IN THE OHIO COURT OF APPEALS
FOR THE FIRST APPELLATE DISTRICT

M.R.,	:	Case No. C200302
Plaintiff-Appellee,	:	
V.	:	
JULIE NIESEN, *Et Al.*,	:	
Defendants-Appellants.	:	

MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

The trial court's prior restraint of constitutionally-protected speech made by Defendants-Appellants Julie Niesen and Terhas White is unquestionably subject to immediate appellate review. *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977),

In this appeal, Appellee M.R., a Cincinnati Police officer, disputes that Ms. Niesen and Ms. White's speech is constitutionally-protected. This is despite the fact that Ms. Niesen and Ms. White's speech discusses *admitted* actions of this uniformed, on duty, police officer – *a public official*. This is also despite the fact that there is no dispute that the speech is about what M.R. did in a *public forum* in City Hall just outside Cincinnati City Council chambers. Council was holding a meeting where its members heard *public concerns* about policing in the wake of the death of George Floyd and ensuing local and national protests. Nonetheless, the order appealed here enjoins Ms. Niesen and Ms. White from so much as identifying the very public official who is suing them and about whom they seek to comment. Accordingly, it stands to reason that, "[i]f a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review." *National Socialist Party*, 432 U.S. at 44; *Puruczky v. Corsi*, 2018-

Ohio-1335 (11th App. Dist.), at ¶ 15 (requiring immediate appellate review of court orders enjoining speech); *Connor Group v. Raney*, 2016-Ohio-2959 (2d App. Dist.) (same); *Internat'l Diamond Exchange Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc.*, 70 Ohio App.3d 667, 671 (2d App. Dist. 1991) (same).[1]

M.R. asserts that social media posts made by Ms. Niesen and Ms. White created a risk of harm to him and his family and that the posts would be offensive to a reasonable person. This position ignores the law, which provides that a police officer, as a public official, is subject not to the negligence standard found in M.R.'s complaint and all subsequent pleadings, but one of actual malice against the officer with the knowledge of the falsity of the statement. Ms. Niesen and Ms. White stated on social media that this officer made an "OK" sign, which is a symbol that has been coopted by and whose meaning has been changed by white supremacists. Ms. Niesen and Ms. White stated that white supremacy should not be tolerated in the Cincinnati Police Department. Among the fundamental protections preserved by the First Amendment, any person's right to speak freely on public issues, falls on the "highest rung of the hierarchy of First Amendment values." *Connock v. Myers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

Accordingly, it is clear that this court has jurisdiction to consider this appeal.

I. Introduction

Criticism of [police officers'] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.

-- *New York Times v. Sullivan*, 376 U.S. 254, 273 (1964)

[1] *See also The Connor Group v. Raney*, No. 26653 (2d App. Dist. July 29, 2015) (unpublished) ("[I]mmediate appellate review is constitutionally required in situations where a preliminary injunction constituted a prior restraint on the exercise of the right of free speech") (citing *Internatl. Diamond Exchange Jewelers, Inc. v. Diamond & Gold Jewelers, Inc.*, 70 Ohio App3d 667 (2d App. Dist. 1991).

The summer of 2020 brought to the forefront of the American – and the worldwide – consciousness the profound problems of systemic racism and racist policing. In the wake of the death of George Floyd, who passed away while a Minneapolis police officer forced his knee into Floyd's neck for nearly eight minutes, citizens brought renewed criticism to racist police practices across the country. These issues are of the utmost public and societal concern, as they cut to the heart of our American democracy, identity, and existence. *See Marquardt v. Carlton*, No. 19-4223, 2020 WL 4811388 (6th Cir. Aug. 20, 2020) (holding that Facebook comments about the propriety of the Cleveland police officer's actions in fatally shooting 12-year-old Tamir Rice were on a matter of serious public concern and were protected by the First Amendment).

