No. ___-_____

In the Supreme Court of the United States

DAVID G. LIEGENBUTH,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

On Petition For Writ of Certiorari to the Connecticut Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

It is unsurprising that, during the uneasiness spawned by a summer of unrest in several of the nation's urban areas following police shootings of men of color – a series of events giving rise to a loose association of protestors under the banner "Black Lives Matter," – a state's highest court could conclude that racial epithets directed at an on-duty law enforcement officer constitute "fighting words" and support a criminal prosecution for breach of the peace. The First Amendment, however, offers broader and deeper protection of offensive speech than a passing wave of political sensitivity affords. By concluding that "vulgar" and "racially charged" remarks directed at a parking enforcement officer are "fighting words," Connecticut's Supreme Court retreated from this Court's "fighting words" precedents and charted a course toward a broad First Amendment exception that prohibits speech merely because it is hateful.

The question presented is:

Whether Referring To A Law Enforcement Officer By A Racial Epithet While Protesting An Enforcement Action Constitutes Fighting Words Unprotected By The First Amendment.

PARTIES TO THE PROCEEDING

Petitioner is David G. Liebenguth. He was the defendant in the Connecticut Superior Court, the defendant-appellant before the Connecticut Appellate Court, and the respondent-appellee before the Connecticut Supreme Court.

Respondent is the State of Connecticut. The State of Connecticut was the prosecuting authority in the Superior Court, the appellee before the Connecticut Appellate Court, and the petitioner before the Connecticut Supreme Court.

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Can an individual lawfully direct patently offensive speech at a law enforcement officer while the officer is performing his duties? Surprisingly, the answer is unsettled as a matter of law. The result is a diminished and inconsistently applied First Amendment, with some jurisdictions holding that the fighting words doctrine of *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), categorically bars a police officer from claiming that his peace has been breached, or disturbed, while other jurisdictions take a more relaxed view of the fighting words doctrine. Connecticut has joined the chorus of those expressing dissatisfaction with the fighting words doctrine, calling, in effect, for a new exception to the First Amendment's guarantee of freedom of speech – if one's speech is offensive, or "hateful," – enough, it may result in criminal prosecution, even if directed at a law enforcement officer performing his duties. Given the politically and racially charged character of current public debate, there is a real and substantial danger that others will follow Connecticut to the detriment of free expression and in derogation of individual liberty.

The Court has recognized that "[s]treet encounters between citizens and police officers… range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations [between] armed men…." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). However, "one of the principal characteristics by which we distinguish a free nation from a police state" is a person's ability to "oppose or challenge police action without… risking arrest." *City of Houston v. Hill*, 482 U.S.

451, 462-463 (1987). This Court historically has expected police officers to have thick enough skins to withstand offensive speech. To expect otherwise carries a risk of overbroad applications of the law with some epithets counting more than others in the discretionary calculus of when and whether to charge someone with a crime.

As Justice Alito recently wrote for the Court, "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate." *Matal v. Tam*, 137 S.Ct. 1744, 1764 (2017) (internal quotation marks and citation omitted); *see also* Ira Robbins, *Digitus Impudicus: The Middle Finger and the Law*, 41 U.C. Davis L. Rev. 1403, 1451-1460 (2008).

This Court has yet to conclude that a categorical rule is necessary to lend uniformity to application of the fighting words doctrine as applied to on-duty law enforcement officers. Put another way, the utterance of the same words may lead to criminal prosecution in some states, but not in others. A federal circuit may recognize the speech as protected, but states within that circuit's jurisdiction will still prosecute for the very same speech. Parochial application of First Amendment standards may have been relatively harmless when communications were local. However, the Internet and instantaneous global communication fosters confusion and disrespect for the law when the same speech is criminalized in some jurisdictions but protected in others. Such a scattershot approach gives lower courts and law enforcement

officers the ability to selectively enforce First Amendment principles according to their sensibilities when confronting volatile speech.

The petitioner, David G. Liebenguth uttered hateful and disrespectful words to an African-American law-enforcement officer as he protested a parking ticket. Connecticut charged and convicted him of breaching the peace, but the Second Circuit has held that such speech is protected under the First Amendment. *Posr v. Court Officer Shield No. 207*, 180 F.3d 409 (2d Cir.1999). The Connecticut Supreme Court, however, concluded that the First Amendment does not protect Mr. Liebenguth's speech and adopted a rule that stands in stark variance to the Second Circuit's.

This cannot be talked up to mere vagaries of federalism. At issue is a core and fundamental right. This Court's intervention is absolutely necessary to establish a consistent First Amendment standard that clearly delineates the fundamental right of free speech.

OPINIONS BELOW

The decision of the Connecticut Supreme Court has not officially been reported yet, but it is reproduced at App.1-47. The underlying decision of the Connecticut Appellate Court is reported at 181 Conn.App. 37, and is reproduced at App.48-72. The Superior Court's judgment file contained its formal verdict is reproduced at App.73-75, and the oral explanation for its verdict is reproduced at App.76-81.

