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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| SCOTT D. COUSINS,<br><br>Plaintiff Below, Appellant,<br><br>v.<br><br>ROSEMARY S. GOODIER,<br><br>Defendant Below, Appellee. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 272, 2021<br><br>Case Below:<br>Superior Court State of Delaware<br>C.A. No. S20C-11-036 CAK |

# APPELLEE'S ANSWERING BRIEF

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## NATURE OF PROCEEDING

The opening sentence of the Superior Court's opinion correctly and pristinely formulated the issue upon which this case turns: "At the end of the day, the question presented in this case is this: in the tort context, do certain statements made by Defendant Rosemary S. Goodier . . . about a lawsuit filed by Plaintiff Scott D. Cousins . . . contain implied facts which may be considered by a jury if I allowed this to go to trial, or as a matter of law are they unactionable expressions of Defendant's opinion?" Tab A of Appellant's Opening Brief (cited herein as "Opinion") at 1.

The Complaint filed by Cousins contained counts for tortious interference with contract, defamation, aiding and abetting, and civil conspiracy. Each count, however, rests on a single predicate act of Goodier, an email sent on August 5, 2020 by Goodier to the Bayard firm. The email, in its entirety, reads:

> Members of our community wish to bring to the firm's attention the lawsuit filed by one of your directors, Scott Cousins, against the Unionville Chadds Ford School District.
> https://www.southernchestercountyweeklies.com/lawsuit-filed-against-unionville-over-mascot-issue/article_29f9d4-d749-11ea-9387-8ff4a9694632.html
>
> In all likelihood, your Management Committee approved this suit, but in the event that it did not, we would like to bring it to your attention. We hope you can reflect upon how shockingly racist and tone deaf this suit is, particularly in light of the present demands against the school board, who has to deal with getting students back to school safely in the midst of a deadly pandemic. We can't help but wonder why the firm would support an action that would divert precious

> resources away from the safety of the community's children to perpetuating an offensive and outdated school mascot. This action is even more troubling in light of the fact that Mr Cousins' child has graduated and no longer attends the school. Our tax dollars and administrative resources will be plunged into countering some shockingly racist statements by Mr Cousins about protecting his white, Christian heritage.
>
> We have no official role, connection, or representation with respect to the school board or the district. We raise these issues solely in our capacity as concerned parents and taxpayers; as such, we are reaching out to you in the hope your firm is better than throwing its support behind this horrific lawsuit.
>
> Rosemary Goodier

Appellant's Appendix (cited herein at "AXXX") at A046.

Cousin's Complaint rested on three phrases in that email, all of which were critical of a lawsuit Cousins filed, in which he attempted to block the dropping of mascot symbols with imagery relating to American Indians by the Unionville Chadds Ford School District High School in Pennsylvania.

In her email, Goodier criticized *the lawsuit* brought by Cousins. The Complaint selected two sentences from Goodier's critique of the lawsuit, claiming that they communicate actionable false statements of fact:

- "We hope you can reflect upon how ***shockingly racist*** and tone deaf this suit is, particularly in light of the present demands against the school board, who has to deal with getting students back to school safely in the midst of a deadly pandemic."

- "Our tax dollars and administrative resources will be plunged into countering some ***shockingly racist statements*** by Mr Cousins about protecting his ***white, Christian heritage***."

The emphasized phrases are the phrases that Cousins asserts render these two sentences actionable. Opinion at 2-3.

The Superior Court correctly reasoned that if the statements in Goodier's email are sheltered from liability under the First Amendment as non-actionable "opinion," "name-calling" or "rhetorical hyperbole," all four of Cousins' counts automatically fail. Opinion at 2-3. The Superior Court was correct. Cousins does not get a different First Amendment with each different tort.

Goodier's statements are protected under the First Amendment. Her criticism of Cousins' mascot lawsuit are not statements of *fact* that judges and juries may adjudicate as true or false, applying law in the way that courts know law. It does not matter what label is affixed to the claim—whether dressed up as defamation, tortious interference, conspiracy, or aiding and abetting. What matters is the content of Goodier's *speech*. If that speech is insulated under the First Amendment, then all four of Cousin's counts must be dismissed, across-the board.

In her briefing before the Superior Court, Goodier first argued that the statements in her email were protected under the First Amendment under established principles applicable to the law of defamation. Goodier then argued that the same First Amendment principles required rejection of Cousins' tortious interference claim and related ancillary claims. The Superior Court took up the issues in the same

order, analyzing the defamation claim first, and then turning to the tortious interference and accompanying claims.

In his briefing before this Court, Cousins reverses that order, leading with tortious interference, and then addressing defamation. In the end, the order does not matter. However, in this Brief, Goodier adopts the order in which she organized her Motion to Dismiss, and the order in which the Superior Court performed its analysis, taking up defamation first. Again, the order does not matter. But, for purposes of following the governing First Amendment principles, this case is more easily understood by taking up defamation first because that is the body of First Amendment law and Delaware common law in which the distinction between actionable false statements of fact and non-actionable statements of opinion, rhetorical hyperbole, insult, or name-calling is most well-developed.

## SUMMARY OF THE ARGUMENT

1. Goodier **denies** Cousins' assertion that the First Amendment does not protect from liability for tortious interference with contract Goodier's statements criticizing the lawsuit Cousins filed in which he sought to prevent the Unionville Chadds Ford School District from dropping imagery of American Indians from the school mascot.

2. Goodier **denies** Cousins' assertion that the First Amendment does not protect from liability for defamation of Goodier's statements criticizing the lawsuit filed by Cousins in which he sought to prevent the Unionville Chadds Ford School District from dropping imagery of American Indians from in the school mascot.

## COUNTERSTATEMENT OF FACTS

Goodier does not repeat the "facts" recited by Cousins as they are mere allegations in his Complaint.[1] In offering its opinion, the Superior Court accepted the non-conclusory allegations in the Complaint as true. *See* Opinion at 1-3, 5.

[1] Throughout the Complaint and his opening brief, Cousins, without any support, implies that Goodier is actively practicing law. In reality, Goodier has not actively practiced law in almost eight years, and has no intention of returning to active practice.

## ARGUMENT

### I. UNDER THE FIRST AMENDMENT AND COMMON LAW, THE STATEMENTS ARE NOT ACTIONABLE AS DEFAMATION

#### A. Question Presented

Did the Superior Court correctly hold that the statements at issue were not actionable as defamation?

