No. 21-3290

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ANTHONY NOVAK,

PLAINTIFF-APPELLANT,

v.

CITY OF PARMA, et al.,

DEFENDANTS–APPELLEES.

On Appeal from the United States District Court for the Northern District of Ohio
Honorable Judge Dan Aaron Polster, District Judge

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF OHIO, AND CATO INSTITUTE IN SUPPORT OF PLAINTIFF–APPELLANT ANTHONY NOVAK AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae American Civil Liberties Union, American Civil Liberties Union of Ohio, and Cato Institute state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: August 5, 2021

By: /s/ David J. Carey
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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization dedicated to defending the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Ohio is an affiliate of the ACLU. Both organizations have been at the forefront of efforts nationwide to protect the full array of civil rights and liberties, including the right to free speech. The ACLU and ACLU of Ohio have appeared in numerous cases to defend the First Amendment right of people to criticize government actors, including police officers, and to be free from retaliatory arrest. This includes appearing as *amici* in *Wood v. Eubanks*, No. 20-3599 (6th Cir) and *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019).

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Cato has participated as *amicus curiae* in numerous cases before federal courts, including with briefs that make light of

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici* certify that no person or entity, other than *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part.

humorless speech restrictions. *See*, *e.g.*, *Iancu v. Brunetti*, 139 S. Ct. 2294 (2019); *Matal v. Tam*, 137 S. Ct. 1744 (2017); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); and *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014).

As organizations committed to protecting the freedom of speech, including the right to parody government without fear of retaliation, *amici* have a strong interest in the proper resolution of this case.

INTRODUCTION

This case centers on two forms of speech that lie at the core of First Amendment protection: parody and criticism of government actors, specifically police officers. "[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Leonard v. Robinson*, 477 F.3d 347, 357 (6th Cir. 2007) (quoting *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966)). And this protection extends to speech that is "not . . . reasoned or moderate," but rather "vehement, caustic, and sometimes unpleasantly sharp." *Hustler Magazine, Inc. v. Falwell*, 485 US. 46, 51 (1988) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). Protection for such speech reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times*, 376 U.S. at 270.

Yet when critical speech takes aim at those with the power to arrest, speakers face the "risk that some police officers may exploit the arrest power as a means of suppressing speech." *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1953 (2018). Anthony Novak's arrest demonstrates that risk. Novak did nothing more than create a Facebook page to parody and mock the local police force; for that, he was arrested and charged with impairing police operations. As this Court found when last

considering this case, "the sole basis for probable cause [here] was speech. Besides posting to his Facebook page, Novak committed no other act that could have created probable cause." *Novak v. City of Parma*, 932 F.3d 421, 431 (6th Cir. 2019). That distinguishes Novak's arrest from the "other First Amendment retaliation cases" cited by Defendants, in which probable cause was based on "a mix of protected speech and unprotected conduct." *Id.* The Court was correct to note that "there is good reason to believe that . . . this is an important difference." *Id.* Indeed, it is a difference of constitutional magnitude.

"An officer may not base his probable-cause determination on speech protected by the First Amendment." *Swiecicki v. Delgado*, 463 F.3d 489, 498 (6th Cir. 2006). Here, Novak's purported crime consisted entirely of protected speech, namely a parody of the local police force. For that reason, there could not have been probable cause to arrest him. Holding otherwise would enable the probable cause exception to swallow the no-retaliatory-arrests rule, especially when it comes to speech criticizing the government.

For these reasons, and as set out more fully below, this Court should reverse the district court and hold that Novak's arrest violated his First Amendment rights.

I. The First Amendment protects parody.

Parody has long served as a powerful instrument of social criticism, both for highlighting human folly and for advocating change. The use of parody to mock

public figures can be traced as far back as Greek antiquity, and parody has played a prominent role in public debate throughout American history. *See Hustler Magazine*, 485 U.S. at 54; *L.L. Bean Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 28 (1st Cir. 1987). As the Supreme Court has held and as this Court has recognized, parody "is protected speech" under the First Amendment. *Novak*, 932 F.3d at 427 (citing *Hustler Magazine*, 485 U.S. at 56–57).

