Case No. 2022-0583

IN THE SUPREME COURT OF OHIO

GIBSON BROS., INC., et al.,

Plaintiffs-Appellees/Cross-Appellants,

v.

OBERLIN COLLEGE, et al.,

Defendants-Appellants/Cross-Appellees.

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

MEMORANDUM OF AMICI CURIAE THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, ADVANCE PUBLICATIONS, INC., THE E.W. SCRIPPS COMPANY, THE INVESTIGATIVE REPORTING WORKSHOP, THE MEDIA INSTITUTE, MOTHER JONES, MPA – THE ASSOCIATION OF MAGAZINE MEDIA, THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, THE NEWS LEADERS ASSOCIATION, THE OHIO ASSOCIATION OF BROADCASTERS, THE OHIO COALITION FOR OPEN GOVERNMENT, THE ONLINE NEWS ASSOCIATION, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, SOCIETY OF PROFESSIONAL JOURNALISTS, STUDENT PRESS LAW CENTER, AND THE TULLY CENTER FOR FREE SPEECH IN SUPPORT OF JURISDICTION

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press and 16 media organizations (collectively, "amici"). Lead amicus the Reporters Committee is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Other amici are prominent news publishers and professional and trade groups.[1] Amici are dedicated to defending the First Amendment rights of journalists and news organizations throughout the United States, including in Ohio. Amici write to emphasize the potential chilling effect on news reporting if the decision of the Ohio Court of Appeals for the Ninth Appellate District (the "Court of Appeals") is permitted to stand—a decision which undermines the core protections of the actual malice standard. Amici urge this Court to accept jurisdiction and to address the trial court's error in proceeding to the punitive damages phase of trial on Plaintiff-Appellee's libel claims, and therein to consider actual malice, *after* the jury had already found that Defendants-Appellants did not act with actual malice at the compensatory damages phase. Amici further urge the Court to accept jurisdiction in order to independently review the jury's subsequent actual malice determination, which was not supported by the record.

STATEMENT OF THE CASE AND FACTS

Amici hereby accept and incorporate by reference the statement of the case and facts as set forth in Defendants-Appellants' Memorandum in Support of Jurisdiction.

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[1] A supplemental statement of identity of the other amici can be found in Appendix A.

<u>INTRODUCTION AND EXPLANATION OF WHY THIS IS A CASE OF PUBLIC AND GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION</u>

This case arises out of a student protest at Oberlin College ("Oberlin") relating to a confrontation at Gibson's Food Market and Bakery (the "Bakery") between a Bakery employee and three Black Oberlin students. *Gibson Bros., Inc. v. Oberlin College*, 2022-Ohio-1079, ¶ 8 (Mar. 31, 2022). Plaintiffs-Appellees (collectively, "Gibson" or "Plaintiffs") allege that they were defamed in a flyer handed out at the protest and in an Oberlin Student Senate resolution. *Id.* ¶ 9. In response, Gibson filed suit—not against the protesters or Student Senate—but against Oberlin and Dean Meredith Raimondo (collectively, "Defendants"). At trial, a jury found Defendants liable for defamation. *Id.* ¶ 17. In the first phase of the trial, bifurcated pursuant to R.C. 2315.21(B)(1), the jury considered Plaintiffs' request for compensatory damages. *Id.* ¶ 79. Plaintiffs were found to be private figures and the speech at issue a matter of public concern. *Id.* ¶ 85. Therefore, under federal and Ohio law, Plaintiffs were entitled to recover actual damages on its libel claims only if the jury found that Defendants acted with negligence, or alternatively, presumed damages if the jury found that Defendants acted with actual malice—that is, knowledge of falsity or reckless disregard of the truth. *Id.* The jury found that Defendants did *not* act with actual malice and, accordingly, awarded Plaintiffs actual damages on their libel claims. *Id.* ¶ 86.

