech undermines First Amendment freedoms by pressuring Ohio colleges to suppress disputed opinions precisely because of their disputed nature.

This case is also of great public and general interest in Ohio—especially given its connection to a historic state college that has played a critical role in this Nation's civil rights movement. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Thus, the expressive rights of students and educators at all colleges and universities must be cautiously guarded. Consistent with its core educational function of facilitating debate, Oberlin has played a crucial role in America's discussions on equal access to education, racism, and other important issues. Because such "speech on 'matters of public concern' … is 'at the heart of the First Amendment's protection,'" *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011) (citation omitted), this Court should take up these issues to provide guidance and definitive resolutions for protections of these important rights.

A. Free Expression on Contentious Issues of Public Concern at All Colleges and Universities Is Essential to American Discourse.

The United States Supreme Court has long recognized the First Amendment protects free expression in the form of speech, association, and academic inquiry at colleges and universities. But those protections are not limited to cautiously measured or gracious words only. Instead, controversial speech and disputed opinions on matters of public concern—like whether a local business discriminates against students—plays a necessary role in our national debate on fundamental issues. "Indeed, 'the point of all speech protection … is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.'" *Id.* at 458 (quoting *Hurley v. Irish–American Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557, 574 (1995)). Here, the Gibsons' lawsuit against Oberlin seeks to restrict *student* speech about the grocer's reputation in the community based on meager evidence that Oberlin personnel published those *student* opinions by handing *student-created* flyers to passers-by and by failing to remove a student senate resolution *created and posted by students*. Because such censorship undermines the protections afforded under the First Amendment, this Court should be skeptical of any judgment that vicariously results in trampling so many citizens' rights.

"The essentiality of freedom in the community of American universities is almost self-evident," *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 250 (1957), because America recognizes that "[t]he classroom is peculiarly the 'marketplace of ideas.'" *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 603 (1967). As a result, "[o]ur Nation is deeply committed to safeguarding academic freedom" in universities—recognized as "a special concern of the First Amendment." *See id.* at 603. *See also Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students."). Admittedly, a private

college like Oberlin is not a state actor governed by the Constitution; however, the same constitutional *principles* apply to its faculty and student speech.

Educational leaders and faculty in American universities play a vital role in our democracy. The United States Supreme Court has even stated that "[t]o impose *any* strait jacket upon the intellectual leaders in our colleges and universities would *imperil the future of our Nation*." *Sweezy*, 354 U.S. at 250 (emphasis added). Courts are admonished to "scrupulous[ly] protect[]" educators' constitutional freedoms lest we "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). So regardless of the institution's funding, this Court should extend those same protections and constitutional principles to all educational institutions that provide a stage for student and educator debate.

Contentious speech on all viewpoints across the political spectrum—which often creates unrest and offends others—is critical to the education of informed citizens in our Republic. "Any word spoken … on the campus[] that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker*, 393 U.S. at 508–09 (citation omitted).

In reality, "a *function* of free speech under our system of government is to *invite* dispute," *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (emphasis added). This is especially true for "provocative and challenging" matters of public concern like racism and criminal justice reform. Discussion about those issues, as here, "may strike at prejudices and preconceptions and

have profound unsettling effects as it presses for acceptance of an idea." *Id.* But regardless of the outcome, speech about these topics "best serve[s] its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *See id.* "Indeed, in times of great national discussion, such as during the height of the Vietnam War or the debate over the war in Iraq, college campuses serve as a stage for societal debate." *Bowman v. White*, 444 F.3d 967, 979 (8th Cir.2006). Unfortunately, controversial campus speech that spans the political spectrum is under attack. *See* Foundation for Individual Rights in Education (FIRE), *Disinvitation Database* (tracking speaker disinvitations both from the Left and from the Right).[1]

For all universities—as incubators of ideas and solutions—an invitation to engage in open dialogue means that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Sweezy*, 354 U.S. at 250. "[O]therwise our civilization will stagnate and die," *id.*, and "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters" because "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard." *Barnette*, 319 U.S. at 641. For state universities, "the mere dissemination of ideas—no matter how offensive to good taste—. . . may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 670 (1973).