Responding to public protests on racist policing in Cincinnati, the Cincinnati City Council scheduled a series of public meetings to hear from constituents.[2]. One such meeting took place at Cincinnati City Hall on June 24, 2020. Complaint, ⁋ 16. A large number of people attended, and M.R., a Cincinnati police officer, was assigned to provide crowd control. *Id*. at ⁋⁋ 17, 39. M.R. admits that he made an "OK" hand gesture to the group, which the group immediately interpreted the gesture as a white supremacist symbol. *Id*. at ⁋⁋ 19-20.[3] That the "OK" hand gesture can also be interpreted as a "white power" symbol is well-documented. *See, e.g.,* Vanessa Swales, "When the O.K. Sign is No Longer O.K.," New York Times (Dec. 15, 2019), available at https://www.nytimes.com/2019/12/15/us/ok-sign-white-power.html; Bobby Allen, "The 'OK'

[2] *See, e.g.,* Jay Hanselman, "Defunding Police Likely Major Topic During Cincinnati Budget Hearings," WVXU.org (June 15, 2020) available at *https://www.wvxu.org/post/defunding-police-likely-major-topic-during-cincinnati-budget-hearings#stream/0*.

[3] As additional support for M.R.'s admission that the crowd interpreted his "OK" gesture as a sign of white supremacy, this Court can take judicial notice of the comments that were immediately offered by members of the crowd to City Council describing the incident. For a recording of the June 24, 2020 public meeting, see the City's Citi Cable channel, available at https://archive.org/details/10200624-coun. Descriptions of the incident appear at the 1:53:43 mark and again at the 1:58:32 mark.

Hand Gesture is Now Listed as a Symbol of Hate," National Public Radio (Sept. 26, 2019), available at https://www.npr.org/2019/09/26/764728163/the-ok-hand-gesture-is-now-listed-as-a-symbol-of-hate; Anti-Defamation League, "Okay Hand Gesture," available at https://www.adl.org/education/references/hate-symbols/okay-hand-gesture; Anti-Defamation League, "How the 'OK' Symbol Became a Popular Trolling Gesture" (Sept. 5, 2018), available at https://www.adl.org/blog/how-the-ok-symbol-became-a-popular-trolling-gesture; David Newport, "Is that an OK sign? A White Power Symbol? Or Just a Right Wing Troll?," Southern Poverty Law Center (Sept. 19, 2018), available at https://www.splcenter.org/hatewatch/2018/09/18/ok-sign-white-power-symbol-or-just-right-wing-troll; *Fairbanks v. Roller*, 314 F.Supp.3d 85 (D.D.C 2018).

The following day, Ms. White[4] and another person filed a complaint about the incident with the Citizen Complaint Authority, an administrative body that receives and investigates complaints against Cincinnati police officers. *See State v. City of Cincinnati Citizen Complaint Authority*, 2019-Ohio-5349 (1st App. Dist.) (describing origin and role of Citizen Complaint Authority). Ms. White, Ms. Niesen, and others also commented about the incident on their social media platforms, tying their discussions to the widespread and ongoing concerns about racist police practices both here in Cincinnati and nationwide. Complaint, at ¶¶ 35, 47, 54. Ms. Niesen's social media post specifically stated that "several speakers indicated that a police officer, later identified as [M.R.] was flashing the 'ok sign', which is a white supremacist symbol" and went on

[4] M.R.'s motion to dismiss this appeal is ironically silent as to any facts related to Ms. White. The motion discusses Ms. Niesen and another defendant, James Noe, who is not a party to this appeal. It does not recount any factual allegations against Ms. White. The facts summarized in this memorandum are recited from M.R.'s complaint, which does contain factual allegations against her.

to cite directly to official and published narratives about the officer and news reports about the same behavior. Complaint, Ex. 1.

Nearly a month later, M.R. filed suit against Ms. Niesen, Ms. White, and a number of other parties. [5] Complaint, p. 1. He alleged four separate legal claims, all arising from speech about the gesture he made as a public official while engaged in a public function at a public meeting on a matter of public concern. First, he alleged that the allegations that he is a racist or white supremacist that were made on social media by Ms. Niesen, Ms. White, and others painted him in a false light. *Id*. at pp. 7-8. Second, he claimed that the defendants' statements that he is racist or white supremacist are false and defamatory. *Id*. at 8. Third, he sued Ms. White and the other complainant for the complaints the filed with the Citizen Complaint Authority, alleging that they committed a crime by making a false a report. *Id*. at 8. Lastly, he plead a generic negligence claim arising from alleged false statements made about him by the defendants. *Id*. at 8-9. All four of these claims are based entirely upon things that were allegedly said by the defendants.