JURISDICTION

The Connecticut Supreme Court issued its decision on August 27, 2020. On March 19, 2020, this Court issued a general order extending the time for filing any

petitions for a writ of certiorari due on or after March 19, 2020 to one hundred and fifty (150) days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Conn. Gen. Stat. § 53a-181(a):

> (a) A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (2) assaults or strikes another; or (3) threatens to commit any crime against another person or such other person's property; or (4) publicly exhibits, distributes, posts up or advertises any offensive, indecent or abusive matter concerning any person; or (5) in a public place, uses abusive or obscene language or makes an obscene gesture; or (6) creates a public and hazardous or physically offensive condition by any act which such person is not licensed or privileged to do. For purposes of this section, "public place" means any area that is used or held out for use by the public whether owned or operated by public or private interests.

STATEMENT OF THE CASE

A. Factual Background

On the morning of August 28, 2014, Michael McCargo, an African-American parking enforcement officer for the town of New Canaan, Connecticut, issued a fifteen-dollar parking ticket to the petitioner, David Liegenbuth, for parking in a metered space without paying. App.5. In issuing the ticket, Officer McCargo parked behind Mr. Liegenbuth's car, thus blocking him from leaving. App.5. He went on to another vehicle to issue a similar ticket. App.5.

As Officer McCargo returned to his vehicle, Mr. Liegenbuth approached him and protested Officer McCargo's ticket and actions in blocking him from leaving in the parking lot. App.5. Officer McCargo testified that he believed that Mr. Liegenbuth was calm at that moment so he responded – in an attempt at humor – that he did not want Mr. Liegenbuth to get away. App.5. Mr. Liegenbuth proceeded to vigorously protest the ticket and to explain why he parked where he did. App.5. In response, Officer McCargo explained to him that he had parked in a metered spot instead of one of the parking lot's free spaces. App.5.

Mr. Liegenbuth took offense to the explanation and uttered various profanities directed at the parking authority. App.5. He then accused Officer McCargo of giving him a ticket because he was white and his car was white. App.5. Throughout his protests, Mr. Liegenbuth employed a plentiful sprinkling of profanity and various gesticulations with his hands, but he remained a respectable distance from Officer McCargo. App.5.

He exhausted his protests, and both men returned to their vehicles. App.5. As Mr. Liegenbuth returned to his vehicle, he told Officer McCargo "Remember Ferguson." App.5. As they both entered their vehicles, Officer McCargo testified that he thought he heard Mr. Liegenbuth utter the words "fucking niggers." App.5. Officer McCargo testified that he was offended by the remark, but that he remained calm and drove away to resume his parking patrol. App.5-6.

Mr. Liegenbuth, however, had not finished expressing his displeasure. He cut through the parking lot in his vehicle and, as he passed Officer McCargo, he said

"fucking nigger" at him as he passed. App.6. While an eyewitness testified that Mr. Liegenbuth's behavior was aggressive and that he stepped toward Officer McCargo in an aggressive manner, Officer McCargo testified that he never felt threatened until he fathomed what Mr. Liegenbuth meant by "Remember Ferguson" after the incident. App.6.

After Officer McCargo thought about the matter, he called his supervisor who told him to report the incident to New Canaan police. App.6. New Canaan subsequently arrested him and charged him with breach of peace in the second degree in violation of Conn. Gen. Stat. § 53a-181(5).[1]

B. Procedural History

Mr. Liegenbuth elected a bench trial. App.4. After the State rested its case, he moved for a judgment of acquittal, which the trial court denied. App.6-7. At the end of the trial and after his counsel raised a First Amendment defense, the trial court found him guilty and rejected the First Amendment defense because no word in English language was more likely to provoke an African-American man than the epithet that Mr. Liegenbuth used and that he had displayed sufficient aggression to render it a fighting word. App.7.

Mr. Liegenbuth took a direct appeal to the Connecticut Appellate Court, which overturned his conviction. App.7-8. The State of Connecticut then petitioned the

[1] Mr. Liebenguth was also charged and convicted of one count of tampering with a witness in violation of Conn. Gen. Stat. § 53a-151. He did not challenge that conviction on appeal to the Supreme Court although he did appeal it to the Connecticut Appellate Court. App.4, n.3 (footnote is printed on App.23).

Connecticut Supreme Court for review, and the Connecticut Supreme Court granted review on the question of whether the First Amendment protected Mr. Liegenbuth's speech. App.9. A unanimous Connecticut Supreme Court reinstated Mr. Liegenbuth's conviction with two justices openly questioning whether the "fighting words" doctrine is viable as a constitutional doctrine. App.23.

REASONS FOR GRANTING THE PETITION

In 1942, the Court first defined "fighting words" as declarations "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). The Court then narrowed this definition to only encompass "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). Multiple subsequent decisions of this Court in 1972 and 1981 then implicitly raised the bar for speech directed at law enforcement officers without altering the basic form or language of the test that should apply. *See, e.g.*, *City of Houston v. Hill*, 482 U.S. 451 (1987); *Gooding v. Wilson*, 405 U.S. 518 (1972).

Thus, some lower courts have concluded that the Court, however, has significantly altered the fighting words test by implicitly replacing the word "citizen" with the terms "police office" or "law enforcement officer." Other courts including the Connecticut Supreme Court have chosen a far more constricted approach by continuing to apply an "ordinary citizen" standard despite this Court's post-*Chaplinsky* jurisprudence.