#### B. Standard of Review

The standard of review is *de novo*, which is the standard applicable to review dismissal of a complaint under Rule 12(b)(6). *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). This standard is not simply a function of Delaware law, but is imposed directly upon this Court under the First Amendment, which requires *de novo* "independent appellate review" when a claim is made that expression is constitutionally protected under the First Amendment. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984). Whether the speech at issue is constitutionally protected as "opinion" is a question of law. *Slawik v. News-Journal Co.*, 428 A.2d 15, 17 (Del. 1981)

#### C. Merits of the Argument

##### 1. Statements Of Opinion Are Not Actionable

Under both common-law and constitutional law principles, no liability may attach to statements of opinion, rhetorical hyperbole, or name-calling. These phrases

are all variations of the same theme, separating insult and critique from palpable false statements of fact. Therein rests the touchstone: it is axiomatic that Cousins bears the burden of establishing that Goodier published a false *statement of fact* concerning him. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 778 (1986); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990). *See also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (First Amendment precluded recovery under state emotional distress action for ad parody which "could not reasonably have been interpreted as stating actual facts about the public figure involved"); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284-86, (1974) (use of word "traitor" in literary definition of union "scab" not basis for defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"). The Constitution protects such "rhetorical hyperbole, a lusty and imaginative expression of . . . contempt." *Id.* at 286. Even the use of language that might in some contexts be deemed factual is insulated from liability when in the specific context in which it is published, it is plain that it is being used figuratively to express an opinion. *Greenbelt Co-op. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 13 (1970) (accusations of "blackmail" protected under First Amendment).

Cousins' complaint must be dismissed if the "allegedly defamatory statements cannot be interpreted as stating actual facts, but instead are either 'subjective speculation' or 'merely rhetorical hyperbole.'" *Doe v. Cahill*, 884 A.2d 451, 466 (Del. 2005). *See also Beverly Enters., Inc. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999) ("[T]he law of defamation does not extend to mere insult.").

**2. Cousins Wrongly Conflates "Defamatory" With "Factual"**

Cousins wrongly argues that the Superior Court erred in failing to take into account the Delaware definition of expression that is "defamatory." *See Spence v. Funk*, 396 A.2d 967, 969 (Del. 1978). Cousins conflates the question of whether a statement lowers the esteem with which a person is held in the community—the core concept of "defamatory meaning"—with whether that statement accomplishes its reputation-lowering impact through expression of *fact* or expression of *opinion*. "The legal decision that a particular statement is 'opinion' makes the statement absolutely nonactionable, even though it might well remain defamatory, that is, injurious to reputation." Rodney Smolla, *Law of Defamation* § 6:60 (2d ed. 2021 update) (citing authorities).

**3. The Superior Court Did Not Invade The Province Of The Jury**

So too, the claim by Cousins that the Superior Court improperly encroached on the function of the jury begged the dispositive question. The jury has no function unless the court finds, at the threshold, that that a statement is reasonably capable of

being construed as factual. *Slawik*, 428 A.2d at 17 ("[T]he issue of whether the allegedly libelous statement constituted a statement of fact or an expression of opinion was a question of law for the Court to determine rather than a question for the jury."). Under the First Amendment, and established Delaware law, no such finding here is possible.

**4. The Superior Court Properly Invoked The *Riley v. Moyed* Test**

In *Riley v. Moyed*, 529 A.2d 248 (Del. 1987), this Court adopted a four-part test for separating fact from opinion. That test was derived from the influential decision *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984). Many state and federal courts around the country have adopted *Ollman*, or variations of it. As this Court summarized the *Riley / Ollman* test: "First, the Court should analyze the common usage or meaning of the challenged language. Second, the Court should determine whether the statement can be objectively verified as true or false. Third, the Court should consider the full context of the statement. Fourth, the Court should consider the broader social context into which the statement fits." *Riley*, 529 A.2d at 251-52 (internal citations omitted). The four factors often overlap and inter-relate. *See Ollman*, 750 F. 2d at 978-80.

### 5. *Riley* Remains Good Law

#### a. *Milkovich* did not overrule *Riley*

Cousins argues that *Riley* is no longer good law, claiming it was superseded by the United States Supreme Court's 1990 opinion in *Milkovich v. Lorain Journal Co*., 497 U.S. at 16-17. Yet nothing in *Milkovich* in any sense "overrules" or "supersedes" *Riley*.

More importantly, even if this Court were to decide to abandon the four-part *Riley* test, deeming it no longer appropriate after *Milkovich*, nothing would change. Cousins must still lose under the First Amendment standards *Milkovich* articulated. Even stripped to the most pristine *Milkovich* constitutional baseline, the imputations that the mascot lawsuit filed by Cousins was "shockingly racist and tone deaf" and advanced Cousins' "white Christian heritage" do not express provably false statements of fact within the meaning of the First Amendment.

In *Milkovich*, a high school wrestling coach, Michael Milkovich, brought a defamation action against a newspaper for a story implying that Milkovich had lied under oath in a judicial proceeding arising from an altercation in a wrestling match. *Milkovich*, 497 U.S. at 3. The offending article included such passages as:

> [A] lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple–Mentor wrestling meet of last Feb. 8. …
>
> It is simply this: If you get in a jam, lie your way out.

> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it.

*Id.* at 5.

The case followed a tortuous path in the Ohio Courts. Inexplicably, lower courts in Ohio initially found the statements to be non-actionable opinion. Sensibly, the Ohio Supreme Court reversed, holding that "the lower courts erred in holding that the statements in issue were nothing more than the writer's 'heartfelt' opinion. We find that the statements in issue are factual assertions as a matter of law, and are not constitutionally protected as the opinions of the writer." *Milkovich v. News-Herald*, 15 Ohio St. 3d 292, 298-99 (1984). Yet even more inexplicably, the Ohio Supreme Court then reversed itself, holding in *Scott v. News-Herald*, 25 Ohio St. 3d 243 (1986) that the statements were as a matter of law protected opinion under the First Amendment. In reaching this conclusion the court in *Scott* heavily emphasized what it deemed to be cautionary language and broader context signaling that the statements were not intended to be understood as factual. *Scott*, 25 Ohio St. 3d. at 252.

It was against this backdrop that the United States Supreme Court reversed. Understandably and entirely correctly, the United States Supreme Court held that

the statements communicated to readers that Milkovich had lied under oath. The Court rejected the argument that just because the statements may have been superficially couched as opinion, the statements were protected by the First Amendment. In the course of that decision that Court famously stated that the First Amendment does not "create a wholesale defamation exemption for anything *that might be labeled* 'opinion.'" *Milkovich*, 497 U.S at 18 (emphasis added). The key to *Milkovich* rests in the italicized phrase, "*that might be labeled* opinion." It is not the label that matters. What matters is what is communicated.

