IN THE SUPREME COURT OF OHIO

M.R., A CINCINNATI POLICE OFFICER, Plaintiff–Appellee, v. **JULIE NIESEN, et al.,** Defendant–Appellants	Supreme Court case no. 2020-1131 On Appeal from the First District Court of Appeals, Hamilton County, case no. C-200302 Hamilton County Common Pleas case no. A2002596

Reply Brief Amici Curiae of Law Professors Jonathan Entin, David F. Forte, Andrew Geronimo, Raymond Ku, Stephen Lazarus, Kevin Francis O'Neill, Margaret Christine Tarkington, Aaron H. Caplan, and Eugene Volokh; the National Writers Union; the Society of Professional Journalists; WGA-East; Euclid Media Group; First Amendment Lawyers Association; and Institute for Free Speech, in Support of Defendant-Appellants

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I. Niesen and White Have a First Amendment Right to Criticize M.R. by Name

Defendant-Appellants Niesen and White seek to publicly discuss and criticize M.R., and to do so using his name. This is the normal way Americans publicly discuss people. It is the normal way news outlets discuss people, especially public officials. *See Soke v. Plain Dealer*, 69 Ohio St.3d 395, 632 N.E.2d 1282 (1994) (recognizing that "police officers are public officials"). Niesen and White have the First Amendment right to do this.

Plaintiff's brief repeatedly labels this normal practice "doxing," but such argument by pejorative is unhelpful here. The term "doxing" has no legal significance, whether in First Amendment law, in Ohio statutes, or in the common law.

The more proper verb here is "naming," as in, "Do Niesen and White have the First Amendment right to name the public official they are criticizing?" The answer to that question is "yes." People cannot be barred even from revealing the name of a rape victim, see *Florida Star v. B.J.F.*, 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989). They surely cannot be barred from revealing the name of a public official who is accused of misconduct.

The First Amendment may even protect disclosure of information such as an official's home address, even though that is less relevant to public debates. *See Publius v. Boyer-Vine*, 237 F. Supp. 3d 997 (E.D. Cal. 2017) (striking down a restriction on publishing officials' home addresses); *Brayshaw v. City of Tallahassee*, 709 F.Supp.2d 1244 (N.D.

Fla. 2010) (likewise); *Sheehan v. Gregoire*, 272 F.Supp.2d 1135 (W.D. Wash. 2003) (likewise). But the First Amendment even more clearly protects the right to speak someone's name, which provides valuable information to the public: seeing the name lets readers ask around about the official's reputation, or search for other articles mentioning the name, *e.g.*, *Police Release Personnel Files of Officers Involved in Shooting*, WLWT-5, Nov. 28, 2012, https://www.wlwt.com/article/police-release-personnel-files-of-officers-involved-in-shooting/3527052.

Nor can this First Amendment right be defeated simply by speculation that publishing a person's name might expose him to some risk of attack in the future. That risk, regrettably, is present whenever someone's alleged misconduct is publicly discussed. An article mentioning an accused (or convicted) criminal might lead some people to attack or threaten the criminal. Likewise with an article discussing a business figure who is accused of unfair practices, or, as here, a post discussing a public official who is accused of acting improperly.

Yet no court would order the *Cincinnati Enquirer*, we assume, to pseudonymize all the people whose alleged misconduct is discussed in the newspaper's pages, simply because of the hypothetical possibility that such discussions could lead a tiny fraction of readers to illegally retaliate against the subjects of the articles. The same logic should apply to Niesen and White.

II. There Has Been No Finding That Niesen's and White's Speech Is Defamatory

Niesen's and White's speech cannot be enjoined on the theory that it is defamatory, because there has been no judicial finding that it is defamatory. Even in the rare circumstances where a court may issue a permanent injunction against speech, it must first conclusively determine that the future speech will be unprotected by the First Amendment—i.e., that the speech "will be integral to criminal conduct, defamatory, or otherwise subject to lawful regulation based on its content." *Bey v. Rasawehr*, 161 Ohio St.3d 79, 90, 161 N.E.3d 529, 2020-Ohio-3301 (quotation marks omitted). But the trial court made no such findings, and indeed did not conduct the sort of trial that would allow such findings to be made; instead, it issued an injunction without determining that "the subject statements were in fact defamatory," *id.* at 92 (citing *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 246, 327 N.E.2d 753 (1975)). Nor did the court limit its injunction to only defamatory speech.

III. Niesen and White Are Entitled to Immediate Appellate Review of Any Injunction Limiting Her Speech

Injunctions against speech are prior restraints. "Temporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Bey*, 161 Ohio St.3d at 85 (quotation marks omitted). The U.S. Constitution requires "immediate appellate review" of prior restraints.

National Socialist Party of America v. Skokie, 432 U.S. 43, 44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977); *see also* Amici Opening Br. at 16-17.

This is a First Amendment mandate, which applies regardless of whether state law treats particular injunctions as appealable; indeed, the point of the *National Socialist Party* decision was to specify, as a federal constitutional matter, which "strict procedural safeguards" "a State" "must provide." 432 U.S. at 44. And this makes sense because "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

"'Where . . . a direct prior restraint is imposed upon the reporting of news by the media, each passing day may constitute a separate and cognizable infringement of the First Amendment.'" *CBS, Inc. v. Davis*, 510 U.S. 1315, 1317, 114 S.Ct. 912, 127 L.Ed.2d 358 (1994) (Blackmun, J., in chambers) (citation omitted). The same is true for reporting of news and opinion by ordinary members of the public. *Wampler v. Higgins*, 93 Ohio St.3d 111, 121, 752 N.E.2d 962, 2001-Ohio-1293 (holding that the Ohio Constitution's free speech provision equally protects "media and nonmedia defendants"); *Citizens United v. United States*, 558 U.S. 310, 352, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (same as to the First Amendment). Niesen and White thus had every right to ask for such immediate appellate review, rather than accepting an unconstitutional prior restraint.

CONCLUSION

Niesen and White have a First Amendment right to criticize M.R. by name. If their allegations are found to be defamatory at a later trial, M.R. may be entitled to a damages award—but he is not entitled to a pretrial prior restraint, such as the one the trial court entered. And the First Amendment secures Niesen's and White's right to appellate review of this prior restraint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under that a copy of the foregoing was served on counsel for all parties by email on the date of filing.

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