The exercise of First Amendment freedoms "will not always be reasoned or moderate." *Hustler Magazine*, 485 U.S. at 51. Parody, in particular, often entails harsh ridicule and carries a strong potential to give offense. But these characteristics are features, not bugs, of parody and are no justification to afford it diminished protection. As the Supreme Court has noted, a caricature is "a weapon of attack, of scorn and ridicule and satire" that is often "slashing and one-sided." *Id.* at 54. If a speaker's opinion gives offense, that is "not a sufficient reason for suppressing it," but rather "a reason for affording it constitutional protection." *Id.* at 55 (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)). Offensive and critical speech expresses a distinct viewpoint just as much as friendly and supportive speech does, and that viewpoint is entitled to full First Amendment protection. *See id.* at 56 ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."); *see also Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017)

("[A government] interest in preventing speech expressing ideas that offend . . . . strikes at the heart of the First Amendment.") (plurality op.).

Courts have recognized that parody comes in many forms. As the D.C. Circuit acknowledged, "[s]ometimes satire is funny . . . Othertimes it may seem cruel and mocking . . . And sometimes it is absurd." *Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013). Taste and opinions will naturally vary as to whether a given parody is brilliant or crass. That is all the more reason why neither judges nor juries may permissibly draw subjective lines as to which parodies are valuable and worthy of First Amendment protection. As the Supreme Court explained, doing so could "allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine*, 485 U.S. at 55. Instead, to "assur[e] that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation," the Supreme Court has held that *any* satirical statement is protected so long as it "cannot reasonably be interpreted as stating actual facts" about its subject. *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990) (cleaned up).

When applying this standard, courts properly take into account the mimicry that is inherent to parody. Parody "is effective as social commentary precisely because it is often grounded in truth." *Farah*, 736 F.3d at 537. Parody relies on the

audience's recognition of the original subject being mocked. *See, e.g.,* Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas,* 17 Cardozo Arts & Ent. L.J. 491, 557 (1999) ("Satire works precisely because it evokes other materials."). A moment of confusion in which the audience questions whether something so outrageous could be true can place them in a frame of mind to consider whether the reality is more absurd than they previously thought. *See San Francisco Bay Guardian v. Superior Court*, 21 Cal. Rptr. 2d 464, 466 (Cal. Ct. App. 1993) ("[T]he very nature of parody . . . is to catch the reader off guard at first glance, after which the 'victim' recognizes that the joke is on him to the extent that it caught him unaware.").

Accordingly, the mere fact that some members of a parody's audience may be fooled into believing it is true does not deprive it of First Amendment protection. *See Novak*, 932 F.3d at 427 ("The test is not whether one person, or even ten people, or even one hundred people were confused by Novak's page."); *see also Farah*, 736 F.3d at 536 ("[I]t is the nature of satire that not everyone 'gets it' immediately."); *Golb v. AG of N.Y.*, 870 F.3d 89, 102 (2d Cir. 2017) ("[A] parody enjoys First Amendment protection notwithstanding that not everybody will get the joke."). Examples abound of satirical publications that were initially regarded as true. Greek playwright Aristophanes' *The Clouds* "was so misunderstood as praising immorality that he had to insert a deadly serious scene directly criticizing an earlier audience for

not catching the satire." Phillip Deen, *What Moral Virtues Are Required to Recognize Irony?*, 50 J. Value Inquiry 51, 52 (2016). Numerous people, including a member of Congress, have mistaken stories from *The Onion*, a popular satirical "news source," as real news. *See id.* at 51. Many readers of Benjamin Franklin's "The Speech of Polly Baker," which protested society's double standards for men and women, believed it to be a genuine account of court proceedings. Max Hall, *Benjamin Franklin & Polly Baker: The History of a Literary Deception* 16–24, 33, 61 (1960). And even when some audience members are confused, "a parody need not spoil its own punchline by declaring itself a parody" in order to be protected speech. *Novak*, 932 F.3d at 428.

The touchstone instead is the understanding of the *reasonable* reader, given the full context of the expression. And given the "special characteristics" of parody and satire, "'what a reasonable reader would have understood' is more informed by an assessment of her well-considered view than by her immediate yet transitory reaction." *Farah*, 736 F.3d at 536.