Most importantly for purposes of this appeal, *Milkovich* did *not* disturb the pre-existing First Amendment precedents on which it both relied and reinforced, requiring that only false statements of *fact* are actionable. *Milkovich* thus relied upon, adopted, and approved its prior decisions in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. at 778; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. at 50; (1988); *Letter Carriers v. Austin*, 418 U.S. at 284-86; *Greenbelt Co-op. Publ'g Association v. Bresler*, 398 U.S. at 13. Those decisions establish the elemental baseline that under the First Amendment no liability may be imposed for defamation unless the statements at issue express or imply a false statement of fact. Even stripped to that most pristine constitutional baseline, the imputations that the mascot lawsuit filed by Cousins was "shockingly racist and tone deaf" and advanced Cousins' "white

Christian heritage" do not express or imply provably false statements of fact within the meaning of the First Amendment.

**b. Subsequent decisions of this Court have not overruled *Riley***

The most important post-*Milkovich* decision of this Court speaking to the issue is *Kanaga v. Gannett Co.*, 687 A.2d 173 (Del. 1996). That case was brought by a physician, Dr. Margo Kanaga, against Wilmington's *New Journal* for an article implying that Dr. Kanaga had performed unnecessary surgery to enhance her fees. This Court properly framed the issue before it as "whether or not the article, when read in context, has implanted within it the assertion of fact that Dr. Kanaga's recommendation of a hysterectomy was unnecessary and that Dr. Kanaga's motivation was pecuniary gain." *Id.* at 178. This Court sensibly held that "[i]f so, a reasonable jury could find that this implied a false assertion of fact." *Id.*

The Court in *Kanaga* was invited to reconsider the four-part test endorsed in *Riley* in light of the subsequent decision in *Milkovich*. But the Court in *Kanaga* declined the invitation, stating that "[w]e do not believe that it is necessary to revisit the current vitality of *Riley* in view of *Milkovich* because *Riley* is distinguishable from the case before us." *Id.* Critically, the Court in *Kanaga* found that the *Riley* test *already took into account and credited* the principle that a statement couched as opinion *would be actionable* if it implied a false defamatory statement of fact:

> As the *Riley* Court noted, a statement of opinion would be actionable if it implies the allegation of undisclosed defamatory facts as the basis for

> the opinion. Unlike the facts in *Riley*, we are faced with that situation in the case before us where the entire context of the published statements, considered from the viewpoint of the average reader, may imply a false assertion of fact.

*Id.* This passage from *Kanaga* demonstrates that Cousins is wrong in claiming that *Kanaga* somehow overruled or repudiated *Riley* in light of *Milkovich*. *Kanaga* did nothing of the kind. To the contrary, *Kanaga* harmonized *Riley* and *Milkovich* by explaining that *Riley* itself assumed and accepted that a statement ostensibly couched as opinion would remain actionable if it implied the existence of undisclosed defamatory facts.

*Kanaga* was followed two years later by *Ramunno v. Cawley*, 705 A.2d 1029, 1037 (Del. 1998). In *Ramunno* this Court reversed a Superior Court's grant of a motion to dismiss that rested in part on a ruling that a statement that a Wilmington lawyer and land developer had "done well through poorly maintained" properties. This Court held that the phrase should not have been dismissed as an expression of opinion because it implied allegedly false facts. Citing both *Milkovich* and *Kanaga*, the Court in *Ramunno* properly recognized the longstanding and unremarkable truism that "a defamation action may lie where an opinion implies the existence of an undisclosed defamatory factual basis." *Id.* at 1036. The Court concluded that "the Superior Court failed to recognize the potentially defamatory factual basis imbedded in the statement." *Id.*

Significantly, the opinion in *Ramunno*, like the opinion in *Kanaga*, did not purport to overrule *Riley*, but merely cautioned against an overly rigid application of *Riley*, an application that would automatically insulate an otherwise actionable factual statement merely because it is surrounded by hyperbole. The Court did not overrule *Riley*. The Court in *Ramunno* thus cautioned: "Again, in light of our holding in *Kanaga* that a statement cast as an opinion is actionable if it implies the existence of undisclosed defamatory facts, we caution against an overly rigid application of the four-part *Riley* test. A statement is not a protected opinion simply because it contains 'colorful language, catchy phrases or hyperbole.'" *Id.* at 1038, n. 34.

**6. *Riley* Is A Useful Test And Should Be Retained**

This Court should retain the *Riley* test, as it provides an excellent and textured vehicle for separating fact from opinion, particularly in close cases. Notably, many jurisdictions throughout the United States continue to apply multi-factor tests derived from *Ollman*, or similar variants, well after *Milkovich*. *See e.g.*, *Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir. 1992) ("Thus, while eschewing the fact/opinion terminology, *Milkovich* did not depart from the multi-factored analysis that had been employed for some time by lower courts seeking to distinguish between actionable fact and nonactionable opinion."); *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994) (continuing to apply

*Ollman* after *Milkovich*); *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 250 (1991) (retaining multi-factor test in New York under New York law notwithstanding *Milkovich*).

Of the *Riley* factors, the most important will always be the second, "objective verifiability." Nothing in *Milkovich* can be understood to undermine continued reliance on that core requirement. "Thus, there is no reason that pre-*Milkovich* opinions which analyze whether a particular type of statement is susceptible to objective proof should be any less binding than before." *Partington v. Bugliosi*, 56 F.3d 1147, 1158 (9th Cir. 1995).

While verifiability is the most important, this Court should not jettison the other *Riley* factors, including "common usage," "full context of the statement," and "the broader social context." These factors remain useful tools in close cases. But *this* case is not even close.

**7. With Or Without *Riley* The Statements Here Are Not Actionable**

This Brief follows the roadmap set forth in *Riley*. All four of the *Riley* factors clearly point toward treating the allegedly defamatory statements here as non-actionable opinion. Yet even if *Riley* were not followed, and the court below merely asked whether, at the end of the day, the questions of whether the lawsuit filed by Cousins was "shockingly racist and tone deaf" or pandering to Cousins' "white Christian heritage" are questions objectively susceptible of proof or disproof, the

result is the same. Whether subjected to a test with *four* parts or *one* part, the statements uttered by Goodier are not actionable.