The same day he filed his lawsuit, M.R. also sought a temporary restraining order, which was supported by his own affidavit, now sealed by the trial court. While M.R.'s complaint focused almost exclusively on alleged reputational injuries arising from the notion that he is a racist police officer who made a racist gesture to members of the public, his restraining order motion went in a markedly different direction. In his motion and affidavit, he expressed dismay at the idea that people he previously arrested for committing felonies might show up at his house and threaten his wife and children. *See* Motion for Temporary Restraining Order; First Affidavit of M.R. He sought to prohibit some of the defendants from identifying him or providing information about

[5] As noted above, M.R.'s Motion to Dismiss this appeal also discusses Defendant James Noe and social media posts allegedly attributable to him. As of the date of filing of this memorandum, M.R.'s counsel has failed to secure service upon Mr. Noe.

where he lives on this basis.[6] *Id*. He also requested an order requiring the removal of the social media posts identifying him as the officer who displayed the "OK" gesture at the June 24, 2020 City Council meeting.

The trial court resoundingly rejected M.R.'s request to have social media posts removed. *See* Order Granting in Part Motion for Temporary Restraining Order (July 24, 2020). The court granted, however, the remainder of M.R.'s motion and prohibited the parties from identifying M.R. or providing any personally identifying information about him. *Id*. It did so despite clear authority affirming the public's right to know the names of public officials. *See, e.g., Boggs v. United States*, 143 Fed. Cl. 508, 514-16 (Fed. Cl. 2019) (holding that the public has a protected interest in being aware of the identities of public officials and that "communications indicating general disapproval or frustration with plaintiffs [are] insufficient to justify anonymity"); *Doe v. McKesson*, 322 F.R.D. 456 (M.D. La. 2017) (prohibiting police officer from suing Black Lives Matter protestors in pseudonym). At a hearing on August 11, 2020, and in an entry dated August 13, 2020, the court indicated that this order was to remain in effect at least through the hearing scheduled for September 1, 2020.[7] *See M.R. v. Niesen*, Entry Vacating Restraining Order Against Alissa Gilley (Aug. 13, 2020) ("The [temporary restraining] orders remain in effect as to all other Defendants

[6] Notably, none of the evidence submitted by M.R. in support of his temporary restraining order motion indicates that Ms. Niesen or Ms. White even know where he lives, much less threatened to share his address publicly.

[7] At the August 11, 2020 preliminary injunction hearing, the trial court granted a continuance to September 1, 2020. In so doing, it was explicit that the temporary restraining order would remain in effect through the date of that hearing, thereby implicitly converting it to a preliminary injunction. Appellants have ordered a transcript of that hearing and will immediately supplement this response upon receipt of the transcript. The Court's August 13, 2020 order vacating the restraining order as to Defendant Alissa Gilley makes clear, however, that its previously-issued temporary restraining orders remain in effect as to the other Defendants.

named in the entries."). As a result, the trial court's order has restrained, and will continued to restrain, Ms. Niesen and Ms. White's speech about M.R.

For the reasons that follow, this Court's immediate review is required. The trial court's order enjoins future expression, triggering the procedural requirement of prompt judicial review. In addition, the trial court's order impairs a substantial right, justifying an interlocutory appeal under Ohio's jurisdictional statutes. Moreover, given the paramount First Amendment concerns in this case, the utterly baseless nature of M.R.'s lawsuit, and the likelihood that this lawsuit and others like it will be used to chill well-meaning citizens from participating in democratic debate, this Court should not only hear this appeal, but reverse the trial court's order.

II. Appellant M.R.'s Motion To Dismiss Should Be Denied; Immediate Appellate Review Is Constitutionally and Statutorily Required When A Court Enjoins Speech.