B. Holding Oberlin Liable for Its Students' Protected Opinions Is Antithetical to Free Expression Guarantees and Ohio Law.

Established in 1833, Oberlin was the first college in America to admit students "irrespective of color"—thirty years before the Nation would abolish slavery. Robert S.

[1] https://www.thefire.org/research/disinvitation-database/.

Fletcher, *A History of Oberlin College* 170 (1943). Two years later, Oberlin again made U.S. history when it allowed four women to enroll as full-time students for the first time ever. *See* Oberlin History, https://www.oberlin.edu/about-oberlin/oberlin-history. Twenty years later, Oberlin was already established as the Nation's preeminent progressive college when it conferred a bachelor's degree on America's first black female college graduate, Mary Jane Patterson. *Id.* Unsurprisingly, many in Ohio took issue with the school's administration and its permissive stance towards integration. In 1858, a group of locals was jailed for rescuing a fugitive slave in violation of the Fugitive Slave Act during the "Oberlin-Wellington Rescue"—an event widely believed to have set the American Civil War in motion. *Id.*

Oberlin's founders—already distinguished sponsors of equal access to education—freely exercised their rights to speak on issues like slavery, racism, and other matters of public concern. *See* Cally L. Waite, *The Segregation of Black Students at Oberlin College After Reconstruction*, 41 Hist. Educ. Q. 344, 344-46 (2001) (noting that Oberlin was referenced 352 times by 1865 in the famous abolitionist newspaper, *The Liberator*). Keeping with this tradition, Oberlin's Memorial Arch[2] became a rallying point during the civil rights movement in the 1960s—hosting rallies led by Malcolm X and Dr. Martin Luther King, Jr. Merredith Collins and Melody R. Waller, *Activism thrives through Oberlin's history*, The Oberlin Review (May 1, 1995).[3] Unsurprisingly, Oberlin set the scene for "a great deal of intellectual discussion" about civil rights, racism, and "talk about the method of protest" during the Civil Rights movement. *See id.* (quoting Professor James Walsh). As a result of these policies and events, the Arch and

[2] https://www.oberlin.edu/memorial-arch.

[3] http://www2.oberlin.edu/stupub/ocreview/archives/1998.05.01/news/activism.html.

Underground Railroad Sculpture[4] are well-known locations in the community for speech on racism and civil rights.

As with any historical organization that defied early norms, Oberlin's educators, administrators, students, and surrounding community, are well aware of the role that the College played in shaping American history. Some students and faculty likely *sought* out Oberlin to contribute to its discussions about slavery, racism, and civil rights. For them, whether a nearby store that is well-known to Oberlin discriminates against members of Oberlin's community is a matter of great public concern that affects their educational experience—and a potential issue to bring to the national dialogue of racism. *See Connick v. Myers*, 461 U.S. 138, 146 (1983) (a matter of public concern is a "matter of political, social, or other concern to the community"). Regardless of whether others would agree with students who claim to have experienced racism at the hands of a well-known business, the First Amendment requires colleges and communities to permit those opinions. The Court of Appeal's opinion disregards Oberlin's role in early national debates and the local community over race; instead, penalizing Oberlin for permitting its students to exercise their expressive rights based on their own subjective opinion.

As shown through recent years' contentious national debates surrounding race, accounts of racism and discrimination are often interpreted based on a number of subjective factors. *See* Dismantling Racism, http://www.dismantlingracism.org/racism-defined.html. Individuals from various ethnic, age, and socioeconomic backgrounds may have vastly different opinions on what constitutes a racist act or discriminatory comment. Accordingly, where the conduct at issue is subject to varying reasonable interpretations, no concrete definition of what constitutes racist conduct can be ascertained and accusations of racist behavior are inherently subjective. *See*

[4] https://www.oberlin.edu/underground-railroad-sculpture.