**a. Factor One: "common usage"**

Under the first *Riley* factor, the common meaning or usage of phrases such as "shockingly racist and tone deaf" or "protecting his white, Christian heritage" clearly point toward critique and opinion, and not factual assertions. "An alleged defamatory statement is generally not provable as false when it labels the plaintiff with a term that has an imprecise and debatable meaning." *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1276 (M.D. Ala. 2019) (finding assertions that plaintiff was "hate group" not actionable).

In *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976) a leading opinion on this issue, the renowned conservative author and commentator William F. Buckley, Jr. sued author and Holocaust scholar Franklin H. Littell for libel because Littell's book characterized Buckley as a "fellow traveler" of "fascism" or the "radical right." *Id*. at 890, 893. The Second Circuit held that those terms were "concepts whose content is so debatable, loose and varying, that they are insusceptible to proof of truth or falsity." *Id*. at 894. The Second Circuit noted that those ambiguous labels contrasted sharply with accusations of being *a member or legislative representative* of a concrete political party, which are allegations that are "susceptible to proof or disproof of falsity." *Id*. In contrast, what was or was not "fascism" was subject to

contest, the sort of imprecise meaning and usage common "in the realm of political debate." *Id*. at 890, 893.

In *Coral Ridge*, the court followed the learning of *Buckley* to hold non-actionable the claim by the Southern Poverty Law Center and others that an organization was a "hate group." "Similar to the terms 'fascism,' 'radical right,' and 'political Marxist,' the term 'hate group' also suffers from a 'tremendous imprecision of the meaning and usage ... in the realm of political debate.'" *Coral Ridge*, at 1277, *quoting Buckley*, 539 F.2d at 294.

**b. Factor Two: objective verifiability**

**i. The meaning of the standard**

For this case to proceed, the Court must come to the conclusion that the First Amendment does not bar a judge and jury from adjudicating in some *objectively verifiable manner* the truth or falsity of the characterizations at issue. The Court must thus imagine submitting to a jury questions such as these:

- Do you find that the Plaintiff Cousins has met his burden of proving that his Chadds-Ford School District High School Mascot Complaint was not shockingly racist and tone deaf?

- Do you find that the Plaintiff Cousins has met his burden of proving that his Chadds-Ford School District High School Mascot Complaint did not contain shockingly racist statements by Mr. Cousins about protecting his white, Christian heritage?

How would a jury possibly reach an objective judgment in answering questions such as these? Would the jurors be required to read the Cousins' mascot

Complaint, and reach their own assessments of whether the Complaint was or was not shockingly racist and tone deaf, or did or did not include shockingly racist statements by Cousins about protecting his white, Christian heritage? And how would the trial court, or this Court on review, go about reviewing the jury's determination? Would this Court be required to read the Cousins mascot suit and determine whether it could or could not be construed as "shockingly racist and tone deaf?" If a trier-of-fact were to determine that the Cousins mascot suit was at least arguably "racist and tone-deaf," could a judgment still be rendered against Cousins because the racist elements were not "shockingly" so?

On this score, the Superior Court's analysis was absolutely sound:

> For me to send this case to a jury, I must find that the jury can determine the truth or falsity of Defendant's statements in some objectively verifiable manner. I cannot imagine what types of questions I could put to the jury in my jury instructions in this regard. If I allowed the jury to review the underlying West Chester, Pennsylvania lawsuit and asked the jurors to determine as a matter of fact whether it is "shockingly racist," I think it is highly debatable whether that fact would be verifiable on the face of the lawsuit. Nor do I think that the statement "shockingly racist" implies the existence of an independent, undisclosed defamatory factual basis for Defendant's opinion about the lawsuit. . .

Opinion at 9-10.

The Superior Court's analysis was impeccably sound. Goodier's statements are as "obviously unverifiable" as the allegedly defamatory statement in *Ollman* that the plaintiff academic was an "outspoken proponent of political Marxism." *Ollman*,

750 F.2d at 987. The *Ollman* court held that this characterization was "much akin to" the "fascist" label in *Buckley*, in that it was a "loosely definable, variously interpretable statement" made in the context of "political, social or philosophical debate." *Id*. The same is true here.

In applying the verifiability factor, this Court should recognize the elemental division between generalized ideological attacks, such as imputations of racism, and specific accusations of specific illegal racially discriminatory conduct. A specific accusation that a person engaged in palpable race discrimination, such as firing an employee because of race, may be actionable defamation. Indeed, the entire premise of civil rights laws banning discrimination presupposes that such a charge may be objectively proven or disproven. But a more generalized accusation that a person or regime is "racist" is not. Goodier's accusations against the Cousin's mascot lawsuit clearly fall on the non-actionable side of the line. Goodier did not accuse Cousins of any act of race discrimination in the workplace, or any other act of illegal racist conduct. To the contrary, Goodier's email focused *only* on Cousin's filing of his Chadds Ford mascot lawsuit. Such critique is not actionable.

Bountiful precedent supports this argument. In *Agar v. Judy*, 151 A.3d 456, 471 (Del. Ch. 2017), for example, the Court of Chancery cited with approval a New Jersey decision, *Ward v. Zelikovsky*, 643 A.2d 972 (1994). Goodier commends the reasoning of *Ward* to this Court. *Ward* recognized that "Courts thus distinguish

'between genuinely defamatory communications as opposed to obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse.'" *Id.* at 979, *quoting* Rodney Smolla, *Law of Defamation* § 4.03, at 4–10. *Ward* emphasized the verifiability factor, and its linkage to core First Amendment values:

> The significance of opinion/fact and non-fact/fact distinctions centers on the concept of verifiability. Requiring that a statement be verifiable ensures that defendants are not punished for exercising their First Amendment right to express their thoughts. Unless a statement explicitly or impliedly rests on false facts that damage the reputation of another, the alleged defamatory statement will not be actionable. We require verifiability because "[i]nsofar as a statement lacks a plausible method of verification," the trier of fact who is charged with assessing a statement's truth "will have considerable difficulty returning a verdict based upon anything but speculation."

*Id*., *quoting Ollman v. Evans*, 750 F.2d at 979.

The court in *Ward* then summarized the national consensus: "Most courts that have considered whether allegations of racism, ethnic hatred or bigotry are defamatory have concluded for a variety of reasons that they are not. The most important reason is the chilling effect such a holding would cast over a person's freedom of expression." *Ward*, 643 A.2d at 980.