The split of authority also transcends regional boundaries and creates a divide between federal and state courts in the same federal circuit. Thus, Second Circuit precedent would require the U.S. District Court for Connecticut to hold that the First Amendment protects Mr. Liegenbuth's speech while the Connecticut Supreme Court's precedent in this case would require a lower court to allow the state to proceed with prosecuting him. *Compare Posr v. Court Officer Shield No. 207*, 180 F.3d 409 (2d Cir.1999) *with* App.1-23 *and State v. Read*, 165 Vt. 141 (1996). The split's very nature currently denies Mr. Liebenguth the right to pursue a malicious prosecution claim in the Second Circuit for First Amendment violations under 42 U.S.C. § 1983 where he would likely succeed.[2] The same type of split exists in the Eighth[3] and Ninth[4] Circuits.

Furthermore, the Connecticut Supreme Court's decision severely curtails the First Amendment's free speech protections in clear contravention of this Court's precedents and creates a content-based censorship of speech under the auspices of this Court's "fighting words" doctrine. The racial slur – "fucking nigger" – that Mr. Liebenguth directed at the law enforcement officer here is no less offensive than the

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[2] To state a § 1983 malicious prosecution claim, Liebenguth would have to show that his prosecution ended in a manner that affirmatively proves his innocence, which the Connecticut Supreme Court's decision constrains him from showing because it affirmed his conviction based on an erroneous interpretation of the First Amendment. *Lanning v. City of Glen Falls*, 908 F.3d 19, 25 (2d Cir. 2018).

[3] *Compare Buffkins v. City of Omaha, Douglas County, Neb.*, 922 F.2d 645 (8th Cir. 1990) *with Bailey v. State*, 334 Ark. 43 (1998) *and State v. Groves*, 219 Neb. 382 (1985).

[4] *Compare Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990) *with State v. Robinson*, 319 Mont. 82 (2003).

other highly personal and offensive insults that the Court has held that the First Amendment protects. *See, e.g.*, *Brown v. Oklahoma*, 408 U.S. 914 (1972) (summarily reversing a conviction for a man calling police officers "Mother-fucking fascist pig cops" in a church at the University of Tulsa) *facts in lower court opinion, Brown v. State*, 492 P.2d 1106, 1108 (1971). The Connecticut Supreme Court, however, ignored this Court's precedents and crafted a decision based on its distaste for the racial slur and its history in America.

A sensibility-based speech code is completely inconsistent with the First Amendment. The Court should not implicitly encourage the development of such codes across the United States by letting the Connecticut Supreme Court's manifest error stand uncorrected. Given the Court's past precedents, it need only summarily reverse Mr. Liebenguth's conviction. If a summary reversal is improvident, however, the Court's intervention is still necessary to emphatically reinforce the First Amendment's proscription against content-based speech regulation.

I. Federal Circuit Courts And State Supreme Courts Do Not Agree On Whether A Law-Enforcement Officer's Peace Can Be Breached By What Would Otherwise Be Regarded As "Fighting Words."

A. The Court's "fighting words" jurisprudence has not definitively resolved the question of whether law enforcement officers are expected to endure hateful speech.

"Fighting words" are declarations "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). While *Chaplinsky* both established the "fighting words" doctrine and applied it to uphold a conviction for speech that labelled a law

enforcement officer a "God damned racketeer" and "a damned Fascist," *id.* at 569, it remains an outlier in the Court's fighting words jurisprudence, and the Court quickly narrowed the "fighting words" doctrine in *Chaplinsky*'s aftermath.

First, in 1969, the Court required more than the mere offensiveness of speech to sustain a speech-based conviction by holding that disrespecting or burning the United States flag did not fall with the "fighting words" exception. *Street v. New York*, 394 U.S. 576 (1969). Citing prior precedents, the Court stated that "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are offensive to some of their hearers." *Id.* at 592.

Second, in 1971, the Court significantly narrowed the "fighting words" exception by requiring "personally abusive epithets" to uphold a conviction under a "fighting words" theory. *Cohen v. California*, 403 U.S. 15, 20 (1971) (reversing the conviction of a man who wore a jacket bearing the words "Fuck the Draft" in the corridor of a courthouse). In its discussion of the man's speech, the *Cohen* Court specifically emphasized that "fighting words" must constitute a "direct personal insult." *Id.* at 20.

Third, in 1972, the Court held that a Georgia breach of peace statute, as construed by the Georgia Supreme Court, exceeded the limits of the "fighting words" exception because it imposed criminal liability on speakers even when circumstances or the obligations of the listener's office prohibit him from responding with violence. *Gooding v. Wilson*, 405 U.S. 518, 526-27 (1972). The *Gooding* Court described the

Georgia statute as making speech a breach of peace just because it is "offensive to some who hear [it]." *Id.* at 527.

While the *Gooding* majority did not mention the facts of the case, Justice Blackmun discussed them in his dissent. *Id.* at 534 (Blackmun, J., dissenting). The man convicted under Georgia's statute had protested police officers' attempts to restore access to a public building in this fashion: "White son of a bitch, I'll kill you"; "You son of a bitch, I'll choke you to death"; and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.* at 534 (Blackmun, J., dissenting).