The internet and social media have engendered new forms and genres of parody, but these First Amendment principles remain the same regardless of the form a parody may take. For example, the Tenth Circuit dealt with the case of a college student who "created a fictional character, 'Junius Puke,' for the editorial column of his internet-based journal, *The Howling Pig*." *Mink v. Knox*, 613 F.3d

995, 998 (10th Cir. 2010). The column featured altered photographs of a real professor, Junius Peake, "wearing dark sunglasses and a Hitler-like mustache." *Id.* The column "addressed subjects on which Mr. Peake would be unlikely to write, in language he would be unlikely to use, asserting views that were diametrically opposed to Mr. Peake's." *Id.*

Even though this parody appeared in an online self-published journal rather than an established media outlet, the First Amendment inquiry was the same: whether the column "could be reasonably understood as describing actual facts about the [professor] or actual events in which he participated." *Id.* at 1006. And that inquiry is based on "what a *reasonable reader* would understand the author to be saying, considering the kind of language used and the context in which it is used." *Id.* at 1007 (emphasis in original). Because "no reasonable reader would believe that the statements in that context were said by Professor Peake in the guise of Junius Puke," the Tenth Circuit found the column to be protected parody.

And the same approach applies for the particular genre that Novak chose for his parody: social media. Parody social media accounts allow satirists to mimic their targets in a forum that has become, in the Supreme Court's words, "the modern public square." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017). In one case, a woman created a parody social media account on Disqus (a social media site similar in functionality to Twitter) mocking Kathryn Knott, who had been charged

in a high-profile assault case and who was the daughter of a local chief of police. *O'Donnell v. Knott*, 283 F. Supp. 3d 286, 291–92 (E.D. Pa. 2017). Using the profile name "Knotty is a Tramp" and an unflattering picture of Kathryn Knott as a profile picture, the account posted comments under stories of the assault case such as "That's why I should get off because daddy is a chief of police." *Id.* at 292, 297.

Social media may be a novel format and a new vehicle for parody, but the First Amendment principle remains the same: "speech is protected when, viewed in the appropriate context, it does not reasonably purport to state an actual fact about" the subject of the parody. *Id.* at 299. Because it was "entirely plausible that a reasonable reader would *not* believe that Kathryn Knott would publicly" write the comments at issue, the court found that the comments were plausibly protected speech. *Id.* at 301–02 (emphasis in original).

In sum, First Amendment protection for a parody is not diminished because some may be offended, because some may be fooled, or because the format is a novel one like social media. So long as the *reasonable* reader upon full reflection understands the speech to be a parody rather than a claim of fact, that speech is protected by the First Amendment.

II. The First Amendment protects the right to criticize the government, including law enforcement officers, even if the speech interrupts officers.

In addition, criticism of police officers is speech protected by the First Amendment. "Since the day the ink dried on the Bill of Rights, 'the right of an American citizen to criticize public officials and policies" has been "central" to the First Amendment. *McCurdy v. Montgomery Cnty.*, 240 F.3d 512, 520 (6th Cir. 2001) (quoting *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975)). Indeed, this Court "'clearly stated that private citizens have a First Amendment right to criticize public officials and to be free from retaliation for doing so' almost three decades ago." *Fakhoury v. O'Reilly*, 837 F. App'x 333, 340 (6th Cir. 2020) (quoting *Holzemer v. City of Memphis,* 621 F.3d 512, 520 (6th Cir. 2010)).

This is because the First Amendment was designed "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). Freedom of speech preserves "the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means." *Leonard*, 477 F.3d at 357 (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)). Therefore, "[i]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." *N.Y. Times*,

376 U.S. at 269 (quoting *Bridges v. California*, 314 U.S. 252, 270 (1941)). As the Supreme Court has recognized, "the right to criticize public men and measures" is "[o]ne of the prerogatives of American citizenship." *Baumgartner v. United States*, 322 U.S. 665, 673–74 (1944). Indeed, "[i]t is as much [the individual's] duty to criticize [government] as it is the official's duty to administer" government. *N.Y. Times*, 376 U.S. at 282.

"The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are intimately involved in the resolution of important public questions." *Hustler Magazine*, 485 U.S. at 51 (cleaned up). That category of people includes police officers. And so the First Amendment's protection extends to "verbal criticism and challenge directed at police officers." *City of Houston v. Hill*, 482 U.S. 451, 461 (1987); *see also N.Y. Times*, 376 U.S. at 270. It also extends to speech that is "provocative and challenging." *Hill*, 482 U.S. at 461 (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)). "[I]nsulting, and even outrageous, speech" must be protected for "the freedoms protected by the First Amendment" to have the "breathing space" they need to survive. *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted) (quoting *Hustler Magazine*, 485 U.S. at 56).