These principles have been consistently applied by state and federal courts throughout the nation. *See, e.g., McCafferty v. Newsweek Media Grp., Ltd.*, 955 F.3d 352, 358 (3d Cir. 2020) (while specific accusations of race discrimination may be actionable, "a simple accusation of racism" is not); *Agar v. Judy*, 151 A.3d at 481 (same); *Stevens v. Tillman*, 855 F.2d 394 (1988), *cert. denied*, 489 U.S. 1065

(1989) ("racist" not actionable); *Buckley v. Littell*, 539 F.2d at 890-94 ("fascist," "fellow traveler," and "radical right" not actionable); *Rutherford v. Dougherty*, 91 F.2d 707 (3d Cir. 1937) (imputations of religious hatred and bigotry not actionable); *Coral Ridge*, 406 F. Supp. 3d at 1276 ("hate group" not actionable); *Sall v. Barber*, 782 P.2d 1216, 1218–19 (Colo. Ct. App. 1989) ("bigot" not actionable); *Rambo v. Cohen*, 587 N.E.2d 140, 147 (Ind. Ct. App. 1992) ("anti-Semite" not actionable); *Raible v. Newsweek, Inc.*, 341 F. Supp. 804, 806–07 (W.D. Pa. 1972) (claims that "white majority" was "racially prejudiced," "angry, uncultured, crude," and "violence prone" not actionable); *Rybas v. Wapner*, 311 Pa. Super. 50 (1983) ("anti-Semitic" not actionable); *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 765 (D.N.J. 1981) ("Even if innuendo implying that plaintiff is racially prejudiced were drawn, it would be insufficient to constitute actionable libel.").

**ii. The disciplinary argument is entirely unsound**

Cousins seeks to avoid the learning of these cases by arguing fancifully that he might be subject to discipline by the Delaware State Bar because of statements made by Goodier in her August 5 email.

To begin, it is utterly implausible that the State Bar would seek to discipline Cousins solely because of Goodier's email. Surely the State Bar would read the Cousins Unionville Chadds Ford Mascot Complaint for itself. Second, it is utterly implausible that the State Bar would discipline Cousins solely because the State Bar

reached its own subjective conclusion that the Cousins lawsuit was "shockingly racist and tone deaf" or advanced Cousins' "white Christian heritage."

But most fundamentally, this case is not about an alleged violation of the First Amendment arising from actions of the Delaware State Bar allegedly censoring Cousins for his political views. No such disciplinary action has ever been commenced. The alleged censor here is not the Delaware State Bar, purportedly using the apparatus of the State to punish a speaker. The censor here is Cousins himself, who *is* invoking the apparatus of the State—its judicial system—in an effort to censor a private citizen, Goodier, for daring to criticize Cousins' suit.

**c. Factor Three: the full context of the statement**

The August 5 email begins with the statement: "Members of our community wish to bring to the firm's attention to the lawsuit filed by one of your directors, Scott Cousins, against the Unionville Chadds Ford School District." A046. It then contains a hyperlink to a news story reporting on the lawsuit. *Id.* The hyperlink is important, for it demonstrates that Cousins' suit had already drawn media attention. It also provides the vehicle through which the lawyers in the Bayard firm to whom the email was addressed could gain immediate access to the public controversy surrounding the mascot issue, and the Cousins' lawsuit. "When an opinion is accompanied by its underlying *nondefamatory* factual basis, a defamation action premised upon that opinion will fail no matter how unjustified, unreasonable or

derogatory the opinion might be." *Riley*, 529 A.2d at 254 (emphasis in original). The entire focus of the August 5 email is the lawsuit, which members of the Bayard firm could and did read for themselves, drawing their own conclusions as to the opinions about that suit expressed by Goodier. *See* A018-21 (Complaint ¶¶ 79-88).

The email then recites: "In all likelihood, your Management Committee approved this suit, but in the event that it did not, we would like to bring it to your attention." A046. The next sentence, which contains the "shockingly racist and tone deaf" language, is embedded within a statement regarding the demands on the school board and its difficulties in ensuring safety during the pandemic: "We hope you can reflect upon how shockingly racist and tone deaf this suit is, particularly in light of the present demands against the school board, who has to deal with getting students back to school safely in the midst of a deadly pandemic." *Id.* This sentence is plainly critical of the *lawsuit*, particularly given its timing in the midst of the pandemic. The email continues: "We can't help but wonder why the firm would support an action that would divert precious resources away from the safety of the community's children to perpetuating an offensive and outdated school mascot." *Id.* This sentence is enormously important, providing key immediate context, as well as placing the email within the stream of the larger social context (factor four of the Delaware test, discussed below). This sentence thus directly links the writer Goodier's *opinion* of

the lawsuit to the writer Goodier's *opinion of the mascot*, as "offensive and outdated."

The email proceeds: "This action is even more troubling in light of the fact that Mr Cousins' child has graduated and no longer attends the school. Our tax dollars and administrative resources will be plunged into countering some shockingly racist statements by Cousins about protecting his white, Christian heritage." A046. Goodier is here lamenting the need to expend tax dollars and school resources defending a lawsuit *countering* "some shockingly racist statements by Cousins about protecting his white, Christian heritage."

The email concludes: "We have no official role, connection, or representation with respect to the school board or the district. We raise these issues solely in our capacity as concerned parents and taxpayers; as such, we are reaching out to you in the hope your firm is better than throwing its support behind this *horrific lawsuit*." *Id.* (emphasis added). A reasonable reader would plainly understand that the writer's views of the lawsuit as "horrific" stem from the writer's sense of offense that the suit seeks to perpetuate an offensive and outdated mascot.

Whether Goodier did or did not quote from the mascot complaint is not critical. What is critical is that the *only* conduct on the part of Cousins that was critiqued was the filing of the lawsuit, thus providing readers of the email with the plain contextual understanding that Goodier's characterizations were her *opinions*

concerning that lawsuit. For purposes of the third factor, the critical fact is that members of the Bayard firm, or anyone else, for that matter, who either read Goodier's email or read the media accounts of Cousins' mascot lawsuit, were free to examine the lawsuit for themselves and make up their own minds. "This is so because readers can interpret the factual statements and decide for themselves whether the writer's opinion was justified." *Riley*, 529 A.2d at 254; *Kanaga v. Gannett Co.*, 687 A.2d 173, 178 (Del. 1996).

**d. Factor Four: the broader social context**

The broader social context in which Goodier's statement was made includes the ongoing national discourse over race in America, a discourse intensified since the death of George Floyd. That discourse has included a debate over the propriety of symbols of the confederacy, or symbols deemed to conjure racial or ethnic stereotypes. A subset of that debate has centered around the names and mascots of sports teams. The former Washington Redskins dropped the name "Redskins."[2] The Cleveland Indians have announced a decision to abandon the name "Indians."[3]

[2] Ken Belson and Kevin Draper, "Washington N.F.L. Team to Drop Name," The New York Times, July 13, 2020, available at: https://www.nytimes.com/2020/07/13/sports/football/washington-redskins-new-name.html.