Gooding's protection for this type of language directed at law enforcement officers begat similar progeny in this Court's subsequent jurisprudence. In its immediate aftermath, the Court summarily vacated two criminal convictions for vile personally insulting epithets and remanded the cases for consideration in light of *Gooding*. *See Brown v. Oklahoma*, 408 U.S. 914 (1972) (reversing the conviction of a man for saying the following "Mother-fucking fascist pig cops" and "that black mother-fucking pig McIntosh" in a church);[5] *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (reversing the conviction of a man for saying "if we Whites didn't do something about the problem 'then the Mother F…ing town, the M.F. country, the M.f. state, and the M.F. country would burn down'" at a town meeting on racial conflicts).[6]

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[5] The facts of the case are quoted from the Oklahoma Court of Criminal Appeals' decision, which can be found at *Brown v. State*, 492 P.2d 1106 (Okla. 1971).

[6] The facts of the case are quoted from the New Jersey Supreme Court's decision on remand, which can be found at *State v. Rosenfeld*, 62 N.J. 594 (1973).

In 1974, the Court then affirmed its *Gooding* holding in one of the cases that it had summarily remanded in its aftermath. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). Once again, Justice Blackmun supplied the facts of the case in his dissent, which he described as follows:

> The officer testified that while he was waiting for appellant's husband to produce his driver's license, appellant came out of their truck 'and started yelling and screaming that I had her son or did something to her son and she wanted to know where he was. I said 'lady I don't have your son and I am not talking to you. I am talking to this man and you can go sit in the truck.' She said 'you god damn m. f. police—I am going to Giarrusso (the police superintendent) to see about this.' I said 'lady you are going to jail—you are under arrest.' She said 'you're not taking me to jail' and she started to get back in the cab of the truck and I caught up to her while she was getting in the cab. I attempted to take her and she started fighting and swinging her arms.' App. 8. A fight ensued and appellant was subdued with the help of another officer. Appellant was charged with resisting arrest and with wantonly reviling the police.

Id. at 138 (Blackmun, J., dissenting). Despite her epithet that accused the officer of committing incest with his mother regularly, the *Lewis* majority vacated her conviction for wantonly reviling the police. *Id.* at 134.

In 1987, the Court subsequently expressed a principle that undoubtedly underlies its decisions in *Gooding*, *Brown*, and *Lewis*: "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *City of Houston v. Hill*, 483 U.S. 451, 461 (1987). In support of this broad statement, the *Hill* Court specifically cited *Lewis* and *Gooding* with approval and also approvingly noted that Justice Powell's concurrence in *Lewis* suggesting a much more constrained application of the "fighting words" doctrine to cases involving speech directed at law enforcement officers. *Id.* at 462. In other words, the *Hill* Court clearly stated that the

First Amendment expects law enforcement officers to have thick skins and to "exercise a higher degree of restraint" than the average person. *Id.* at 462.

These precedents, however, did not explicitly resolve whether law enforcement officers are expected to resist the urge to respond to hateful epithets with violence or to otherwise react with trained equanimity.

Thus, in the nearly eighty years since *Chaplinsky*, lower courts have fashioned their own responses to how to apply the fighting words doctrine to confrontations between individuals and law enforcement with little to no regard for the Court's decisions in *Chaplinsky*'s progeny. The law is now unclear on whether offensive speech directed at a law enforcement officer can be regarded as "fighting words," and thereby serve as the basis for criminal prosecution.

B. Lower court application of the "fighting words" doctrine to confrontations with law enforcement officers is discordant and inconsistent.

The Maryland Supreme Court describes the split of authority delicately: "[T]here is some question as to whether words addressed to the police can be classified as 'fighting words,' or whether a different and higher standard applies when the addressee is a police officer." *Diehl v. State*, 451 A.2d 115, 121 (Md. 1982). More bluntly put, the "fighting words" doctrine remains putty in the hands of anxious lower courts, which are free to sculpt it as they see fit in absence of guidance from this Court. Thus, what was once a danger of unlimited discretion on the part of street-level police officers on whether to arrest a person who spewed vitriol at the officer, is now also the danger of a lower court's embrace of political fashion to sculpt a First Amendment that suits individual courts' tastes. Such unbridled discretion has

created a veritable hodgepodge of standards based on subjective judgments about which epithets and insults are more hateful and offensive than others. In this case, Connecticut's Supreme Court added its two cents to this brew by adopting a politically correct First Amendment standard.

The hodgepodge requires this Court's intervention to establish a uniform First Amendment "fighting words" doctrine.

1. Most courts expect law enforcement officers to endure even the vilest of comments.

To the best of the undersigned's knowledge, every federal circuit court that has considered "fighting words" directed at a police officer in malicious prosecution claims under 42 U.S.C. § 1983 has held that this Court's precedents protect the vilest epithets that our society can hurl when they are directed toward law enforcement officers. Of the nineteen states that have addressed "fighting words" directed at police officers, fourteen have held that the vilest language enjoys First Amendment protection when speakers hurl it at law enforcement officers. The District of Columbia has joined those states.

