Case No. 80350

IN THE SUPREME COURT OF THE STATE OF NEVADA

In the Matter of
DAPHNE WILLIAMS,
Appellant,

vs.

CHARLES "RANDY" LAZER,
Respondent.

ON PETITION FOR REVIEW

from the Eighth Judicial District Court for Clark County, Nevada

The Honorable Joseph Hardy, Jr., District Judge
District Court Case No. A-19-797156-C

AMICUS CURIAE BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NEVADA

IN SUPPORT OF APPELLANT DAPHNE WILLIAMS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amici Curiae American Civil Liberties Union and American Civil Liberties Union of Nevada are non-profit entities that do not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in *amici curiae*.

American Civil Liberties Union is represented by Arianna Demas, and American Civil Liberties Union of Nevada is represented by Nicole C. Levy.

/s/ *Nicole C. Levy*

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INTEREST OF AMICUS CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Nevada is a state affiliate of the ACLU. The ACLU and the ACLU of Nevada have frequently appeared before courts throughout the country in First Amendment cases and in cases dedicated to preventing, combating, and redressing sex and race discrimination, both as direct counsel and as amicus curiae. This includes defending against defamation cases that improperly infringe upon First Amendment rights. *See, e.g.*, *Green Grp. Holdings, LLC v. Schaeffer,* No. CV 16-00145-CG-N, 2016 WL 6023841 (S.D. Ala. Oct. 13, 2016); Order, *Energy Transfer Equity, LP v. Greenpeace International,* No. 1:17-cv-00173-BRW (D. N. Da. Feb. 14, 2019). The preservation of a pleading standard for defamation that satisfies the First Amendment is therefore of immense concern to the ACLU, its civil rights clients seeking justice, and its members and donors.

Amici file this *amicus curiae* brief conditionally with a concurrently filed Motion for Leave to File Amici Curiae Brief as permitted by NRAP 29(a).

[1] *Amici* confirm that no party or counsel for any party authored this brief in whole or in part, and that no person other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Through this case, Respondent Charles "Randy" Lazer, a real estate agent, seeks to hold Petitioner Daphne Williams, a Black woman, liable for filing a complaint with the Nevada Real Estate Division (NRED), alleging that she experienced racism and sexism during a real estate transaction. As Ms. Williams specified in her NRED complaint, Lazer said to her: "Daphne, I think you are going to be successful. When you become successful and you want to buy a bigger house and if your brother is retired by then, I'd be glad to be your realtor." Order of Affirmance at 2. To Williams, this communicated that Lazer viewed her as unsuccessful. She felt that this statement diminished her accomplishments and affronted her dignity on the basis of her gender and her race, *see id.*, an experience that is all too common for many women and people of color.

Although Lazer does not dispute that he uttered the offending remarks, he filed this lawsuit for defamation because he disagreed with Williams' view that those remarks were discriminatory. The Court of Appeals held that Williams' characterization of Lazer's remarks as racist and sexist was not a constitutionally protected statement of opinion, but rather a defamatory statement of fact. *Id.* at 9–10.

This Court should grant review and reverse. Speech about race and gender discrimination is political speech lying at the heart of the First Amendment's

protections. As courts throughout the country have recognized, the meaning of terms like "racist" and "sexist" continues to be vigorously disputed, and it is error to deem those characterizations factual in the defamation context. To hold otherwise would chill public debate on matters of overriding national concern and make it more difficult to expose and combat harmful prejudice.

The Court of Appeals erred in holding that statements of opinion lose their constitutional protection if they are derogatory, if they are styled as statements of fact, or if the speaker believes them to be true. None of these factors can remove the constitutional protection from a paradigmatic statement of opinion, such as the one at issue here.

ARGUMENT

I. The First Amendment protects the right to characterize another person's views, words, and actions as racist, sexist, or otherwise bigoted.

The First Amendment exists to enable and protect "uninhibited, robust, and wide-open" debate on public issues, *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), and to "bring[] about . . . political and social changes desired by the people." *Roth v. U.S.*, 354 U.S. 476, 484 (1957). To fulfill this purpose, our national commitment to public discourse—and our First Amendment rights—"must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies

of their period." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 147 (1967) (quoting *Thornhill v. Ala.*, 310 U.S. 88, 102 (1940)).