[3] David Waldstein and Michael S. Schmidt, Cleveland's Baseball Team Will Drop Its Indians Team Name, The New York Times, December 13, 2020: available at: ttps://www.nytimes.com/2020/12/13/sports/baseball/cleveland-indians-baseball-name-change.html?

Closer to home and the immediate facts of this case, as the Complaint recites, the mascot lawsuit filed by Cousins drew significant local news coverage, including an article published on August 5, 2020 in *The Daily Local*, a community newspaper. A020 (Complaint ¶ 51). That news coverage included the following passages, quoting from Cousins' lawsuit:

> "Certainly, American history is replete with horrific acts of violence against Native People," Cousins said in the suit. "It is without question that Man's Laws have failed to live up to our founding principles based on Natural Law. Anyone who suggests that Native People have never been victimized has not seriously studied American history. We need to study history — not cancel it, revise it or eradicate it — in order to ensure that the victimization of Native People never happens again. Simply claiming that Native People were victimized in the past, however, is unrelated to whether the Unionville High School Mascot honors these great nations and the proud history of Native People."
>
> *****
>
> In the court filing, Cousins describes himself as a Christian, adult, white, heterosexual male who is an interested community resident living in the district, whose ancestors were not white European imperialists, but were poor, working class people fleeing Europe for the promise of the New World. Cousins described his ancestors as not believing that they were inherently superior to non-white groups, did not support the genocide of Native Peoples and fought to end 250 years of African slavery. Cousins said he "shares his ancestors' blood and the wisdom of their collective beliefs."

*Id*.

Charges of "racism" in various forms are often leveled in the midst of these arguments—and indeed have often been so leveled throughout American history. This social context is an additional factor weighing in favor of construing Goodier's

statements as opinion. As the court in *Ollman* emphasized, "[t]he Supreme Court has expressly recognized the importance of social context when, in finding as an expression of opinion the use of the word 'traitor' as applied to an employee who crossed a picket line, the court stated that 'such exaggerated rhetoric was commonplace in labor disputes.'" *Ollman*, 750 F.2d at 983, *quoting Letter Carriers*, 418 U.S. at 286. If heated rhetoric and name-calling pejoratives are common in labor disputes, they are all the more common in American discourse concerning race. As Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit explained, in a decision concluding that repeated allegations that a plaintiff was a "racist" was not actionable defamation: "In daily life 'racist' is hurled about so indiscriminately that it is no more than a verbal slap in the face." *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988).

To live by the sword is to die by the sword. Having entered the arena of national debate over the propriety of sports teams continuing to use names and symbols conjuring the images of Native Americans by filing a lawsuit seeking to block the dropping of such a symbol, Cousins opened his lawsuit to caustic and vehement critique.

Cousins goes to great length in his Complaint, for example, to describe a novel he wrote entitled *The Blood of Enlightenment*. A015-28 (Complaint, ¶¶ 35-43). The Complaint recites that this novel ranged widely across issues relating to the history

of slavery, race, and related ecclesiastical battles, and even quotes from a review of Cousins' book. Certainly any literary critic who chose to negatively review Cousins' book, charging that it is "tone deaf to racism" or protective of the author's "white Christian heritage" could not, consistent with the First Amendment, be sued for those negative characterizations:

> While a bad review necessarily has the effect of injuring an author's reputation to some extent-sometimes to a devastating extent, as Moldea alleges is true here-criticism's long and impressive pedigree persuades us that, while a critic's latitude is not unlimited, he or she must be given the constitutional "breathing space" appropriate to the genre.

*Moldea v. New York Times Co*., 22 F.3d 310, 315 (D.C. Cir. 1994). If that is true of a critique of Cousins' novel, it is equally true of a critique of Cousins' lawsuit. The Superior Court made exactly the right connection. "Because the reader understands that such supported opinions represent the writer's interpretation of the facts presented, and because the reader is free to draw his or her own conclusions based upon those facts, this type of statement is not actionable in defamation." Opinion at 14.

## II. COMMON LAW AND FIRST AMENDMENT DOCTRINES REQUIRE DISMISSAL OF THE TORTIOUS INTERFERENCE CLAIM

### A. Question Presented

Did the Superior Court correctly hold that the statements at issue were not actionable as tortious interference because they are protected under the First Amendment.

### B. Standard of Review

The standard of review is *de novo*. *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984).

### C. Merits of the Argument

#### 1. The Tortious Interference Claim Rests On The Same Predicate

While styled as a separate claim, Cousins' tortious interference claim is based on the same predicate act as his defamation claim—the August 5 email. Distilled to their core, both claims are grounded in the expressive content and communicative impact of the email. Nothing in the record supports the preposterous proposition that Cousins lost his position at Bayard because of the email sent by Goodier. As the Complaint itself essentially concedes, Cousins lost his job because the partners at Bayard *themselves* disagreed with the Chadds Ford mascot lawsuit and considered Cousins' continued association with the firm untenable. A018-21 (Complaint ¶¶ 80-98).

The premise of the Cousins lawsuit is identical for both the defamation and tortious interference claims. The act constituting the "tort" of defamation was the email, and the meaning it conveyed. The act constituting the "tort" of tortious interference was the email, and the meaning it conveyed.

**2. Goodier's Motivation Was Political**

Simply as a matter of ordinary common-law doctrine, Cousins' tortious interference claim is fatally flawed. As the Superior Court correctly recognized, under Delaware law the tortious interference claim is viable only if Goodier's *sole* motivation was to interfere with Cousins' contract with Bayard: "Under Delaware law, however, '[o]nly if the defendant's *sole* motive was to interfere with the contract will this factor support a finding of improper interference.'" Opinion at 16, *quoting WaveDivision Holdings, LLC v. Highland Capital Mgmt., L.P.*, 49 A.3d 1168, 1174 (Del. 2012) (emphasis in original).

As the Superior Court also correctly recognized, *of course* Goodier's motivation was largely, if not entirely, motivated by her *political* beliefs. Cousins' own Complaint confessed as much. The Superior Court thus correctly observed that "the Complaint states that Defendant's motivation was at least in part political, as Plaintiff's 'cancel culture' references bely." Opinion at 16. As such, Cousins' tortious interference was fatally deficient under Delaware common law.