Because actual malice is a prerequisite to recovering punitive damages for speech involving a matter of public concern, the jury's finding that Defendants did not act with actual malice should have ended the matter as to Plaintiffs' libel claims and precluded any consideration of punitive damages. *Id.* ¶ 84. But the trial court proceeded to the punitive damages phase of trial and impermissibly required the jury to consider actual malice for a second time. At the punitive damages phase, the jury reached a conclusion directly at odds with and

irreconcilable with its earlier finding, concluding that Defendants *had* acted with actual malice and awarding over $33 million in punitive damages. *Id.* ¶¶ 17, 124. Defendants appealed, arguing, *inter alia*, that the trial court erred in proceeding to the punitive damages phase after the jury found no actual malice, and that the record did not support a finding of actual malice. The Court of Appeals erroneously rejected these arguments and, in doing so, failed to conduct the constitutionally required independent review of the jury's actual malice finding.

If permitted to stand, the decision on the issue of actual malice, below, and the resulting $33 million punitive damages award against Defendants would undermine the vital protections for speech afforded by the actual malice standard, in conflict with Ohio law and well-established First Amendment jurisprudence. Such a result would chill the exercise of First Amendment speech rights by news media organizations and other speakers, leading them to self-censor to avoid protracted litigation and sky-high damages verdicts unsupported by the evidence. For the reasons set forth herein, amici respectfully urge this Court to accept jurisdiction in this case.[2]

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Amici Curiae Proposition of Law No. 1 (supporting Defendants' Proposition of Law No. 3): The trial court erred in proceeding to the punitive damages phase on Plaintiffs' libel claims.

By proceeding to the punitive damages phase on Plaintiffs' libel claims, the trial court impermissibly caused the jury to revisit its finding that Defendants did not act with actual malice. By doing so, it set aside constitutional speech protections of critical necessity to journalists, news

[2] Defendants also argue, *inter alia*, that the verdict must be reversed because the statements at issue are protected opinion and Defendants did not publish them. Amici agree but do not address these issues herein, as they are fully addressed in Defendants' briefing. Amici also agree with, but do not further address, Defendants' contention that Plaintiffs cannot prevail on or recover punitive damages for their intentional infliction of emotional distress claims, which hinge on the same speech as Plaintiffs' libel claims. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 55–57 (1988); *Vail v. The Plain Dealer Publ'g Co.*, 72 Ohio St. 3d 279, 283, 649 N.E.2d 182, 186 (1995).

organizations, and other speakers. Under well-settled Ohio law and First Amendment jurisprudence, when a plaintiff in a defamation action is a private figure and the challenged speech involves a matter of public concern, the plaintiff must establish actual malice to recover presumed *and* punitive damages. *See Woods v. Cap. Univ.*, 2009-Ohio-5672, ¶ 35 (10th Dist.) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *Gilbert v. WNIR 100 FM*, 142 Ohio App. 3d 725, 744–45, 756 N.E.2d 1263, 1277 (2001)). Otherwise, damages are "restrict[ed] . . . to compensation for actual injury." *Gertz*, 418 U.S. at 349. Without this actual malice requirement, juries may excessively punish speech based on disagreement with its content, increasing the "danger of media self-censorship." *Id.* at 350.

Here, because the trial court held that Plaintiffs were private figures and that the speech at issue involved matters of public concern, Plaintiffs argued and presented evidence on actual malice in phase one of the trial.[3] *Gibson Bros., Inc.*, 2022-Ohio-1079, ¶¶ 81–82, 85. The jury found that Defendants acted with negligence but *did not* act with actual malice. *See* Jury Interrogatory #1 – Allyn W. Gibson Libel Claim Against Oberlin College at 2; Jury Interrogatory #2 – Allyn W. Gibson's Libel Claim Against Meredith Raimondo at 2; Jury Interrogatory #1 – David R. Gibson Libel Claim Against Oberlin College at 2; Jury Interrogatory #2 – David R. Gibson's Libel Claim Against Meredith Raimondo at 2; Jury Interrogatory #1 – Gibson Bros., Inc. Libel Claim Against Oberlin College at 2; Jury Interrogatory #2 – Gibson Bros., Inc.'s Libel Claim Against Meredith Raimondo at 2. This jury's finding of no actual malice and consideration of actual damages should have ended the proceedings as to Plaintiffs' libel claims.