Applying these principles, courts have repeatedly held that the First Amendment protects speech criticizing police officers—including insults, profanity, and complaints of incompetence or ill will. Indeed, the Supreme Court has held that laws prohibiting speech that "curse[s] or revile[s] or . . . use[s] obscene or opprobrious language toward or with reference to any member of the city police" are unconstitutional. *Lewis v. City of New Orleans*, 415 U.S. 130, 132 (1974). And the Sixth Circuit has held that the First Amendment protects everything from directing "[foul] language, cussin', ranting and raving" at a police officer, *Barnes v. Wright*, 449 F.3d 709, 718 (6th Cir. 2006) (alteration in original); to characterizing a police officer as an "asshole" and "stupid," *Greene v. Barber*, 310 F.3d 889, 895–96 (6th Cir. 2002); to telling an officer that one doesn't have to do the "sh*t" the officer orders one to do, *McCurdy*, 240 F.3d at 520; to directing the "words and gesture 'f—k you'" at officers, *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997); *Cruise-Gulyas v. Minard*, 918 F.3d 494, 497 (6th Cir. 2019).

This principle holds true even where the speech interrupts police work. *City of Houston v. Hill* is instructive on this point. In that case, a man began shouting at two officers to "pick on somebody [their] own size" in "an admitted attempt to divert [their] attention from [his friend]." 482 U.S. at 453–54. After an officer expressly asked the man whether he was "interrupting me in my official capacity" and the man responded in the affirmative, the officers arrested him. *Id.* at 455. In reviewing the

ordinance on which the officers based their arrest—which "prohibit[ed] speech that 'in any manner interrupts' an officer"—the Supreme Court held that "[t]he Constitution does not allow such speech to be made a crime." *Id.* at 462 (cleaned up). Rather, "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462–63.

The Supreme Court recognized that "verbal . . . criticism of [an officer's] actions operates, of course, to impair the working efficiency of government agents." *Id.* at 463, n.12 (quoting Note, *Obstructing A Public Officer*, 108 U. Pa. L. Rev. 388, 390–92, 406–07 (1960)). But the Court was not persuaded that this reality justified a law prohibiting interruption of an officer. Instead, it concluded that "the First Amendment recognizes, wisely we think, that a certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive." *Id.* at 472.

III. Where the purported crime consists entirely of protected speech, that speech cannot furnish probable cause for arrest.

Probable cause requires an officer to have knowledge "sufficient to warrant a prudent man in believing that the arrestee had committed or was committing an offense.'" *Swiecicki*, 463 F.3d at 498 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) (brackets omitted). But no such belief can arise where the theory of the offense is

that speech protected by the First Amendment—including parody and political criticism of police officers—constituted the criminal act.

Such speech "cannot support a conviction and it cannot create probable cause." *Leonard*, 477 F.3d at 360 (citing *Bachellar v. Maryland*, 397 U.S. 564, 570 (1970)). *See also Sandul*, 119 F.3d at 1256 (Protected speech "cannot serve as the basis for a violation of any [municipal ordinance]."); *Swiecicki*, 463 F.3d at 499 (If an officer "based his decision on protected speech," he "lacked probable cause to arrest."). Because applying a criminal law to protected speech would be unconstitutional, protected speech cannot justify a belief that a crime has been or is being committed. "First Amendment freedoms, clearly established for a generation, preclude a finding of probable cause" if the law at issue would be "either facially invalid, vague, or overbroad when applied to speech (as opposed to conduct)." *Leonard*, 477 F.3d at 356. The constitutional question thus becomes whether a "reasonable police officer would believe that" the law at issue is "constitutional as applied" to the speech at issue. *Id*. at 359.

Further, a court need not have already invalidated the law for this rule to apply. Even where no court has ruled on the particular law at issue, an officer cannot rely on that law for probable cause if a "person of reasonable prudence would be bound to see [the law's] flaws." *Leonard*, 477 F.3d at 359 (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979)). Although no court had ruled on the constitutionality of three

of the statutes at issue in *Leonard*, the Court held that "no reasonable police officer would believe that any of the three" statutes was "constitutional as applied to [the arrestee's] political speech during a democratic assembly." *Id.* For that reason, *Leonard* held that the "arrest was not supported by probable cause." *Id.* at 361. *See also Sandul*, 119 F.3d at 1254, 1256 ("[The arrestee's] failure to challenge the . . . ordinances does not obliterate his inalienable First Amendment rights . . . While the . . . ordinances are presumptively valid . . . [the arrestee's] § 1983 claims are unaffected by his failure to challenge the constitutionality of the ordinances.").[2]