1. Prompt judicial review is required when courts impose prior restraints on expression.

Where a state court imposes a restraint on free expression through litigation, the state must provide a mechanism for immediate appellate review. *National Socialist Party*, 432 U.S. at 44. This principle was initially adopted by the Supreme Court over forty years ago, and it has been widely accepted by the Ohio courts. *See, e.g., Puruczky v. Corsi*, 2018-Ohio-1335 (11th App. Dist.), at ¶ 15; *Connor Group v. Raney*, 2016-Ohio-2959 (2d App. Dist.), at ¶ 1 ("a preliminary injunction that constitutes a prior restraint on speech requires immediate appellate review"); *Internat'l Diamond Exchange Jewelers, Inc. v. U.S. Diamond & Gold Jewelers, Inc.*, 70 Ohio App.3d 667, 671 (2d App. Dist. 1991) (holding that, where a court order seeks to "impose a restraint on First Amendment rights, there must be strict procedural safeguards including immediate appellate review") (internal citations omitted). Because "an injunction against speech is the very prototype to the greatest threat to First Amendment values, the prior restraint," parties restrained from speaking by order of a court must have the opportunity to promptly appeal.

Madsen v. Women's Health Center, Inc., 512 U.S. 753, 797 (1994) (Scalia, J., concurring in part and dissenting in part); *Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 307 (1996) (characterizing court-ordered injunctions against speech as prior restraints).

The trial court's injunction order falls into the category of judicially-imposed prior restraints that trigger the immediate appellate review requirement. As an initial matter, the trial court's order retains all of the procedural qualities of a preliminary injunction. For one thing, the order was issued after a hearing at which both Ms. Niesen and Ms. White were present and therefore has more lasting duration.[8] By their very nature, temporary restraining orders last for only a short, specified period of time, because they are premised on the assumption that the parties have not been given adequate notice and therefore that the order will be granted *ex parte*. *See Turoff v. Stefanac*, 16 Ohio App.3d 227, 228 (8th App. Dist. 1984) ("The purposes of limiting the duration of a temporary restraining order to fourteen days in Ohio cases … is that such orders are usually sought ex parte."). Given Ms. Niesen and Ms. White's presence, the concerns that limit the duration of a temporary restraining order are not relevant here.

Even more significantly, the trial court expressly extended the timing of its injunctive order up to the September 1, 2020 preliminary injunction hearing. *See* Entry Vacating Restraining Order Against Alissa Gilley (Aug. 13, 2020) ("The [temporary restraining] orders remain in effect as to all other Defendants named in the entries."). By rule, the temporary restraining order issued on July 24, 2020 could be in effect for a maximum of 28 days – which is August 21, 2020. *See* Ohio R. Civ. P. 65(A). By extending the order to a date past the expiration of the temporary restraining order period, the trial court in essence imposed a preliminary injunction. *See, e.g., City of*

[8] When prepared, the transcript of the trial court's July 24, 2020 hearing will reflect the presence of both women in court.

Cincinnati ex rel. Cosgrove v. Grogan, 141 Ohio App.3d 733, 742 (1st App. Dist. 2001) ("The Supreme Court recognized that a temporary injunction and an ex parte TRO are 'two entirely independent forms of relief.'") (citations omitted); *Turoff*, 16 Ohio Attp.3d at 228 ("when both parties had notice of, were present at, and participated in the hearing, the court may treat the application as one for a preliminary injunction."). Moreover, the trial court's injunctive order on its face lacks an expiration date, a quality the Ohio courts have interpreted to convert a temporary restraining order to a preliminary injunction. *See, e.g., Meade v. Beverly Enterprises-Ohio, Inc.*, 2003-Ohio-5231 (11th App. Dist.), at note 1.

Even if the First Amendment concerns were insufficient to trigger this Court's immediate review, by statute this Court must allow Ms. Niesen and Ms. White's appeal to proceed. Ohio Rev. Code § 2505.02(B)(1) provides for appellate review when the order being appealed affects a substantial right. Ohio Rev. Code § 2505.02(A)(1) separately makes clear that federal constitutional rights, like the First Amendment rights at issue in this case, are substantial rights within the meaning of the appellate review statute. *See also Celebreezze v. Netzley*, 51 Ohio St.3d 89, 90-91 (identifying First Amendment rights as substantial within the meaning of Ohio Rev. Code § 2505.02(B)(1)).