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[3] While amici disagree with the trial court's finding that the Plaintiffs are private figures—given their local prominence and voluntary involvement in the controversy surrounding whether Gibson had engaged in racist practices—amici proceed on the basis of that finding for purposes of this brief.

The trial court's error in proceeding to the punitive damages phase despite the jury's clear finding of no actual malice, and the trial court's denial of Defendants' motion for judgment notwithstanding the verdict ("JNOV") as to that issue, constitute reversible error, as does the Court of Appeals' affirmance of those decisions.

A. The actual malice standard protects the exercise of free speech rights; Plaintiffs' libel claims should not have proceeded to the punitive damages phase after a jury finding of no actual malice.

The actual malice standard provides essential protection for speech by requiring certain libel plaintiffs to establish that defamatory speech was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964). It "was fashioned to assure [the First Amendment's guarantee of] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," even when those ideas are "vehement, caustic, and sometimes unpleasantly sharp." *Id.* at 269–70 (citation omitted). As the U.S. Supreme Court has recognized, "erroneous statement is inevitable in free debate" and "must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive." *Id.* at 271–72 (citation and internal quotation marks omitted). And absent constitutional protections, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true" due to the fear of facing expensive libel litigation, which "dampens the vigor and limits the variety of public debate." *Id.* at 279.

The actual malice requirement stood in contrast to the English common law tradition of libel suits as a tool of social control intended to protect the church, crown, and wealthy landed gentry. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967); *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of certiorari). To the extent that objective

survived in the American courts, it had curtailed important social discourse, such as abolitionist literature. *See, e.g.*, Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785 (1995). Indeed, *Sullivan* itself was part of a campaign of libel suits against the press aimed at suppressing criticism of Jim Crow laws. *See Sullivan*, 376 U.S. at 294–95 (Black, J., concurring); Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* 36 (1991) ("By the time the Supreme Court decided the *Sullivan* case, in 1964, Southern officials had brought nearly $300 million in libel actions against the press."). But, beginning with the *Sullivan* decision, the U.S. Supreme Court recognized that the First Amendment imposes limits on state libel laws. And this Court has reinforced those holdings, recognizing that "overbroad defamation standards result in the stifling of important non-defamatory material," in contravention of the First Amendment and Section 11, Article I of the Ohio Constitution. *Scott v. News-Herald*, 25 Ohio St. 3d 243, 245, 496 N.E.2d 699, 702 (1986).

Although the actual malice requirement initially applied only in defamation cases brought by public officials, the U.S. Supreme Court soon extended it to those brought by public figures. *Butts*, 388 U.S. at 164 (Warren, C.J., concurring); *see also id.* at 141, 159 (overturning $800,000 libel verdict against Associated Press for coverage of plaintiff's participation in pro-segregation riot). And in *Gertz*, the Court recognized the important role the actual malice requirement plays in the context of damages, holding that a private-figure plaintiff must establish actual malice to recover presumed or punitive damages, *Gertz*, 418 U.S. at 349, when the allegedly defamatory speech involves a matter of public concern. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985); *Gilbert*, 142 Ohio App. 3d at 744. As the Court explained:

> [J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their

> discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship . . . .

Gertz, 418 U.S. at 350–51; *see also Time, Inc. v. Firestone*, 424 U.S. 448, 475 n.3 (1976) (Brennan, J., dissenting) (noting, as to high pain-and-suffering awards, that "[t]he specter of such expenses may be as potent a force for self-censorship as any threat of an ultimate damages award"). Accordingly, a finding of actual malice is a constitutional prerequisite to an assessment of punitive damages. *Gertz*, 418 U.S. at 349.