Today, those exigencies include attempts to address a long legacy of racism and sexism in American society, and the housing market in particular. Attempts to identify and address discrimination in the housing market are "a social necessity required for the 'maintenance of our political system and an open society.'" *Curtis Pub. Co.*, 388 U.S. at 149 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)). In this context, speech condemning racist and sexist views, statements, or behavior is "not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Hustler*, 485 U.S. at 51 (1988) (citation omitted).

While frank discussions about racism, sexism, and other forms of invidious discrimination are essential to robust public debate and societal change, the precise contours of these categories have been, and continue to be, hotly contested. As the Seventh Circuit observed in *Stevens v. Tillman*, the meaning of the term "racist" has evolved over time to mean everything from "a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races," to "[h]e is neither for me nor of our race," "she is condescending to me, which must be because of my race," and "she thinks all black mothers are on welfare, which is stereotypical." 855 F.2d 394, 402 (7th Cir. 1988) (holding that defamation

liability could not be imposed for statements characterizing a public school principal's remarks as "very racist," and the principal herself as "racist" and "very insensitive to the needs of our community"). Today, people continue to debate what constitutes invidious discrimination.

Even if there was a robust consensus about the meaning of terms like "racist" and "sexist," the First Amendment would still require that people have the freedom to define these concepts for themselves and to attempt to persuade others to adopt their views. "Individuals should be able to express their views about the prejudices of others without the chilling effect of a possible lawsuit in defamation resulting from their words." *Ward v. Zelikovsky*, 136 N.J. 516, 535 (1994) (quoting *Rybas v. Wapner*, 31 Pa. Super. 51, 55 (1983)).

For these reasons, identifications of ideas, speech, or actions as racist, sexist, or otherwise discriminatory must be treated as statements of opinion. The Supreme Court has long recognized that statements of opinion are constitutionally protected against defamation liability. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 21 (1990). *See also, e.g., Pegasus v. Reno Newspapers, Inc.*, 57 P.3d 82, 87 (Nev. 2002); *Nevada Ind. Broadcasting v. Allen*, 664 P.2d 337, 341 (Nev. 1983). "An *evaluative* opinion involves a value judgment based on true information disclosed to or known by the public. Evaluative opinions convey the publisher's judgment as to the quality of another's behavior and, as such, it is not a statement of fact."

People for Ethical Treatment of Animals v. Bobby Berosini, Ltd., 111 Nev. 615, 624 (1995), *overruled on other grounds by City of Las Vegas Downtown Redevelopment Agency v. Hecht*, 113 Nev. 644, 940 P.2d 134 (1997); *see also Abrams v. Sanson*, 136 Nev. 83, 90 (2020).

Consistent with Supreme Court precedent, courts around the country have held that characterizations of another person's views, words, or actions as racist, sexist, or otherwise bigoted are protected statements of opinion. "[T]o call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel." *Raible*, 341 F. Supp. at 807 (holding that statements describing an individual as "angry, uncultured, crude, violence prone, hostile to both rich and poor, and racially prejudiced" are not actionable). "Standing alone . . . [an accusation of bigotry] is an opinion." *Puccia v. Edwards*, No. 98-00065, 1999 WL 513895, at *3 (Mass. Super. Court. Apr. 28, 1999). *See also Squitieri v. Piedmont Airlines, Inc.*, No. 3:17CV441, 2018 WL 934829, at *4 (W.D.N.C. Feb. 16, 2018) ("racist" is nonactionable opinion); *Hanson,* 2014 WL 2931817, at *6 (same for "sexist" and "jerk"); *Tillett v. BJ's Wholesale Club, Inc*., No. 3:09-CV-1095-J-34MCR, 2010 WL 11507322, at *4 (M.D. Fla. July 30, 2010) (same for arguing that a plaintiff is associated with "abusive, hostile and intimidating" symbols or ideologies and thereby "'insinuat[ing]' that he is racist"); *Jackson v. United Steel, Paper & Forestry,*

Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC, No. 2:07-CV-461-JEO, 2009 WL 10704261, at *39 (N.D. Ala. Feb. 23, 2009) (same for "racist" and "radical"); *Martin v. Brock*, No. 07C3154, 2007 WL 2122184, at *3 (N.D. Ill. July 19, 2007) (same for "racist"); *Smith v. Sch. Dist. of Phila.*, 112 F. Supp. 2d 417, 429 (E.D. Pa. 2000) (same for "racist and anti-Semitic"); *Vail v. The Plain Dealer Publ'g Co*., 649 N.E.2d 182, 186 (Ohio 1995) (same for "[e]ngaging in 'an anti-homosexual diatribe' and fostering "homophobia'").