Wampler, 752 N.E.2d at 962 ("statements which are 'loosely definable' or 'variously interpretable' cannot in most contexts support an action for defamation"). Consistent with this principle, the Third Circuit recently held that allegations of racism are protected opinion where they are understood as an interpretation of events by the listeners and given the surrounding context. *McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 357–58 (3d Cir.2020) (phrase "defending raw racism and sexual abuse" is protected opinion in light of the context).

C. Holding Colleges Liable for Protected Expression Undermines Fundamental Constitutional Interests, Chills Speech Across All Academic Institutions, and Creates Additional Liability.

Antithetical to those constitutional and historical underpinnings, affirming Oberlin's liability herewill also chill all student and educator expression across Ohio. If the Court of Appeals is affirmed under these circumstances, universities and colleges across the State will undoubtedly over-restrict speech as a result for two reasons. First, the astronomical increase in educational institutions' potential liability based on others' potentially problematic speech. Second, private colleges—who are not constitutionally required to protect speech—will be perversely incentivized to avoid a similar fate through increased restrictions on expression. Because affirming such potential liability will inevitably lead to more censorship, more litigation, and undermining the value of academic freedom and student discourse, the secondary implications of liability also weigh heavily in favor of reversing.

First, if the judgment against Oberlin is affirmed, the Court's ruling will pressure all higher education institutions in Ohio—public and private—to avoid liability risks and, in doing so, take steps to suppress students' and teachers' potentially problematic speech. For private colleges, the motivation to increase restrictions will be obvious: to avoid liability based on even *arguably* false speech by students or faculty, whether it be student protests on race issues,

conservative guest speakers, or any other forms of speech that some consider controversial. Given the prospective cost in terms of attorneys' fees, settlements, and judgments, those colleges will try to restrain any divisive student speech in case they might be deemed to have assisted in some minor way.

Although Ohio public universities are generally, "as an arm of the State, immune from suit under the Eleventh Amendment," *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 571 (6th Cir.2000), a compelling financial motivation still pressures them to avoid liability for infringing students' rights. State employees—who are indemnified by Ohio, *see* R.C. 9.87(a)—abuse any immunity privilege when their conduct can "be described as malicious, reckless, or bad faith." *Culberson v. Doan*, 125 F. Supp. 2d 252, 283 (S.D.Ohio 2000) (citing R.C. 2744.03(A)(1) and (6)(b)). Because an employee's intent is a factual issue, Ohio's state universities will still bear the high costs of defending lawsuits through trial based on little more than allegations that the privilege *may* have been abused. *See, e.g.*, *id.* (denying summary judgment based on factual issue of abuse of privilege); *Stepp v. Medina City Sch. Dist. Bd. of Edn.*, 71 N.E.3d 609, 619 (2016) (same). Accordingly, even the specter of Oberlin-like liability or litigation costs will cause all colleges and universities to scrutinize their own students' expressive conduct.

Universities and colleges are already forced to deal with speech that necessarily occurs in an academic setting. Unfortunately, most American colleges have at least one policy that expressly or implicitly restricts constitutionally protected speech as a result. *See* FIRE, *Spotlight on Speech Codes 2020: The State of Free Speech on Our Nation's Campuses*, at 2, 17 (2020) (noting increase since 2009)[5]; *see also* Azhar Majeed, *Defying the Constitution the Rise, Persistence, and Prevalence of Campus Speech Codes*, 7 Geo. J.L. & Pub. Pol'y 481 (2009).

[5] https://www.thefire.org/resources/spotlight/reports/spotlight-on-speech-codes-2020/.

But any increased restrictions on expression in the academic setting caused by concerns over liability, however minor, still undermine the inherent value of diverse discourse in higher education. *See Barnette*, 319 U.S. at 641–42; *Sweezy*, 354 U.S. at 250. And even if properly narrowed, a university's restriction of *any* constitutionally protected student expression chills *all* student speech by encouraging individuals to disengage versus subjecting themselves to possible expulsions or dismissal.