The instant case illustrates the vital importance of the actual malice standard in the damages context. The speech at issue, as the trial court acknowledged, plainly involves a matter of public concern: allegations of racial discrimination by a local business. *Gibson Bros., Inc.*, 2022-Ohio-1079, ¶ 85. Specifically, the statements were made during constitutionally protected, peaceful protests arising in response to eyewitness reports of a Bakery employee's use of physical force against a Black Oberlin student and allegations of the Bakery's past racial discrimination. *Id.* ¶¶ 3, 9–12. Those statements led to a years-long defamation lawsuit costing tens of millions of dollars in legal fees and damages. At the end of phase one of the jury trial, however, jurors agreed on a key finding: Defendants did not act with actual malice. That finding barred Gibson from recovering both presumed *and* punitive damages. Yet instead of ending the proceedings on Plaintiffs' libel claims there, the trial court, as affirmed by the Court of Appeals, set aside that core constitutional speech protection—over Defendants' objections and motion for reconsideration—leading the jury to award $33 million in punitive damages.

The effect of giving libel plaintiffs multiple attempts to show actual malice at different stages of the proceedings and, thus, multiple opportunities to win high punitive damages awards, extends far beyond this case. Not only does permitting a jury to re-examine its initial actual

malice finding violate a libel defendant's Seventh Amendment right to "have a single issue decided *one time* by a single jury," *Greenhaw v. Lubbock Cnty. Beverage Ass'n*, 721 F.2d 1019, 1025 (5th Cir. 1983), *overruled on other grounds by Int'l Woodworkers of Am. v. Champion Int'l Corp.*, 790 F.2d 1174 (5th Cir. 1986) (emphasis added), it threatens to chill the exercise of free speech, including news reporting, on matters of vital public interest.[4] Indeed, after trial here, observers cited "'concern on the part of some college presidents that this decision will have a chilling effect on free speech,'" and noted that "by some accounts, this effect has already started to spread," citing a professor's defamation suit against his university based on students' flyers. EJ Dickson, *How a Small-Town Bakery in Ohio Became a Lightning Rod in the Culture Wars*, Rolling Stone (July 18, 2019), https://perma.cc/N76K-9JNU; *see also* Timothy Zick, *The Costs of Dissent: Protest and Civil Liabilities*, 89 Geo. Wash. L. Rev. 233, 237–39 (2021) (citing this case as an example of how "[d]amage awards resulting from civil causes of action . . . represent a particularly concerning threat to protest"). The Supreme Court warned against this potential chilling effect in *Sullivan*, cautioning that speakers "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether

[4] The Seventh Amendment's Reexamination Clause provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. The Ohio Constitution provides an "analogous" jury trial right in Section 5, Article 1. *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, ¶ 41, 116 Ohio St. 3d 468, 476, 880 N.E.2d 420, 432; *see also id.* ¶ 135 (Cupp, J., concurring) (explaining that Seventh Amendment jury trial right "decisions are strongly persuasive"). This jury trial right imposes constitutional limits on bifurcating trials, requiring issues examined in each phase to be sufficiently distinct. *See, e.g.*, *Olden v. LaFarge Corp.*, 383 F.3d 495, 509 n.6 (6th Cir. 2004); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995); *Banford v. Aldrich Chem. Co.*, Nos. 03-CV-8704, 03-CV-8865, 2005 WL 5338393 (Ohio Ct. Com. Pl. Oct. 21, 2005); Ohio R. Civ. P. 42(B) (bifurcation "shall preserve any right to a jury trial"). Although these cases have involved trials with the second phase decided by a second factfinder, the same concerns apply when a court empanels one jury but directs it to reexamine its phase-one findings. Doing so subverts the right to have issues decided once by one jury, burdens parties with relitigating settled issues, and creates unpredictable and inconsistent verdicts.