M.R.'s motion to dismiss this appeal clearly ignores both the clear constitutional authority and the unambiguous statutory commands that support appellate jurisdiction in this case. More specifically, M.R. attempts to distinguish *National Socialist Party* on the grounds that the underlying speech at issue in each case differs. In so doing, however, M.R. entirely fails to acknowledge the Supreme Court's explicit requirement that state appellate courts immediately review trial court injunctions of speech. *National Socialist Party*, 432 U.S. at 44. What is worse, M.R.'s motion is completely silent as to the strong statutory support for Ms. Niesen and Ms.

White's appeal. Because their First Amendment rights are impaired by the trial court's order, Ms. Niesen and Ms. White can clearly invoke this Court's appellate jurisdiction. *See* Ohio Rev. Code. § 2505.02(A), (B).

2. The trial court's order restrains free speech.

The breadth and scope of the trial court's order, and its impact on constitutionally-protected expression, command this Court's immediate review. The order prohibits Ms. Niesen and Ms. White from "publicizing, through social media or other channels, Plaintiff's personal identifying information." *See* Temporary Restraining Order (July 24, 2020). The term "personal identifying information" is not defined, but taken in conjunction with the trial court's order sealing M.R.'s affidavit and permitting him to proceed in pseudonym, the order at a minimum prohibits Ms. Niesen and Ms. White from speaking M.R.'s name. *Id*.; Entry (July 22, 2020).

This limitation is of constitutional magnitude. To be sure, citizens have the fundamental right to speak openly about public officials and can only face civil liability if their comments are offered with "actual malice," meaning knowledge of the assertion's falsity or reckless disregard for their truth. *NY Times v. Sullivan*, 376 U.S. 254, 283 (1964) ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct."). Indeed, the facts of this case are eerily similar to those of *NY Times v. Sullivan*, the Supreme Court's seminal pronouncement on the First Amendment protection afforded to speech about public officials. At issue in *Sullivan* was a newspaper advertisement purchased by civil rights activists that was critical of Sullivan, then the police commissioner of Montgomery, Alabama. *Id*. at 256. The ad claimed that Sullivan had engaged in racist police tactics in arresting Martin Luther King, Jr. and in attempting to intimidate civil rights protestors who supported him. *Id*. at 256-58. In a sweeping ruling, the Supreme Court

overturned the jury verdict in Sullivan's favor and held the ad to be fully protected by the First Amendment. *Id*. at 284, 292.

Confronted with a virtually identical set of facts to this case[9], the *Sullivan* Court made three critical observations about the First Amendment. First, it held that speech about matters of public concern – like institutional racism, the functioning of government, and the quality of a particular public servant's official actions (issues of public concern in 1964, and issue of public concern still today) – are entitled to the fullest constitutional protection. *Id*. at 271-73 ("we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials"). Second, it held that criticism of public officials need not be true, popular, or even well-founded to trigger the First Amendment. *Id*. at 271. In order to promote full democratic dialogue and debate, statements about public officials that are less than accurate must be given "breathing space," lest individuals be deterred from offering comments at all. *Id*. at 272, 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable 'self-censorship.'") (citations omitted). Third, the Court discounted injury to a public official's reputation as a valid basis for suppressing expression, even where that expression contains "half-truths" and "misinformation." *Id*. at 272. Because a public official's reputation is itself a matter of political and public concern, any damage done to the official's reputation as a result of public criticism

[9] The only real distinction is that the advertisement in *Sullivan* appeared in the New York Times, and therefore presumably had a much broader range of circulation than the individual Facebook pages on which Ms. Niesen and Ms. White communicated. *Sullivan*, 376 U.S. at 356; Complaint, at ¶¶ 35, 47.

cannot form the basis of a claim for damages. *Id*. at 272-73. For these reasons, statements critical of public officials engaged in their official duties are only actionable if uttered with knowledge of their falsity or the reckless disregard of their truth. *Id*. at 283.

In the more than five decades since *Sullivan* was decided, courts have made clear what *Sullivan* implied: police officers are unquestionably public officials for defamation purposes. *See, e.g.,Henry v. Pearson*, 380 U.S. 356 (1965); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Soke v. The Plain Dealer*, 69 Ohio St.3d 395, 397 (1994); *Williams v. Gannett Satellite Info. Network, Inc*., 162 Ohio App. 3d 596, 600-1, at ¶ 14 (1st App. Dist. 2005). A police officer suing for defamation or false light invasion of privacy must therefore demonstrate actual malice on the part of the speaker. *See Welling v. Weinfeld*, 2007-Ohio-2451, at ⁋ 58 (holding that the constitutional limitations on the tort of defamation apply with equal force to the tort of false light invasion of privacy).