Further, speech codes invite significant costly lawsuits by students and faculty seeking to vindicate their First Amendment rights—with the additional possibility of attorneys' fees against public institutions. *See* 42 U.S.C. § 1988. So, in addition to the distraction from their primary purpose, universities are opened up to potential financial liability on two fronts: from those who claim they failed to stop offensive speech and those who claim their own speech has been restricted. Placed between a rock and a hard place, public universities are especially likely to respond by imposing and defending unconstitutional regulations or risk losing funding. *See, e.g.*, *McGlone v. Bell*, 681 F.3d 718, 733 (6th Cir.2012); *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 544 (6th Cir.2001); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir.1995). In doing so, students thereby learn that vocal dissent will be subdued or eliminated by official government-funded resistance. Liability under these circumstances encourages more speech codes, which themselves lead to more litigation and added costs for Ohio's taxpayers.

Second, if the First Amendment's protections do not extend to Oberlin's "speech" here, private colleges will be specifically encouraged to restrict and punish unpopular speech—fundamentally altering the fair and balanced treatment of First Amendment protections for those at public and private universities. Placed in Oberlin's unenviable shoes, a public university in Ohio cannot terminate its employees based on the same speech relating to an issue of public

concern. According to well-established law, even where the Ohio public employee's speech is itself likely racist[6] or includes defamatory per se allegations of illegal activity,[7] a university "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent." *Healy v. James*, 408 U.S. 169, 187–88 (1972) (emphasis added).

Private colleges, however, can and would undoubtedly punish any students or employees to forestall or vindicate their own similar judgment. Specifically, any potential liability here would motivate private colleges to (1) condition or limit their recognition of expressive rights, (2) investigate, suppress, and punish expression even *alleged* to be defamatory, and (3) close expressive forums to avoid the possibility of defamatory or offensive expression—regardless of whether the speaker is espousing "conservative" or "liberal" viewpoints. The dichotomy created by such diverse treatment of educational institutions' rights and the freedom "to inquire" will alter academia. Because violations of constitutional rights have drastic implications, the lower courts' disregard for fundamental freedoms is clear error. Accordingly, this Court should grant review of an opinion that creates such jurisprudential conflict and displays a manifest indifference for the constitutional rights of all Ohio students, educators, and educational institutions.

III. STATEMENT OF THE CASE AND FACTS

Amici incorporate the Statement of the Case and Facts submitted by Oberlin.

---

[6] *See Min Li v. Qi Jiang*, 38 F. Supp. 3d 870, 873 (N.D.Ohio 2014) (teacher's speech protected where she "described herself as hating the 'little runts' from 'deep in her bones'" and sent an "email urg[ing] the recipients to not 'buy any Japanese products from [then] on'").

[7] *See Mosholder v. Barnhardt*, 679 F.3d 443, 446 (6th Cir.2012) (school violated teacher's First Amendment rights by retaliating against her after she alleged that the local detention center's management allowed inmates to associate with gangs through their lyrics during approved rap competition).

IV. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I: The First Amendment protects private and public universities alike from requirements to mandate viewpoint restrictions on student speech.

The First Amendment's historical and prudential protections for discourse are not only limited to public universities. Regardless of a school's funding source, "[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes." *Barnette*, 319 U.S. at 641–42. Most importantly, the law recognizes that contentious speech is the exact reason for such protections; the "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id.* In Ohio, recognition of the importance of protecting expressive rights has meant that "[t]he right to sue for damage to one's reputation pursuant to state law is not absolute" but "is encumbered by the First Amendment." *Soke v. Plain Dealer*, 69 Ohio St.3d 395, 397, 632 N.E.2d 1282, 1283 (1994). Moreover, the Ohio Constitution provides broader protection for opinions than the First Amendment. *See Vail v. The Plain Dealer Publ'g Co.*, 72 Ohio St.3d 279, 281, 649 N.E.2d 182 (1995).