it can be proved in court or fear of the expense of having to do so." 376 U.S. at 279–80. The Court stressed that such self-censorship "dampens the vigor and limits the variety of public debate," undermining the purpose of the First Amendment. *Id.*

Media defendants, who often face meritless yet nevertheless costly lawsuits arising from their reporting on issues of public importance, will particularly feel the effects of a rule giving plaintiffs a second chance to show actual malice and win punitive damages—especially at a time when local news outlets are in dire financial straits. *See* Kristen Hare, *More Than 100 Local Newsrooms Closed During the Coronavirus Pandemic*, Poynter (Dec. 2, 2021), https://perma.cc/YU4M-MHR9. The resulting chilling effect threatens to stymie critical news reporting and deprive the citizens of Ohio of meaningful discourse on matters of public concern.

B. Proceeding to the punitive damages phase was inconsistent with the text and purpose of R.C. 2315.21(B)(1).

The plain text and legislative purpose of the bifurcation statute, R.C. 2315.21(B)(1), also make clear that the trial court erred in permitting the jury to proceed to the punitive damages phase on Gibson's libel claims. Under R.C. 2315.21(B)(1), in tort cases tried to a jury in which plaintiffs claim compensatory and punitive damages—including defamation cases—the trial court must bifurcate the trial upon the motion of any party. R.C. 2315.21(B)(1); *Wayt v. DHSC, L.L.C.*, 2018-Ohio-4822, ¶ 22, 155 Ohio St. 3d 401, 405, 122 N.E.3d 92, 96. In phase one, a party may not present "evidence that relates *solely* to" punitive damages. R.C. 2315.21(B)(1)(a) (emphasis added). If the jury awards compensatory damages, "evidence may be presented in the second stage of the trial, and a determination by that jury shall be made, with respect to whether the plaintiff additionally is entitled to recover punitive . . . damages." R.C. 2315.21(B)(1)(b). In other words—because compensatory damages are a prerequisite to punitive damages, *Niskanen v. Giant Eagle, Inc.*, 2009-Ohio-3626, ¶ 13, 122 Ohio St. 3d 486, 489, 912 N.E.2d 595, 599,

courts may only move on to phase two if the jury decides in phase one that the plaintiff is eligible to recover punitive damages. This provision was enacted as part of a broader tort-reform bill enacted to address the fact that "[i]nflated damage awards create an improper resolution of civil justice claims. The increased and improper cost of litigation and resulting rise in insurance premiums is passed on to the general public through higher prices for products and services." Am. Sub. S.B. 80, 150 Ohio Laws, Part V, 8028 ("S.B. 80") (eff. Apr. 7, 2005).

Here, the court bifurcated the trial at Defendants' request. *Gibson Bros., Inc.*, 2022-Ohio-1079, ¶ 79. Gibson presented actual malice evidence in phase one because that issue did not "relate[] solely to" punitive damages; it related directly to their claim for presumed damages. R.C. 2315.21(B)(1)(a). When the jury found no actual malice, it also made its "determination . . . with respect to whether the plaintiff[s] additionally [were] entitled to recover punitive . . . damages." R.C. 2315.21(B)(1)(b); *Gilbert*, 142 Ohio App. 3d at 744. At that point, the punitive damages question was settled. By nevertheless permitting the jury to proceed to the punitive damages phase—and enter an inconsistent verdict and a markedly high punitive damages award—the trial court contravened this tort-reform law.[5] Allowing such a decision to stand would encourage the "improper resolution of civil justice claims," undermining the General