### 3. The First Amendment Bars The Claim

Elemental propositions of constitutional law dictate that if the statements published in Goodier's email are insulated from liability under the First Amendment in a defamation claim, the identical statements must also be insulated from liability under a tortious interference or any other derivative claim. Cousins does not get four different versions of the First Amendment by pleading his case four times over.

Cousins makes much of the truism that the tort of intentional interference and the tort of defamation have different common-law elements. This misses the key point. While the torts may have different elements, the *facts* upon which Cousins seeks to impose liability on Goodier do not. As the Superior Court correctly reasoned:

> Plaintiff's three additional tort claims all rest on the very same allegedly defamatory statements made by Defendant which are the subject of Plaintiff's defamation claim. If those statements are not actionable as defamation, they are not actionable as tortious interference with contract, conspiracy, or aiding and abetting. The same First Amendment protections that insulate Defendant from liability for defamation insulate her from liability for tortious interference with contract.

Opinion at 15.

Goodier has not found any decision by any federal or state court that has held that a statement insulated from liability for defamation under the First Amendment as an expression of opinion may nonetheless be actionable when the *same* statement is, without more, alleged to constitute the predicate act for a claim for tortious

interference with contract, or any other tort. Cousins cites no such case, from any court, anywhere in the country.

In contrast, Goodier has located and cited below countless cases from around the nation holding that such liability may *not* be imposed. That the law be so one-sided is no surprise. Any other rule would permit defeat of fundamental constitutional values through the ruse of crafty pleading. "Although the limitations that define the First Amendment's zone of protection for the press were established in defamation actions, they are not peculiar to such actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement: 'that constitutional protection does not depend on the label given the stated cause of action.'" *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1042 (1986).

**4. Artifice Of Pleading Must Not Prevail Over Substance**

Two Delaware cases decided in the common-law context demonstrate that a plaintiff may not through the artifice of clever pleading avoid the strictures of defamation law that would otherwise apply.

In *Hoover v. Van Stone*, 540 F. Supp. 1118 (D. Del. 1982), the Delaware federal District Court, applying Delaware law, held that a counterclaim for defamation was barred under the Delaware absolute "judicial proceedings" privilege. The issue before the court was whether the judicial proceedings privilege, originally developed within the contours of defamation law, should also be applied

to claims for tortious interference with contractual relationships, abuse of process, and barratry. The court held that the privilege should apply across-the-board, less the policies animating the privilege be defeated by mere artful pleading:

> Defendants argue that even if the absolute privilege bars an action for defamation, it does not preclude the prosecution of the three other counts contained in the counterclaim. These counts, however, are all predicated on the very same acts providing the basis for the defamation claim. Application of the absolute privilege solely to the defamation count, accordingly, would be an empty gesture indeed, if, because of artful pleading, the plaintiff could still be forced to defend itself against the same conduct regarded as defamatory.

*Id.* at 1124.

*Hoover* was endorsed and relied upon with approval by this Court in *Barker v. Huang*, 610 A.2d 1341, 1348 (Del. 1992). In *Barker* this Court held that the Superior Court erred in not applying the absolute privilege applicable in defamation actions to the other causes of action that had been pleaded as well:

> However denominated, Barker's claim is that Huang intentionally made derogatorily false statements about her, and that she has been harmed thereby. To the extent that such statements were made in the course of judicial proceedings, they are privileged, regardless of the tort theory by which the plaintiff seeks to impose liability. We therefore hold that Barker's claims of invasion of privacy and intentional infliction of emotional distress, to the extent that they complain about statements made by Huang during the course of the *Rochen* litigation, are barred by the absolute privilege.

*Id*. at 1349. *Hoover* and *Barker* thus established the principle that a plaintiff may not effectuate an "end run" around a privilege applicable to defamation actions by recasting the same harm under the guise of other causes of action. While *Hoover*

and *Barker* dealt with a common-law immunity, the principle certainly applies with equal if not greater force when the source of the immunity is the United States Constitution.

**5. Tortious Interference Is Not Invisible To The First Amendment**

Tortious interference is not invisible to the First Amendment. "A state may not, by manipulating its definition of the elements of a tort, impose civil liability for constitutionally protected expression." Robert L. Tucker, *"and the Truth Shall Make You Free": Truth As A First Amendment Defense in Tortious Interference with Contract Cases*, 24 Hastings Const. L.Q. 709, 726 (1997).

The seminal decision applying First Amendment principles to such claims is the decision of the United States Supreme Court in *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 916-17 (1982), in which the Supreme Court held that that the First Amendment barred tortious interference claims such as those advanced by Cousins.

Cousins argues that *Claiborne* does not apply because the boycott in *Claiborne* was intended in part to influence government and conducted in the general public forum, whereas Goodier was allegedly seeking to influence members of the Bayard firm through an email she sent to the firm. This proposition is wrong.

Nothing in *Claiborne* indicated that the First Amendment rights of the boycotters was tethered to the targeting of government. The targets of the boycott

in *Claiborne*, and the plaintiffs who sued, were *private* businesses owned by white merchants. *Id.* at 907. The Supreme Court in *Claiborne* made it clear that the actions of the civil rights activists were aimed at reforming the entire *societal regime* of prejudice: "The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with *a social structure* that had denied them rights to equal treatment and respect." *Id.* (emphasis added). Moreover, nothing in *Claiborne* indicated that statements communicated to merchants would have lost their attention had they been communicated directly, in individualized conversations. *Claiborne*, of course, was decided before the internet or email even existed. But the *mode* of communication was not the point of *Claiborne*. The point of *Claiborne* was the protection of speech, even speech calculated to influence action, on matters of public concern.

The court in *Claiborne* thus relied heavily on its previous decision in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), in which a community organization distributed leaflets critical of a private real estate broker for alleged blockbusting tactics, letting the "neighbors know what he was doing to us." *Id*. at 417. The purpose of the expression was to influence the behavior of the real estate broker. *Id.* at 419 ("Petitioners plainly intended to influence respondent's conduct by their activities.") The United States Supreme Court held that the First Amendment insulated the broker's critics from censorship and prior restraint,

rejecting the lower court's view that the putatively coercive motive of the expressive activity somehow stripped it of First Amendment protection. That court noted that "[t]he Appellate Court appears to have viewed the alleged activities as coercive and intimidating, rather than informative and therefore as not entitled to First Amendment protection." *Id.* at 418. Elaborating, the United States Supreme Court observed that "the Appellate court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement." *Id.* at 419. But the motive to coerce, the Supreme Court held, did not matter: "The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment." *Id.*

As in both *Claiborne* and *Organization for a Better Austin*, Goodier's speech rests at the core of the First Amendment. Goodier's criticism of a Cousins' lawsuit challenging a public school district's decision to change a mascot is manifestly political speech on a matter of public concern, critiquing a lawsuit against a government agency. "[S]peech on 'matters of public concern' ... is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (Plurality Opinion of Powell, J.), *quoting First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). The First Amendment reflects "a profound national commitment to the principle that debate on public

issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This commitment reflects the reality "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Thus "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983)(internal quotation marks and citation omitted).