M.R.'s complaint does not even allege actual malice on the part of Ms. Niesen and Ms. White, nor could it. For one thing, M.R. admits he made the "OK" gesture while serving as a police officer at a public meeting. Complaint, at ⁋ 19. For another, M.R. improperly focusses on the intent underlying Ms. Niesen and Ms. White's statements, alleging in his complaint that defendants' conduct was "malicious." Complaint, at ⁋ 24. But "actual malice" is not synonymous with bad intent or ill motive. *Burns v. Rice*, 2004 -Ohio- 3228 (10th App. Dist.). Rather, the focus is upon the defendant's attitude toward the truth or falsity of the published statements, not the existence of hatefulness or ill will. *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Herbert v. Lando*, 441 U.S. 153 (1979). M.R. offers absolutely no information in his complaint about how Ms. Niesen or Ms. White would have any knowledge about his personal belief systems other than the gesture he displayed in uniform, and in this regard his complaint is fatally defective.

Moreover, a police officer suing those who criticize his execution of his official duties is also prohibited from recovering damages for statements of opinion. Expressions of opinion about public officials are protected not only under the First Amendment, but under the Ohio Constitution. *See Jorg v. CBUF*, 153 Ohio App.3d 258 (1st App. Dist. 2003). "Once a determination is made that specific speech is 'opinion,' the inquiry is at an end. It is constitutionally protected." *Id.* at 261, ¶ 9 (citing *Vail v. Plain Dealer Pub. Co*., 72 Ohio St.3d 279 (1995)). Ohio's courts have on many occasions considered statements about racism or bigotry and have held that such statements are inherently opinion and therefore protected speech. For example, in *Lennon v. Cuyahoga County Juv. Court*, 2006-Ohio-2587 (8th App. Dist. 2006), the court observed that "appellant's being called a racist was a matter of one [person's] opinion and thus is constitutionally protected speech." Id. at ¶ 31. In addition, in *Condit v. Clermont County Review*, 110 Ohio App.3d 755, 760 (12th App. Dist. 1996), the court found that accusations of "fascist" and "anti-semite" were protected statements of opinion.[10] As a result, under the high standard for the protection of expression of opinions, a discussion about whether particular conduct is racist could essentially never be the subject of an action for defamation or false light. *See, e.g., Steele v. Spokesman-Review*, 138 Idaho 249 (Idaho 2002) (rejecting attorney's claim against newspaper who reported that he was a white supremacist in part based upon the fact that a person's belief system is not provable). The burden is all the more insurmountable for a police officer. *See Waterson v.*

[10] *See also Buckley v. Littell*, 539 F.2d 882, 891-95 (6th Cir. 1977) (noting that the word "fascist" is "loose[]" and "ambiguous and cannot be regarded as a statement of fact because of the "tremendous imprecision" of meaning and usage of the term); *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988) (holding that the term "racist" is "hurled about so indiscriminately that it is no more than a verbal slap in the face" and "not actionable unless it implies the existence of undisclosed, defamatory facts"); *Raible v. Newsweek*, 341 F. Supp. 804, 807 (W.D. Pa. 1972) ("to call a person a bigot or other appropriate name descriptive of his political, racial, religious economic or sociological philosophies gives no rise to an action for libel"); *Rambo v. Cohen*, 587 N.E.2d 140, 148-9 (Ind. App. 1992) ("the phrase 'anti-Semitic'… is not defamatory *per se*").

Cleveland State Univ., 93 Ohio App.3d 792, 797-98 (10th App. Dist. 1994) (holding that explicit allegation of racism against police officer is not actionable).

Under these bedrock and foundational First Amendment cases, several key concepts emerge, all of which underscore the illegality of the trial court's restraining order:

1. Debate about matters of public concern is fully protected by the First Amendment. In discussing a racist gesture offered by a police officer in the course of his official duties at a public meeting in a public forum, Ms. Niesen and Ms. White were addressing a topic of serious public concern. *See Marquardt*, 2020 WL 4811388.