[5] The jury's reexamination of its actual malice findings was similarly barred by direct estoppel, a type of issue preclusion. Issue preclusion bars parties from relitigating an issue that "(1) was actually and directly litigated in the prior action, (2) was passed upon and determined by a court of competent jurisdiction, and (3) when the party against whom [issue preclusion] is asserted was a party in privity with a party to the prior action." *Thompson v. Wing*, 70 Ohio St. 3d 176, 183, 637 N.E.2d 917, 923 (1994). "If the second action is on the same claim," including in phase two of a bifurcated proceeding, "preclusion is an instance of direct estoppel." Restatement (Second) of Judgments § 13 cmt. g, illus. 3 (1982); *see also id.* § 27. Preclusion rules "serve the necessary function of conserving judicial and litigant resources and minimize the possibility of inconsistent decisions." *In re Fordu*, 201 F.3d 693, 703 (6th Cir. 1999) (applying Ohio law).

Assembly's intent and stripping libel defendants of the statute's speech-protective effects by holding punitive damages proceedings for plaintiffs constitutionally ineligible to recover them.

Amici Curiae Proposition of Law No. 2 (supporting Defendants' Proposition of Law No. 2): The trial court and Court of Appeals erred in failing to conduct an independent review of the record as to the jury's finding of actual malice.

Even if the trial court properly permitted the jury to proceed to the punitive damages phase as to Gibson's libel claims, the trial—and appellate—court erred by failing to conduct the constitutionally required independent review of the record as to whether Defendants acted with actual malice. Independent appellate review serves "to insure that the judgment of the trial court does not constitute a forbidden intrusion on the exercise of free expression." *Lansdowne v. Beacon J. Publ'g Co.*, 32 Ohio St. 3d 176, 181, 512 N.E.2d 979, 985 (1987). Without it, "the jury's application of such a standard . . . holds a real danger of becoming an instrument for the suppression of those vehement, caustic, and sometimes unpleasantly sharp attacks, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 508–11 (1984) (citations and internal quotation marks omitted). And, in such a system, "the principle that debate on public issues should be uninhibited, robust, and wide-open" will evaporate as speakers self-censor due to fear of whether their libel defenses "can be proved in court or fear of the expense of having to do so." *Sullivan*, 376 U.S. at 270–72, 279.

For these reasons, Ohio courts routinely undertake their duty to review actual malice determinations and reverse judgments for plaintiffs when "a jury acting reasonably could not find actual malice with convincing clarity." *Dupler v. Mansfield J. Co.*, 64 Ohio St. 2d 116, 124, 413 N.E.2d 1187, 1194 (1980); *see also, e.g.*, *Varanese v. Gall*, 35 Ohio St. 3d 78, 83, 518 N.E.2d 1177, 1183 (1988); *Bertsch v. Commc'ns Workers of Am., Loc. 4302*, 101 Ohio App. 3d 186, 191–92, 655 N.E.2d 243, 247 (9th Dist. 1995). Here, the trial court and the Court of

Appeals failed to independently review the jury's finding of actual malice at the punitive damages phase—either in the trial court's one-page order denying Defendants' JNOV motion or in the appellate court's decision. *See Gibson Bros., Inc.*, 2022-Ohio-1079; Entry and Ruling on Defs.' Motion for JNOV (Sept. 9, 2019). This failure was erroneous, and amici urge this Court to undertake the requisite independent review.

A decision that would allow Ohio courts to forgo independent review of actual malice findings is particularly likely to harm the news media. The actual malice standard was crafted to function as an "extremely powerful antidote to the inducement to media self-censorship" inherent in old common law libel rules. *Gertz*, 418 U.S. at 342. Without it, media speakers would face an ever-growing number of protracted, expensive libel suits from people who disagreed with their speech on matters of public concern, and others would self-censor for fear of facing litigation of their own. As it stands, people dissatisfied with constitutionally protected speech about them increasingly bring libel suits to silence critics and promote their own agendas—often targeting local news outlets less able to fight back. For example, a small-town Iowa newspaper faced a defamation suit from a local police officer after it truthfully reported on his sexual relationships with teenage girls. *See* Meagan Flynn, *A Small-Town Iowa Newspaper Brought Down a Cop. His Failed Lawsuit Has Now Put the Paper in Financial Peril.*, Wash. Post (Oct. 10, 2019), https://perma.cc/W7US-DPQ6. The newspaper, family-owned for nearly a century, sought $140,000 in crowdfunding to avoid having to sell the paper to pay its legal costs. *Id.* In Colorado, Brokers' Choice of America sued NBC for libel in 2009 based on an episode of "Dateline" that revealed the group had encouraged insurance agents to mislead and scare senior citizens into purchasing unsuitable annuities. *Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1094 (10th Cir. 2017). The suit was not dismissed until eight years later,