No jury is entitled to render a verdict against Goodier because it disagrees with Goodier's views on the Chadds Ford mascot lawsuit. There might well be jurors who agree with Goodier and find the statements expressed by Cousins in his mascot lawsuit contemptuous. There might also be jurors who find Cousins' lawsuit to be on the right side of history and feel contempt toward Goodier for criticizing it. The whole point of the First Amendment is to leave these debates to the marketplace of ideas; the nation's courts do not sit to adjudicate such questions. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Neither Goodier's speech nor Cousins' speech may be restricted simply because they may cause upset or arouse contempt. "If there is a bedrock principle

underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley v. Irish–American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 574 (1995). *See also Snyder v. Phelps*, 562 U.S. 443 (2011) (homophobic picketing of military funeral protected speech).

**6. The Cases Cited By Cousins Are Not Applicable**

Cousins quotes isolated sound-bites from various cases that have properly permitted tortious interference claims to move forward in an attempt to create the false impression that somehow Cousins' tortious interference claim here is immunized under the First Amendment. The cases Cousins invokes, however, do not support the propositions for which they are invoked.

*Lloyd v. Jefferson*, 53 F. Supp. 2d 643, 651 (D. Del. 1999), *aff'd in part, dismissed in part*, 262 F.3d 403 (3d Cir. 2001), was a suit brought by a contract employee of the state of Delaware against Delaware law enforcement officials alleging violation of her federal constitutional rights and related state claims, including tortious interference with contract. As relevant here, the gravamen of the tortious interference complaint was that the government officials sought to get the plaintiff fired from her job in retaliation for the plaintiff's complaint against one of

the government officials alleging gender discrimination. Unlike Goodier's email, there was no expression of opinion on matters of public concern in *Lloyd*. Nor is Goodier's email an action by a government official seeking to retaliate against a government employee in retaliation for allegations of sexual discrimination. This suit is brought by one private citizen, Cousins, against another, Goodier, because Goodier expressed her opinion that a lawsuit filed by Cousins was tone-deaf to racism. *Lloyd* has nothing to do with the facts or law applicable here.

*Nelson v. Fleet Nat'l Bank,* 949 F. Supp. 254 (D. Del. 1996) was a sexual harassment suit alleging federal civil rights law claims and common-law claims against an alleged sexual predator, who among other things made female employees wear tee-shirts bearing the slogan "Need a Quickie" to an industry picnic, and engaged in other egregious acts of sexual harassment. *Id.* at 257. Quite soundly, the court found that the victim of this harassment had alleged facts sufficient to state a claim for tortious interference, as an adjunct to her civil rights law claims. Nothing in *Nelson,* however, supports the proposition that a public rebuke of a lawsuit as tone-deaf to racism constitutes is stripped of protection under the First Amendment.

**7. National Precedent Stands Overwhelmingly Against Cousins**

The national precedent stands overwhelmingly against Cousins. *See, e.g., Blatty v. New York Times Co.*, 42 Cal. 3d at 1045 ("It is plain that Blatty's intentional interference claims have as their gravamen the alleged injurious falsehood of a

statement. . . . Because these causes of action thus have as their gravamen the alleged injurious falsehood of a statement, they must satisfy the requirements of the First Amendment. It is also plain that Blatty's intentional interference claims fail to satisfy First Amendment requirements."); *Resolute Forest Products, Inc. v. Greenpeace Int'l*, 302 F. Supp. 3d 1005, 1016 (N.D. Cal. 2017) ("Therefore, claims which are similar to defamation, such as tortious interference with contractual or prospective relationships 'are subject to the same first amendment requirements that govern actions for defamation.'"), *quoting Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990); *Gardner v. Martino*, 563 F.3d 981, 992 (9th Cir. 2009) (applying *Unelko's* holding to actions for intentional interference with economic relationships and for prospective economic advantage); *Med. Lab. Mgmt. Consultants v. Am. Broadcasting Cos., Inc.*, 306 F.3d 806, 821 (9th Cir. 2002) (Tortious interference causes of action are subject to First Amendment requirements); *Redco Corp. v. CBS, Inc*., 758 F.2d 970, 973 (3d Cir. 1985) (unless defendants "can be found liable for defamation, the intentional interference with contractual relations count is not actionable"); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir. 1994) (Constitutional requirements for defamation "must equally be met for a tortious interference claim based on the same conduct or statements"; otherwise "a plaintiff may ... avoid the protection afforded by the Constitution ... merely by the use of

creative pleading"); *South Dakota v. Kansas City S. Indus.*, 880 F.2d 40, 50–51 (8th Cir. 1989) (applying First Amendment to tortious interference); *Eddy's Toyota of Wichita, Inc. v. Kmart Corp.*, 945 F. Supp. 220, 224 (D. Kan. 1996) ("[T]he court agrees with defendant that the letters in this circumstance are protected free speech and cannot form a basis for plaintiff's tortious interference claim," applying *Claiborne*); *Nat'l Org. for Women, Inc. v. Scheidler*, 1997 WL 610782, at *31 (N.D. Ill. Sept. 23, 1997) ("The court therefore concludes that the application of the state law of tortious interference with contractual relations to Migliorino's conduct in this case would violate the First Amendment."); *City of Keene v. Cleaveland*, 118 A.3d 253, 260 (N.H. 2015) (tortious interference claim barred under First Amendment principles established in *Claiborne*); *Cincinnati Arts Ass'n v. Jones*, 2002-Ohio-5428, ¶ 54, 120 Ohio Misc. 2d 26, 37, 777 N.E.2d 346, 355 (C.P. 2002) (Rejecting tortious interference claim applying *Claiborne* and observing: "Even when contracts are interfered with by political speech, there is no right to recovery.").

## CONCLUSION

Cousins filed a suit to block a public school district from altering its mascot symbols. Goodier sent an email critical of Cousins' suit. Goodier's critique of the suit is protected by the First Amendment. The Superior Court properly so held, and it judgment should be affirmed.

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