Despite ostensibly seeking to hold Oberlin liable for its conduct, the Gibsons' lawsuit seeks to mandate viewpoint restrictions on students' speech. The Court of Appeals concluded that "the sole focus of this appeal is on the separate conduct of Oberlin" and its personnel "that allegedly caused damage to the Gibsons, not on the First Amendment rights of individuals to voice opinions or protest." *Gibson Bros., Inc. v. Oberlin College*, 9th Dist. Nos. 19CA011563, 20CA011632, 2022-Ohio-1079 ("Appellate Ruling") ¶ 3. Yet the speech at issue was created and published by students, and the alleged harm to Gibsons was caused primarily by student speech—only a sliver of which was allegedly published *again* by Oberlin employees. The only

way for Oberlin College to avoid liability under the Court of Appeals' ruling would have been to actively suppress student speech by denying funding to student organizations and removing or destroying student-created documents.

But forcing colleges to police the content of student speech and impose unanimity on a contentious and oft-disputed issue like "what constitutes racism in the Oberlin community" is useless. *See Barnette*, 319 U.S. at 641 ("Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, . . . down to the fast failing efforts of our present totalitarian enemies."). More perniciously, however, the Gibsons' actions are the first step in (1) suppressing all discourse and opinions on what constitutes discriminatory conduct by (2) incentivizing or financially forcing educational institutions to suppress inconvenient student speech. In other words, lawsuits like this aim to strong-arm colleges like Oberlin into defining "racism" for their students through the implicit or explicit threat of lawsuits and enormous financial liability. *Id.* Because the Court of Appeals disregarded Oberlin and its students' First Amendment rights to speak on and debate an issue of public concern, this Court should explicitly affirm those First Amendment protections on independent review. *Puruczky v. Corsi*, 2018-Ohio-1335, 110 N.E.3d 73, 81 (8th Dist.).

PROPOSITION OF LAW NO. II: Historical context must be taken into account when determining whether student speech is protected as opinion under the First Amendment.

The Court of Appeals' opinion disregards the history and context of Oberlin's connection to the speech at issue and is premised on a misunderstanding of the First Amendment and Ohio law. Consistent with its values, Oberlin's faculty and students have always championed education for black Americans and invited free speech on matters like slavery, civil rights, and equality. While many disagree with the substance and manner of how the students chose to

express their sincerely held opinions, the First Amendment does not permit the government to enforce content-based restrictions on others' opinions.

The sum of the challenged speech at issue here is contained in two documents, a flyer and a student senate resolution, both created and disseminated by students. *See* Appellate Ruling ¶¶ 28-30. In circular fashion, and with no citation to authority, the Court of Appeals concluded that the flyer's statement that Gibsons "is a racist establishment with a long account of racial profiling and discrimination" and the senate resolution's statement that Gibsons "has a 'history' or 'account' of discrimination and racial profiling" are not protected opinions because they "can be verified as true or false by determining whether there is, in fact, a history or account of racial profiling or discriminatory events at the bakery." *Id.* ¶ 33. This self-fulfilling conclusion ignores the fact that students' views on what constitutes "racial profiling" or "discriminatory events" are *themselves student opinions* that would be understood as such by the community.

The Court of Appeals' conclusion is unsupported by controlling law. In determining whether statements are matters of opinion, courts must consider the totality of the circumstances including the context of the expression and the community's awareness of the speaker's propensity for rhetoric and hyperbole. *Vail*, 72 Ohio St.3d 279, syllabus. Because words themselves may not be enough to understand the implications, "[i]n addition to examining the allegedly defamatory statements as they appear in context, we also examine 'the broader social context into which the statement fits.'" *Wampler v. Higgins*, 93 Ohio St.3d 111,131, 752 N.E.2d 962 (2001) ("Some types of … speech by custom or convention signal to readers or listeners that what is being read or heard is likely to be opinion, not fact."). This is especially true for protests, which include a multitude of angry voices and act as "a traditional haven for cajoling, invective, and hyperbole." *See Scott v. News-Herald*, 25 Ohio St.3d 243, 253, 496 N.E.2d 699 (1986).