when the U.S. Court of Appeals for the Tenth Circuit held that NBC's speech was substantially true. *Id.* at 1091. Because Colorado lacked an anti-SLAPP law at the time, however, NBC was unable to speed the suit's resolution or recover attorney's fees. *See Anti-SLAPP Guide: Colorado*, Reporters Comm. for Freedom of the Press, https://perma.cc/F35H-Y7GK (last visited May 11, 2022). Other organizations, fearing similarly costly, protracted court battles, have refrained from publishing critical commentary. *See, e.g.*, Adam Liptak, *Fearing Trump, Bar Association Stifles Report Calling Him a 'Libel Bully'*, N.Y. Times (Oct. 24, 2016), https://perma.cc/378G-GZYC; D. Victoria Baranetsky & Alexandra Gutierrez, *OP-ED: What a Costly Lawsuit Against Investigative Reporting Looks Like*, Columbia Journalism Rev. (Mar. 30, 2021), https://perma.cc/NB92-ZXTW (describing media entity's "exceptionally costly" five-year effort to defeat libel suit and noting that "other news organizations might look at this lawsuit and decide that reporting on powerful or deep-pocketed organizations isn't worth the risk"). When media organizations are forced to spend time and money defending against libel claims based on their reporting, their output suffers, scarce financial resources are diverted from newsrooms to court costs, and readers lose access to valuable content. This threat is particularly acute where, as in Ohio, no anti-SLAPP law exists to provide a mechanism for swift dismissal of meritless lawsuits designed to deter speech on matters of public concern. *See Anti-SLAPP Guide: Ohio*, Reporters Comm. for Freedom of the Press, https://perma.cc/8L33-AEHS (last visited May 6, 2022). For these reasons, it is critically important for courts to uphold and enforce First Amendment speech protections, including the actual malice standard in the damages context.

Here, an independent examination makes clear that the jury's actual malice finding was unsupported by the record. The evidentiary burden required to sustain a judgment of actual malice by clear and convincing evidence is intentionally high. To establish actual malice—and

thus to recover punitive damages for speech on a matter of public concern—a plaintiff must show the defendant published the allegedly defamatory speech with knowledge of its falsity or reckless disregard for its truth. *Gertz*, 418 U.S. at 349–50. To show reckless disregard, a plaintiff must show the defendant spoke with a "high degree of awareness of . . . probable falsity" or "entertained serious doubts as to the truth of his publication." *Varanese*, 35 Ohio St. 3d at 80 (citations omitted). Failure to investigate does not suffice, nor does "evidence of personal spite, ill will, or deliberate intention to injure, as the defendant's motives for publishing are irrelevant." *Id.* (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). "Finally, actual malice is to be measured as of the time of publication." *Id.*