The Second, Third, Sixth, Eighth, Ninth, and Tenth Circuits make clear that officers are expected to endure verbal criticism, even in its vilest forms, that an ordinary citizen is not expected to endure. *See Stearns v. Clarkson*, 615 F.3d 1278 (10th Cir. 2010) (holding that the epithet "mother f*****" does not constitute "fighting words" when it is directed at a police officer and declining to dismiss a § 1983 unreasonable seizure case when officers arrested a man for visiting a police officer's house and then saying "you're probably the mother f***** that shot my dad" when

the officer investigated the visit); *Johnson v. Campbell*, 332 F.3d 199 (3rd Cir. 2003) (granting judgment as a matter of law on a § 1983 claim to a basketball coach who called a police officer a "son of a bitch" because his speech did not constitute "fighting words"); *Greene v. Barber*, 310 F.3d 889 (6th Cir. 2002) (reversing a grant of summary judgment against a lawyer who called a police lieutenant an "asshole" and "really stupid" and holding that his speech did not constitute fighting words); *Posr v. Court Officer Shield No. 207*, 180 F.3d 409 (2d Cir.1999) (reversing the dismissal of a § 1983 malicious prosecution action brought by a man who was arrested for telling a court officer "One day, you're gonna get yours" because his speech did not constitute fighting words); *Duran v. City of Douglas*, 904 F.2d 1372 (9th Cir. 1990) (vacating summary judgment for a police officer in a § 1983 action where the plaintiff made unelaborated obscene gestures at him and yelled unspecified profanities at him in Spanish); *Buffkins v. City of Omaha, Douglas County, Neb.*, 922 F.2d 645 (8th Cir. 1990)[7] (reversing a directed verdict against a § 1983 plaintiff who called a police officer an "'asshole" because her speech did not constitute fighting words).

Fourteen state courts of last resort and the District of Columbia Court of Appeals have agreed with the federal circuits that vile epithets directed at law enforcement officers do not constitute fighting words.[8] *See State v. E.J.J.*, 183 Wash.

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[7] As a courtesy note to the Court and the Respondent, the undersigned is aware that, as of this date, a Westlaw search using the case reporter information will lead to an unrelated Eleventh Circuit decision. To the best of the undersigned's knowledge, however, the case citation is correct in both the printed reporter and Lexis-Nexis.

[8] Three of these state courts of last resort lack precedent dealing with personal epithets, but have upheld some relatively less offensive language directed at police on the same principles as the more offensive cases have. *See In re Jeremiah W.*, 361

2d 497 (2015) (vacating the conviction of a juvenile for calling police officers profane names without describing what those names were); *Martinez v. District of Columbia*, 987 A.2d 1199 (D.C. 2010) (vacating a disorderly conduct conviction based on a woman saying "I bet your dicks are hard off this," "wait until I get a fucking lawyer," and "you bitch ass police" to police officers during a traffic stop); *State v. Correa*, 147 N.M. 291 (2009) (holding that the defendant did not disturb the peace when he called police officers "asshole," "f---ing punk bitch," and "f---head"); *State v. Suhn*, 759 N.W.2d 546 (S.D. 2008) (vacating a conviction of a man who yelled "Fucking cop, piece of shit. You fucking cops suck. Cops are a bunch of fucking assholes"); *H.N.P. v. State*, 854 So.2d 630 (Ala. Crim. App. 2003) (vacating the conviction of a woman for flipping an off-duty police the middle finger); *Commonwealth v. Hock*, 556 Pa. 409 (1999) (vacating conviction of a woman who said "F____ you, a_____" to a police officer investigating whether her driving privileges were suspended); *City of Bismark v. Schoppert*, 469 N.W. 2d 808 (N.D.1991) (vacating the conviction of a man who gave a police officer the middle finger, called her a "Fucking, bitching cop," and told her to "fuck my ass"); *State v. Fratzke*, 446 N.W.2d 781 (Iowa 1989) (reversing the conviction of a man who sent a letter to a state trooper through a court clerk calling him a "thief disguised as a protector" and "a red-necked m*th*r-f*ck*r"); *Musselman v. Com.*, 705

S.C. 620 (2004) (vacating a conviction of a teenager for saying "Fuck you, man. I ain't got to come over there" to a police officer who sought to question him); *City of New Orleans v. Lyons*, 342 So.2d 196 (1977) (vacating a conviction for a woman saying "F—you" while being questioned by a police officer); *Ware v. City and County of Denver*, 182 Colo. 177 (1973) (vacating a conviction for the defendant's utterance of the words "fuck you" to members of the U.S. Department of Justice).

S.W.2d 476 (K.Y. 1986) (vacating the conviction of a man who called a police officer a word that the court translated as "a little fat person who had a continuing incestuous relationship with his mother" during a traffic stop); *Diehl v. State*, 451 A.2d 115 (Md. 1982) (vacating the conviction of a man who said "Fuck you, Gavin" to the chief of police during a traffic stop);[9] *State v. John W.*, 418 A.2d 1097 (Me.1980) (vacating the conviction of a man who called a police officer a "fucking pig" and a "fucking kangaroo" after a fellow officer arrested his sister for calling him a "fucking pig"); *Matter of Welfare of S.L.J.*, 263 N.W.2d 412 (M.N. 1978) (vacating the conviction of a fourteen-year-old girl for saying "fuck you pig" to a police officer after he questioned her and told her to hurry home because she was out past the city's curfew or he would arrest her).