Indeed, this Court has consistently held that officers lack probable cause to arrest people solely on the basis of protected speech where that speech also constituted the purported crime. For example, it has held that police lacked probable cause to arrest based on an individual calling a police officer a "son of a bitch [who] broke all of the zoning laws" and a "fat slob," *Kennedy v. City of Villa Hills*, 635 F.3d 210, 215 (6th Cir. 2011); saying "God damn" to a township board, *Leonard*, 477 F.3d at 351; shouting "f—k you" and extending a middle finger to a group of

[2] The district court below suggested that "in the absence of any clear legal precedent" a police officer need not "question whether a statute is constitutional." *Novak v. City of Parma*, No. 1:17-cv-2148, 2021 WL 720458 at *11 (N.D. Ohio Feb 24, 2021). If by "clear legal precedent" the district court meant precedent specifically invalidating Ohio Rev. Code § 2909.04 as applied to parody, then this suggestion was inconsistent with *Leonard* and legal error. If instead by "clear legal precedent" the district court meant precedent establishing that Novak's Facebook page was constitutionally protected speech, then *Hustler Magazine* is that clear legal precedent.

abortion protesters, *Sandul*, 119 F.3d at 1252, 1256; and telling a baseball player he "suck[s]" and "ha[s] a fat ass" and then "verbally protesting his [own] arrest," *Swiecicki*, 463 F.3d at 500.

Below, the district court held that "even if Novak could show, as a matter of law, that he had a First Amendment right to post a parody on Facebook about the Parma police, if the defendants had probable cause to investigate and arrest him under Ohio Rev. Code § 2909.04, Novak cannot show any constitutional violation." *Novak v. City of Parma*, No. 1:17-cv-2148, 2021 WL 720458 at *7 (N.D. Ohio Feb. 24, 2021). This is backwards: if the First Amendment protects Mr. Novak's parody Facebook page—and therefore prohibits Parma from criminalizing that speech, including under Ohio Rev. Code § 2909.04—it equally prohibits the page from providing probable cause for arrest under that statute.

"[B]oth [an arrestee's] claims and [an officer's] defenses turn on the laws that [the arrestee] allegedly violated and their validity as applied." *Leonard*, 477 F.3d at 356. For this reason, "[a]s a preliminary matter, it is necessary to determine whether [the arrestee's] actions were protected speech." *Sandul*, 119 F.3d at 1254. If yes, the actions cannot be criminal—nor can they serve as probable cause for an arrest.

Reichle v. Howards does not change this analysis. In *Reichle*, the Supreme Court held that probable cause can be based on otherwise protected speech where that speech "provides evidence of a crime." *Reichle v. Howards*, 566 U.S. 658, 668

(2012). On that basis, the Supreme Court held that officers who arrested a man after he spoke critically about the Vice President *and* touched him without consent were entitled to qualified immunity. *Id.* Critically, the Court did *not* hold that the officers could have arrested him merely on the basis of his political speech. The same holds true for *Wayte v. United States*, the one case on which the *Reichle* Court relied for this proposition. In *Wayte*, the otherwise protected speech was a letter opposing the draft. But that letter offered evidence of separate illegal conduct, namely the willful failure to register for the draft. 470 U.S. 598, 612–13 (1985)).

Here, there was no separate conduct for which Mr. Novak's speech served as evidence. The officers' arrest of Mr. Novak was the equivalent of arrest merely *for* writing the letter or criticizing the Vice President—not based on evidence of *additionally* failing to register for the draft or touching the Vice President without consent. Thus, while otherwise protected speech may, in certain contexts, offer evidence of a crime, it cannot justify a belief that a crime consisting *only of that speech* has been committed.

Indeed, this Court has previously recognized this difference in a case involving arrest under another ordinance in Ohio prohibiting obstruction or delay of public officials performing their duties. *See Patrizi v. Huff*, 690 F.3d 459, 464 (6th Cir. 2012). There, the Court noted that "[t]he Supreme Court has recognized First Amendment limitations on the conduct that state municipalities may outlaw with

respect to interruption of police activity," *id.* at 467 (citing *Hill*, 482 U.S. at 455), and stated that *Hill*'s "explanation of what conduct may and may not be criminalized must . . . inform this court's analysis" of probable cause. *Id.* The Court then specifically held that *Reichle* "does not affect our present analysis" because "the case considered not the criminalization of otherwise protected speech, but the scope of the First Amendment right when retaliatory motivations may lead to an arrest that is *independently justified* in light of probable cause for an unchallenged offense." *Id.* at 467, n.7 (emphasis added).