2. Even "half-truths" and "misinformation" about public officials like police officers is entitled to First Amendment protection and, in the absence of actual malice, cannot be actionable. *Sullivan*, 376 U.S. at 272. M.R. has not even alleged actual malice in this case, nor he has demonstrated that the statements at issue here are untrue.

3. Statements of opinion, including calling someone a racist or a white supremacist, are fully entitled to constitutional protection. To the extent Ms. Niesen and Ms. White used these terms to describe M.R., they were expressing opinions that cannot give rise to civil liability consistent with the First Amendment. *Lennon*, 2006-Ohio-2587.

All of this is to say that the trial court lacked a valid legal basis for restraining Ms. Niesen and Ms. White from identifying M.R. in their future communications. Despite the clear protection afforded to Ms. Niesen and Ms. White's expression, consider the wide range of fully constitutional statements now prohibited under the trial court's injunctive order:

1. "[M.R.'s real name] is a Cincinnati police officer," a true statement of fact about a public official protected under the *Sullivan* standard. *See Boggs*, 143 Fed. Cl. at 516; *Doe*, 322 F.R.D. 456.

2. "[M.R.'s real name] was serving as a Cincinnati police officer on June 24th during the City Council's meeting on police reform," also a true statement of fact about a public official engaged in public duties in a public forum fully protected under the *Sullivan* standard.

3. "[M.R.'s real name] made the 'OK' gesture at the June 24th meeting," again a true statement of fact about a public official engaged in public duties in a public forum on a matter of public concern that is also fully protected under the *Sullivan* standard.

4. "I filed a complaint against [M.R.'s real name] with the Citizen Complaint Authority," once again a true statement about a matter of public record. *See* Complaint, at ¶ 45 ("CCA complaints are public record.").

5. "[M.R.'s real name] is suing me," a true statement of fact about an ongoing public court proceeding protected by the *Sullivan* standard. *See Boggs*, 143 Fed. Cl. at 516; *Doe*, 322 F.R.D. 456.

6. "[M.R.'s real name] is a racist," a constitutionally-protected statement of opinion about a public official. *See Lennon*, 2006-Ohio-2587.

What is worse, the trial court's order extends beyond these true statements of fact and protected statements of opinion. In fact, references to M.R. in this brief, rather than use of the officer's given name, are intentional. Not only have Ms. Niesen and Ms. White been restrained from identifying M.R. in their future expression, but M.R.'s identity has been hidden by court order in this case. *See* Entry (Aug. 11, 2020). As a result, not even the attorneys in this case are permitted to use M.R.'s actual name in these pleadings, and have themselves been chilled from providing this basic information to the Court.

The Supreme Court and Ohio courts are clear. When speech is restrained by an injunction in this manner, when parties and lawyers are prohibited from offering truthful statements and

opinions about a public official engaged in official acts at a public meeting, when the "uninhibited, robust, and wide-open" debate the First Amendment envisions on matters of public and political concern is silenced, ***the appellate courts must intervene***. *Sullivan*, 376 U.S. at 217; *National Socialist Party*, 432 U.S. at 44. Because the trial court restrained Ms. Niesen and Ms. White's free expression on a matter of societal importance and great public concern about a public official engaged in his official duties, this Court's immediate review is required. *Id*.

III. Appellants Do Not Object To Expedited Review.

As discussed at length in this memorandum, this case involves significant constitutional questions that impact Appellants' fundamental right to free expression. The Court should expedite its review of the merits of the lower court's injunction and should ultimately overturn that order, as it was issued in violation of the First Amendment.

IV. Conclusion

For the foregoing reasons, the Court must deny M.R.'s motion to dismiss this appeal. Immediate appellate review is constitutionally required under *National Socialist Party*, 432 U.S. at 44. In addition, appellate jurisdiction is proper under Ohio Rev. Code § 2505.02(A) and (B), as the trial court's order implicates a substantial right. Given the First Amendment rights at issue in this case, the Court should resolve its merits on an expedited basis and should overturn the trial court's July 24, 2020 injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing document was provided via electronic mail followed by regular U.S. mail to counsel for Plaintiff on the 23rd day of August, 2020.

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