Given the *de minimis* conduct of Oberlin's administrators in contrast to the substantial expression of the student activists, Oberlin's well-known role in matriculating students who lead the Nation's civil rights debates, and the context of these statements during a heated protest, this Court should accept this jurisdictional appeal and confirm on *de novo* review that the allegations of profiling or discrimination in this case are opinions as a matter of law. *Ferner v. Toledo-Lucas Cnty. Convention & Visitors Bur., Inc.*, 80 Ohio App. 3d 842, 848, 610 N.E.2d 1158 (6th Dist.1992).

CONCLUSION

With a history of deference to its students' expressive rights, Oberlin has long molded America's necessary and contentious debate on racism, discrimination, and civil rights. Given that historical context, the nature of the speech, and the First Amendment's broad protections for campus expressions on matters of public concern, Oberlin cannot be held liable here as a matter of law and the opinion below threatens the constitutional rights of all Ohio students and educators "to inquire, to study and to evaluate, to gain new maturity and understanding." *Sweezy*, 354 U.S. at 250. Therefore, *amici* urge this Court to accept Oberlin's appeal and address these substantial constitutional questions that are of public and great general interest.

Respectfully Submitted,

/s/ Kevin T. Shook
Kevin T. Shook
(Ohio Bar No. 0073718)
Frost Brown Todd LLC
10 West Broad Street, Suite 2300
Columbus, OH 43215
Tel: (614) 464-1211; Fax: (614) 464-1737
kshook@fbtlaw.com

Ryan W. Goellner
(Ohio Bar No. 0093631)
Frost Brown Todd LLC
301 E. Fourth Street, Suite 3300
Cincinnati, OH 45202
Tel: (513) 651-6840; Fax: (513) 651-6981
rgoellner@fbtlaw.com

Attorneys for Amici Curiae National Coalition Against Censorship, and Defending Rights & Dissent

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief was sent to all counsel of record via email, this 16th day of May, 2022, to the following:

Benjamin C. Sasse
Elisabeth Arko
Irene Kevse Walker
TUCKER ELLIS LLP
950 Main Ave., Ste. 1100
Cleveland, OH 44113
benjamin.sasse@tuckerellis.com
elisabeth.arko@tuckerellis.com
Irene.kevsewalker@tuckerellis.com

Owen J. Rarric
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY
4775 Munson St., NW
PO Box 36963
Canton, OH 44735
orarric@kwgd.com

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Wickham
TZANGAS, PLAKAS, MANNOS & RAIES
220 Market Ave. S., 8th Fl.
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jwickham@lawlion.com

Terry A. Moore
Matthew W. Onest
Jacqueline Bollas Caldwell
4775 Munson St., NW
PO Box 36963
Canton, OH 44735
tmoore@kwgd.com
jcaldwell@kwgd.com
monest@kwgd.com

Rachelle Zidar
Matthew W. Nakon
Richard Panza
Malorie A. Alverson
Michael R. Nakon
Wilbert V. Farrell
WICKENS, HERZER, PANZA, COOK & BATISTA
35765 Chester Road
Avon, OH 44011-1262
RZidar@WickensLaw.com
MNakon@WickensLaw.com
RPanza@WickensLaw.com

Ronald D. Holman, II
Julie A. Crocker
William A. Doyle
Cary M. Snyder
Josh M. Mandel
TAFT STETTINIUS & HOLLISTER LLP
200 Public Sq., Ste. 3500
Cleveland, OH 44114
rholman@taftlaw.com
jcrocker@taftlaw.com
wdoyle@taftlaw.com
csnyder@taftlaw.com
jmandel@taftlaw.com

James N. Taylor
409 East Ave., Ste. A
Elyria, OH 44035
taylor@jamestaylorlpa.com

/s/ Kevin T. Shook
Kevin T. Shook
Ohio Bar No. 0073718
Frost Brown Todd LLC
10 West Broad Street, Suite 2300
Columbus, OH 43215
Tel: (614) 464-1211
kshook@fbtlaw.com
Fax: (614) 464-1737

0144659.0731760 4886-4495-9520v7