If this Court were to hold otherwise, police officers could rely on any law—whether ultimately invalid on its face or only unconstitutional as applied to protected speech—to silence speech via arrest, even where they knew that any conviction ultimately would not stand up under First Amendment scrutiny.

This risk is not hypothetical. Officers often choose to arrest individuals for speech that is critical of the police and other government actors, even when this Court ultimately holds that they did so without probable cause. *See, e.g., Kennedy,* 635 F.3d at 215–16 (holding that police lacked probable cause to arrest based on calling a police officer a "son of a bitch" and a "fat slob," and recognizing that "because the First Amendment requires that police officers tolerate coarse criticism, the Constitution prohibits states from criminalizing conduct that disturbs solely police officers"); *Leonard*, 477 F.3d at 351 ("hold[ing] that . . . no reasonable officer

would have found probable cause to arrest Leonard solely for uttering 'God damn' while addressing the township board because the First Amendment protects this sort of uninhibited debate"). *See also Cruise-Gulyas*, 918 F.3d at 496 (6th Cir. 2019) (holding that an officer lacked probable cause for a traffic stop based solely on the driver flipping off an officer because "her gesture on its own [does not] create probable cause . . . that she violated any law"). Holding that speech critical of and parodying police officers cannot furnish probable cause for arrest for disrupting public services is necessary to curb such abuses.

Further, Novak's arrest cannot be justified by drawing a distinction between Novak's speech and the *effects* of Novak's speech. Below, the district court suggested that such a distinction exists, and that the *effects* of Novak's parody may be treated as separate conduct rather than speech. *See Novak*, 2021 WL 720458, at *1 ("[E]ven if the content of Novak's Facebook page *was* protected, Novak's conduct in confusing the public and disrupting police operations was not.") (emphasis in original). This too was error.

The Supreme Court has consistently held that the government may not infringe First Amendment liberties merely by applying generally applicable laws to the effects of protected speech. As the Court has explained, the argument that a statute can criminalize protected speech if the statute "*generally* functions as a regulation of conduct . . . . runs headlong into a number of [Supreme Court]

precedents, most prominently *Cohen v. California*, [403 U.S. 15 (1971)]." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) (emphasis in original). "*Cohen* also involved a generally applicable regulation of conduct, barring breaches of the peace. . . . But when Cohen was convicted for wearing a jacket bearing an epithet," the Supreme Court "recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message." *Id.* at 28. The Court "accordingly applied more rigorous scrutiny and reversed his conviction." *Id.* (citing *Cohen*, 403 U.S. at 16, 18–19, 26). *See also Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940) (setting aside a breach of the peace conviction because the sole basis of the conviction was protected speech, notwithstanding the fact that "the effect of [the defendant's] communication upon his hearers" did in fact cause a disturbance); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134–35 (1991) ("Listeners' reaction to speech is not a content-neutral basis for regulation. . . . Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.").

Just as any offense or disturbance caused by Cohen's epithet did not permit the government to criminalize the epithet, so here any confusion caused by Novak's parody did not permit the government to criminalize Novak's parody. If it were otherwise, then any protected speech could be criminalized—the police could arrest

someone for burning an American flag or yelling an epithet so long as they could show that such speech caused reactions that somehow "impaired police operations." *See* Eugene Volokh, *Speech as Conduct*, 90 Cornell L. Rev. 1277, 1288 (2005) ("[I]f generally applicable laws were immune from First Amendment scrutiny, the government could suppress a great deal of speech that is currently constitutionally protected, including advocacy of illegal conduct, praise of illegal conduct, and even advocacy of legal conduct."). That cannot be right, and it is not right under the Supreme Court's consistent approach.

The only alleged justification for Novak's arrest was his parody Facebook page. But parody and criticism of police officers had already been held to be protected speech well before Novak's arrest. It should have been clear at the time to any reasonable officer that Ohio Rev. Code § 2909.04 could not constitutionally be applied to a pure exercise of First Amendment protected speech like Novak's parody. For that reason, there was no probable cause for Novak's arrest.

CONCLUSION

For these reasons, this Court should reverse the court below and hold that Defendants violated Plaintiff's First Amendment rights.

Respectfully submitted,

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Dated: August 5, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this Brief of Amici Curiae in Support of Plaintiff–Appellant and Reversal complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) because, excluding parts of the document exempted by Fed. R. App. P. 32(f) and 6th Cir. R. 32(b)(1) it contains 5,040 words.

I further certify this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface with 14-point Times New Roman font.

Dated: August 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2021, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which will send notification of such filing to all counsel of record.

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