Of course, people accused of bigotry often disagree passionately with such characterizations of their actions or words. But, a plaintiff's argument that an observer "might come to a different conclusion upon review of the facts . . . does not make the [d]efendants' assessment of [the] acts [as bigoted] anything other than opinion." *Turner v. Wells*, 879 F.3d 1254, 1265 (11th Cir. 2018). If anything, it only bolsters the necessary conclusion that they are statements of opinion—i.e., things about which people can disagree.

Without the robust protections of the opinion doctrine, those seeking to eradicate bigotry would think twice before publicly condemning racism or sexism, whether through public debate or by petitioning the government for redress—and those who believe they've been wrongly accused of bigotry would similarly feel chilled from defending themselves robustly.

In this case, the Court of Appeals reasoned that Williams' characterization of Lazer's comment as "sexist" and "racist" was not protected opinion, but rather a defamatory statement of fact, because "her NRED complaint appears to have been meant to have Lazer viewed in contempt by the NRED." Order of Affirmance at 10. The same could be said about any accusation of bigotry, particularly in an administrative filing or court proceeding. But, as described above, courts have repeatedly held that an accusation of bigotry is a protected statement of opinion, not a defamatory statement of fact.

The only case cited by the Court of Appeals, *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706 (2002), does not contravene these authorities. Rather, the cited passage from *Pegasus* merely reiterates the well-established principle that an express or implied statement of fact is defamatory in nature if it "would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt." *Id.* at 714. A statement of opinion based on disclosed facts, such as the one at issue here, is fully protected by the First Amendment, "no matter how unjustified and unreasonable the opinion may be or how derogatory it is." Restatement (Second) of Torts § 566 cmt. c (1977); *accord, e.g., Standing Comm. on Discipline of U.S. Dist. Court for Cent. Dist. of California v. Yagman*, 55 F.3d 1430, 1439 (9th Cir. 1995).

The Court of Appeals also reasoned that Williams' statement was not protected opinion, because her NRED complaint was styled as a "statement of fact," and because Williams averred that she has never doubted the truth of her allegations. Order of Affirmance at 9–10. These characteristics are, however, insufficient to remove the constitutional protection from paradigmatic statements of opinion. Most people sincerely believe in the objective truth of their opinions, but that does not alter their First Amendment right to express those opinions without fear of defamation lawsuits; if it did, only the moral relativist would be entitled to constitutional protection. *See Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). Nor does an evaluative statement of opinion, such as the statement that someone else is a bad person, become a potentially defamatory statement of fact because it happens to appear in a formal complaint under the heading "Statement of Fact." *See id.* (just as labeling a statement as "opinion" does not automatically make it opinion, labeling it as "fact" does not make it fact); *see also Rose v. Hollinger Int'l, Inc.*, 889 N.E.2d 644, 648 (Ill. App. Ct. 2008) (noting that although courts consider the context in which the statement appears in determining whether it is fact or opinion, "the emphasis is on whether the statement is capable of objective verification"). Although the Court of Appeals considered Williams' characterization of Lazer's comment unreasonable, that is simply not the test for determining whether Williams' statement is protected opinion under the First Amendment.

CONCLUSION

For the foregoing reasons, this Court should grant review and reverse.

Respectfully submitted,

Dated: January 4, 2020

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, type-face, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2019 with a proportionally spaced typeface in 14-point, double spaced Times New Roman font.

2. I certify that this brief complies with the type-volume limitations of NRAP 29(e) because it contains 2228 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 4th day of January, 2020.

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CERTIFICATE OF SERVICE

I certify that on January 4, 2020, I submitted the foregoing AMICUS CURIAE BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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