Alabama's highest criminal court provided the clearest articulation of the reasoning underlying all of these decisions:

> The fact that an officer encounters … vulgarities with some frequency, and the fact that his training enables him to diffuse a potentially violent situation without physical retaliation … means that words which might provoke a violent response from the average person do not, when addressed to a police officer, amount to `fighting words.'"

H.N.P., 854 So.2d at 632.

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[9] In 2003, the Maryland Court of Appeals affirmed a disorderly conduct conviction of a woman who screamed tirades of profanity in a hospital and called a police officer an "asshole," but it distinguished the case from *Diehl* by characterizing the arrest and conviction as being for a time, place, and manner violation rather than the content of the speech. *Polk v. State*, 378 Md. 1 (2003). The court did not conduct a fighting words analysis. *Id.*

This reasoning clearly follows this Court's language in *Hill* where the Court held that society expects law enforcement officers to "exercise a higher degree of restraint" than the average person. *City of Houston v. Hill*, 483 U.S. 451, 462 (1987).

2. Connecticut has joined a minority of courts in relaxing the requirement that officers endure hostile remarks.

In this case, the Connecticut Supreme Court joined four other state courts of last resort in relaxing the First Amendment's protections for epithets directed toward law enforcement officers. These courts, however, have not followed a uniform line of reasoning to justify their decisions as the courts who have upheld the First Amendment's protections for epithets have.

Two courts have assumed without analysis that certain words are fighting words. *See Bailey v. State*, 334 Ark. 43 (1998) (holding that the defendant's use of the words "MF," "SB," and "Fuck you, nigger, and fuck you, too" toward police officers constituted fighting words without explaining why); *State v. Groves*, 219 Neb. 382 (1985) (holding that the words "fuckhead" and "motherfucker" are fighting words regardless of whether they are directed at police officers or ordinary citizens without elaborating).

Two courts have held that, while law enforcement officers are expected "to exercise more restraint than the average citizen," it would be imprudent to allow speakers to "gratuitously test that restraint without fear of being charged with disorderly conduct." *State v. Robinson*, 319 Mont. 82, 87 (2003) (holding that the words "fucking pig" are fighting words regardless of who they are directed at); *State v. Read*, 165 Vt. 141 (1996) (holding the words "fucking piece of shit," "fucking

asshole," "fucking pig," and "stupid fucking pig" are fighting words regardless of who they are directed at) .

Connecticut, however, has struck a different path, conducting extensive historical analysis of a word's offensiveness and holding that it constitutes a fighting word if it is directed at anyone – an approach that essentially creates per se fighting words much like Arkansas and Nebraska, but through historical analysis. *See* App.13-14, 16-17, 22.

II. The Connecticut's Supreme Court Decision Directly Contradicts This Court's Precedents And Represents A Frontal Assault On The "Fighting Words" Doctrine As Part Of A Broader Effort To Prohibit "Hate Speech" - An Assault That Inevitably Transform The First Amendment Into A Shield For "Safe Spaces" Inhabited By The Politically Correct.

A. The Connecticut Supreme Court's Decision Directly Contradicts This Court's Precedents.

Here is a modest sampling of vile epithets that the Court has extended First Amendment protection to: "White son of a bitch" - *Gooding v. Wilson*, 405 U.S. 518, 534 (1972) (Blackmun, J., dissenting) (discussing the facts of the case); "Mother-fucking fascist pig cops" and "that black mother-fucking pig McIntosh" - *Brown v. Oklahoma*, 408 U.S. 914 (1972);[10] "you god damn m. f. police" - *Lewis v. City of New Orleans*, 415 U.S. 130, 138 (1974) (Blackmun, J., dissenting) (discussing the facts of the case).

As the Court can readily see, this list of protected speech shares a theme of attacking the hearer's mother – an area commonly considered to be the most taboo in

[10] The facts of the case are quoted from *Brown v. State*, 492 P.2d 1106 (Okla. 1971).

Western culture. It contains the word "bitch," which historical dictionaries described as the "most offensive appellation that can be given to an English woman, even more provoking than that of whore" *See* Francis Grose, 1811 Dictionary of the Vulgar Tongue. It contains the word "fascist," which the Court initially ruled was a fighting word in *Chaplinsky*. It contains words that accuse law enforcement officers of committing incest on a continual basis with their mothers. In other words, this list of speech that the Court has held to be protected is a roll call of the most offensive insults that an English-speaking person can hurl at another.

If Connecticut's Supreme Court had remained true to the Court's precedent, it would have had no difficulty concluding that Mr. Liebenguth's use of the epithet "fucking nigger" toward a law enforcement officer enjoyed the same First Amendment protection as the other words on the list above. Mr. Liebenguth's speech, however, struck a raw nerve on the Connecticut Supreme Court's sensibilities, and it engaged in judicial gymnastics to avoid a decision that would be logically consistent with this Court's precedents and the First Amendment.