In the face of these well-settled rules, Plaintiffs relied solely on the kind of evidence that cannot establish actual malice. Critically, almost all of Plaintiffs' evidence post-dates the November 10, 2016 publication of the flyer and Student Senate resolution, *see Gibson Bros., Inc.*, 2022-Ohio-1079, ¶¶ 11–12, 30; Pls.' Appellate Br. at 7–9 (June 8, 2020), which cannot show actual malice, i.e., Defendants' state of mind, at the time of publication. *See, e.g.*, *Dupler*, 64 Ohio St. 2d at 124 (finding actual malice could not be shown by evidence from months after publication); *Bose Corp.*, 466 U.S. at 512 (post-publication refusal to admit mistake "does not establish that he realized the inaccuracy at the time of publication"). Plaintiffs' only evidence about Defendants from the time of publication is that Raimondo handed out flyers and facilitated students' printing them, which does not show she knew they were false or thought it highly likely they contained false statements. Pls.' Appellate Br. at 11–13. Likewise, some Oberlin employees' expressions of frustration with Gibson cannot establish actual malice, "because the focus of inquiry is *not* on the defendant's attitude toward the plaintiff, but rather on the defendant's attitude *toward the truth or falsity* of the statement alleged to be defamatory."

Varanese, 35 Ohio St. 3d at 80 (emphasis in original). And while Gibson made much of the unremarkable evidence that not all Oberlin employees believed Gibson was racist, *see* Pls.' Appellate Br. at 14–18, the actual malice test looks to the state of mind of the speaker—not to the state of mind of all of the speaker's colleagues. *See Sullivan*, 376 U.S. at 287; *Dongguk Univ. v. Yale Univ*., 873 F. Supp. 2d 460, 465 (D. Conn. 2012), *aff'd*, 734 F.3d 113 (2d Cir. 2013). At most, this evidence pertains to an alleged failure to investigate, which is insufficient to establish actual malice. *See Sullivan*, 376 U.S. at 288; *St. Amant*, 390 U.S. at 731; *Varanese*, 35 Ohio St. 3d at 84. In sum, Gibson failed to show by clear and convincing evidence that Defendants acted with actual malice, barring an award of punitive damages. A finding to the contrary is unsupported by the record and endangers "speech concerning public affairs [which] is more than self-expression; it is the essence of self-government," and thus "occupies the highest rung of the h[ie]rarchy of First Amendment values." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted).

CONCLUSION

For the foregoing reasons, amici urge this Court to accept jurisdiction in this matter.

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Respectfully submitted,

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APPENDIX A
SUPPLEMENTAL STATEMENT OF IDENTITY OF AMICI CURIAE

Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

The E.W. Scripps Company is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets. Scripps also owns Scripps Networks, which reaches nearly every American through the national news outlets Court TV and Newsy and popular entertainment brands ION, Bounce, Grit, Laff and Court TV Mystery. The company also runs an award-winning investigative reporting newsroom in Washington, D.C., and is the longtime steward of the Scripps National Spelling Bee.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The Investigative Reporting Workshop, based at the School of Communication (SOC) at American University, is a nonprofit, professional newsroom. The Workshop publishes in-depth stories at investigativereportingworkshop.org about government and corporate accountability, ranging widely from the environment and health to national security and the economy.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a

competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

Mother Jones is a nonprofit, reader-supported news organization known for ground-breaking investigative and in-depth journalism on issues of national and global significance.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to

nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

The Ohio Association of Broadcasters is the not-for-profit organizations representing the interest of local radio and television stations in the state Ohio. Its membership is comprised of more than three hundred commercial and non-commercial station members. The association functions to protect the ability of over-the-air radio and television stations to operate their businesses and serve their local communities.

The Ohio Coalition for Open Government ("OCOG") is a nonprofit corporation whose supporters include citizens, Ohio newspapers, Ohio broadcasters, local news websites and others who share a common interest in informing the public about enforcing and studying the laws that obligate public offices to follow Ohio's "sunshine laws" related primarily to open records and open meetings. The coalition was formed in 1992 by the Ohio News Media Foundation, a nonprofit corporation affiliated with the Ohio News Media Association.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Radio Television Digital News Association ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

Student Press Law Center ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

The Tully Center for Free Speech began in Fall, 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served on May 16, 2022, via email, pursuant to S. Ct. Prac. R. 3.11 of the Supreme Court Rules of Practice, upon the following:

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