It first sought a way to reason that the parking enforcement officer who ticketed Mr. Liebenguth was not a law enforcement officer. App.17-18. Despite the officer being set loose on the public to enforce local parking laws by issuing tickets and fines, the Connecticut Supreme Court drew a specious distinction between a police officer and parking enforcement officer without elaborating why. App.17-18.

Second, the Connecticut Supreme Court had to wrestle with one of its own precedents in which it held that a woman who called a retail store employee a "fat

ugly bitch" and a "cunt" did not utter fighting words and that her epithets were protected by the First Amendment. *State v. Baccala*, 326 Conn. 232, *cert. denied* 138 S.Ct. 510 (2017). *Baccala* baffled the court in this case because it had reasoned that the store employee was expected to diffuse hostile situations and to model appropriate behavior. *Id.* at 253. To circumvent *Baccala*, the Connecticut Supreme Court reasoned that the store manager had been put on notice that she would likely be subjected to the abuse, that the store manager was expected to diffuse the situation by modeling appropriate behavior, and that the store manager could have asked Baccala to leave the premises and had her arrested if she refused to comply. App.21. It then held that the parking enforcement officer in this case had no notice of the abuse, no responsibility to model appropriate behavior and diffuse the situation, and no ability to ask Mr. Liebenguth to leave or to have him arrested. App.21-22.

This reasoning fails entirely as a matter of common sense. The parking enforcement officer would have been disciplined or terminated if he had not modeled appropriate behavior. He had every ability to tell Mr. Leibenguth to leave or to have him arrested, which he did eventually do. He also had plenty of notice that by giving Mr. Liebenguth a ticket – thereby accusing him of violating parking law – and imposing a fine on him would likely draw a heated objection.

Even so, in the Connecticut Supreme Court's eyes, the traffic officer was ill equipped to endure the abuse a police officer and store employee might. The distinction is specious and without difference. Furthermore, the court never identified when a listener or which listener might be expected to endure the epithet

that Mr. Liebenguth used. Thus, despite vehemently denying in its opinion that it was creating a per se category of speech never to be tolerated, the Connecticut Supreme Court fashioned a decision that, in fact, did the very thing it denied doing – create a per se category of speech never to be tolerated.

The new test that the Connecticut Supreme Court has adopted is a "special words for special people" test for prohibited speech. Although eschewing the theory that there is such a thing as a "per se fighting word," it concluded that the word "nigger," when uttered by a white person and directed at a black person is such a term. App.13-14, 22. The context in which the utterance is made becomes, in the Connecticut Court's hands, a per se test.

> "In fact, because of the racial prejudice and oppression with which it is forever inextricably linked, the word 'nigger,' when used by a white person as an assertion of the racial inferiority of an African-American person, 'is more than [a] mere offensive utterance.... No word ... is as odious or loaded with as terrible a history.'"

App.14.

The Connecticut Supreme Court did not stop there. It described the word as becoming more toxic still upon mere utterance when modified by the "profane adjective 'fucking' – a word of emphasis meaning wretched, rotten or accursed – to intensify the already highly offensive and demeaning character of the word 'niggers.'" App.14. Thus, with the stroke of a pen, the Connecticut Court transformed fighting words doctrine into a "hurt feelings" doctrine. "[T]he term 'fucking nigger' [is] ... so powerfully offensive that ... [it] inflicts cruel injury by its very utterance. It is degrading, it is humiliating, and it is freighted with a long and shameful history of

humiliation, the ugly effects of which continue to haunt us all." App.14 (internal citation omitted).

The Connecticut Supreme Court's conclusions and premises about the history of hatred and the hurtful character of vitriolic speech are idealisms, but idealisms cannot replace First Amendment rights. In the game of who has been hurt worst of all by history, Jews arguably have a more powerful claim than African-Americans, who are generations removed from slavery and the legacy of Jim Crow, yet, Holocaust survivors in Skokie, Illinois, were expected, as a matter of law, to endure the taunting of Neo-Nazi marchers through their neighborhoods. *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied Smith v. Collin*, 439 U.S. 916 (1978).

The American experience will be defined in years to come by our success in forging common bonds around shared values rather than the nurturing of identity-based grievances. The test that the Connecticut Supreme Court has adopted is better suited to a partisan political rally than the application of neutral First Amendment principles around which all may gather.

It also directly contradicts the Court's "fighting words" precedents, which protect similarly odious speech. Thus, the Court's intervention is necessary to either summarily vacate Mr. Liebenguth's conviction as it did in *Gooding, Brown,* and *Rosenfeld* or to bring much needed clarity to the "fighting words" doctrine.

B. The Connecticut Supreme Court's decision represents a frontal assault on the "fighting words" doctrine in an effort to prohibit hate speech.

Recently, the Court reaffirmed its holding that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we

hate." *Matal v. Tam,* 137 S.Ct. 1744, 1765 (2017) (internal citation and quotation marks omitted). The Connecticut Supreme Court, however, has chosen to chart a new course in First Amendment doctrine.

Two concurring opinions in the Connecticut Supreme Court's decision display what is really at stake in this decision: The Court is reluctant to follow this Court's teaching in *Chaplinsky* and its progeny, and the trajectory of the Connecticut Court's recent jurisprudence on the First Amendment suggests a growing reluctance to tolerate speech this Court has long regarded as sacrosanct.

The concurring opinions refer to the fighting words doctrine as unworkable and suggest it is time to rethink it, or, at the very least, to create an exception to it, at least when it comes to so-called "hate speech." Justice Khan wrote: "I write separately, however, to reiterate my opinion that '[t]he continuing vitality of the fighting words exception is dubious and the successful invocation of that exception is so rare that it is practically extinct.'" App.27 (quoting *State v. Parnoff*, 329 Conn. 386 (2018)).

Justice Ecker was more direct, explicitly calling for a hate speech exception to the fighting words doctrine:

> I join the majority decision because we are bound by United States Supreme Court precedent to apply the fighting words doctrine as currently formulated, and, in my view, the majority reaches the correct result applying the doctrine to the facts of this case. I write separately lest my silence otherwise be misunderstood as an endorsement of this deeply flawed doctrine. I also wish to draw attention to the looming question that comes into increasingly sharp focus with every decision by this court on the topic. The question is whether there may be a more sensible first amendment framework that would better serve to justify the outcome reached today in a manner that fully honors our government's commitment to freedom of speech without, in the process,

> sacrificing our ability to regulate a narrow category of malicious hate speech - which, for present purposes, may be defined as speech communicated publicly to an addressee, in a face-to-face encounter, using words or images that demean the addressee on the basis of his or her race, color, national origin, ethnicity, religion, gender, sexual orientation, disability, or like trait, under circumstances indicating that the speaker intends thereby to cause the addressee severe psychic pain.

App.33.

The First Amendment protects vitriolic and hateful speech so long as it does not constitute defamation, incitement to violence, a true threat or fighting words. *United States v. Stevens*, 559 U.S. 460, 468 (2010). Connecticut has begrudgingly and inconsistently applied the fighting words doctrine, giving speakers no fair warning about what is and what is not prohibited.

In *State v. Parnoff*, 329 Conn. 386 (2018),[11] the Connecticut Court upheld reversal of a lawyer's conviction for telling trespassing water company employees that, if they entered his land, he would get a gun and shoot them. These words were deemed to abstract and remote to serve as fighting words, and the threat of shooting was too abstract to be imminent.

In *State v. Baccala*, 326 Conn. 232, 253, cert. denied 138 S.Ct. 510 (2017), the Court held that calling a store employee a "fat ugly bitch" and a "cunt" did not constitute fighting words because the store employee had presumably been trained

[11] The undersigned argued *Parnoff* before the Connecticut Supreme Court. Then Chief Justice Chase Rogers asked the State if a conviction would have been easier to secure had the State pursued a "true threat" theory of prosecution, a remark that foretold how the Court would come to treat subsequent "true threat" cases.

to deal with disgruntled members of the public and was expected to model appropriate behavior to diffuse hostile situations.

In this case, the Connecticut Supreme Court struggles to articulate what renders the epithet "fucking nigger" fighting words while "fat ugly bitch," "cunt," and other hateful epithets of ethnic animus such as "kike, mick, wop, nip, gook, honkie, wetback and chink" are not. App.13. This parsing of vulgarity does not promote either respect for the law or the standards that make sense to lawyers – much less the citizens that have to abide by them. Furthermore, a history of racial discrimination and simmering political pressure do not transform African-Americans into the possessors of special privileges or rights under the First Amendment, nor do they create special categories of speech or speakers.

Thus, it is quite literally the case in Connecticut that the doctrine is standardless, allowing courts and prosecuting authorities "to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). Thus, Connecticut's version of the fighting words doctrine is a cudgel in the hands of the politically correct, and the Court's conclusion that there is such thing as per se fighting word is undermined by the Court's tendentious and precious reading of American history. Whatever rhetorical value journalists and pundits may derive from opining about a so-called "racial reckoning," the fighting words doctrine ought not to serve as a crutch of the self-righteous, nor as a bar to the freedom to express the thought we hate.

Unless this Court categorically rules that there are no per se fighting words and that, in the context of law enforcement officers, context doesn't transform

otherwise protected speech into fighting words, Connecticut's decision will stand as an open invitation to other courts to undermine freedom of speech. The chorus of supporting law review articles calling for an abandonment of the fighting words doctrine provides a ready arsenal of arguments to do so. *See, e.g.*, B. Caine, *The Trouble with 'Fighting Words': Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overrruled*, 88 Marq. L. Rev. 441, 507 (2004); W. Reilly, *Fighting the Fighting Words Standard: A Call for Its Destruction*, 52 Rutgers L. Rev. 947, 956 (2000).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse Mr. Liegenbuth's conviction as it has done in previous fighting words cases or grant a full hearing on the merits of this case to clarify the fighting words doctrine and establish a clear and uniform standard that all courts can apply and ordinary citizens and lawyers can understand.

Respectfully submitted

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APPENDIX