No. 22-293

In The Supreme Court of the United States

ANTHONY NOVAK,

Petitioner,

v.

CITY OF PARMA, OHIO; KEVIN RILEY and THOMAS CONNOR, individually and in their official capacities as employees of the City of Parma, Ohio,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *THE ONION* AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Onion is the world's leading news publication, offering highly acclaimed, universally revered coverage of breaking national, international, and local news events. Rising from its humble beginnings as a print newspaper in 1756, *The Onion* now enjoys a daily readership of 4.3 trillion and has grown into the single most powerful and influential organization in human history.

In addition to maintaining a towering standard of excellence to which the rest of the industry aspires, *The Onion* supports more than 350,000 full- and part-time journalism jobs in its numerous news bureaus and manual labor camps stationed around the world, and members of its editorial board have served with distinction in an advisory capacity for such nations as China, Syria, Somalia, and the former Soviet Union. On top of its journalistic pursuits, *The Onion* also owns and operates the majority of the world's transoceanic shipping lanes, stands on the nation's leading edge on matters of deforestation and strip mining, and proudly conducts tests on millions of animals daily.

The Onion's keen, fact-driven reportage has been cited favorably by one or more local courts, as well as Iran and the Chinese state-run media. Along the way,

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[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Timely notice of the intent to file this *amicus* brief was provided to all parties, and all parties have consented to the filing of this brief.

The Onion's journalists have garnered a sterling reputation for accurately forecasting future events. One such coup was *The Onion*'s scoop revealing that a former president kept nuclear secrets strewn around his beach home's basement three years before it even happened.[2]

The Onion files this brief to protect its continued ability to create fiction that may ultimately merge into reality. As the globe's premier parodists, *The Onion*'s writers also have a self-serving interest in preventing political authorities from imprisoning humorists. This brief is submitted in the interest of at least mitigating their future punishment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Americans can be put in jail for poking fun at the government? This was a surprise to America's Finest News Source and an uncomfortable learning experience for its editorial team. Indeed, "Ohio Police Officers Arrest, Prosecute Man Who Made Fun of Them on Facebook" might sound like a headline ripped from the front pages of *The Onion*—albeit one that's considerably less amusing because its subjects are real. So, when

[2] *See Mar-a-Lago Assistant Manager Wondering if Anyone Coming to Collect Nuclear Briefcase from Lost and Found*, The Onion, Mar. 27, 2017, https://bit.ly/3S40xiP.

The Onion learned about the Sixth Circuit's ruling in this case, it became justifiably concerned.

First, the obvious: *The Onion*'s business model was threatened. This was only the latest occasion on which the absurdity of actual events managed to eclipse what *The Onion*'s staff could make up. Much more of this, and the front page of *The Onion* would be indistinguishable from *The New York Times*.

Second, *The Onion* regularly pokes its finger in the eyes of repressive and authoritarian regimes, such as the Islamic Republic of Iran, the Democratic People's Republic of North Korea, and domestic presidential administrations. So *The Onion*'s professional parodists were less than enthralled to be confronted with a legal ruling that fails to hold government actors accountable for jailing and prosecuting a would-be humorist simply for making fun of them.

Third, the Sixth Circuit's ruling imperils an ancient form of discourse. The court's decision suggests that parodists are in the clear only if they pop the balloon in advance by warning their audience that their parody is not true. But some forms of comedy don't work unless the comedian is able to tell the joke with a straight face. Parody is the quintessential example. Parodists intentionally inhabit the rhetorical form of their target in order to exaggerate or implode it—and by doing so demonstrate the target's illogic or absurdity.

Put simply, for parody to work, it has to plausibly mimic the original. The Sixth Circuit's decision in this

case would condition the First Amendment's protection for parody upon a requirement that parodists explicitly say, up-front, that their work is nothing more than an elaborate fiction. But that would strip parody of the very thing that makes it function.

The Onion cannot stand idly by in the face of a ruling that threatens to disembowel a form of rhetoric that has existed for millennia, that is particularly potent in the realm of political debate, and that, purely incidentally, forms the basis of *The Onion*'s writers' paychecks.

ARGUMENT

I. Parody Functions By Tricking People Into Thinking That It Is Real.

Tu stultus es. You are dumb. These three Latin words have been *The Onion*'s motto and guiding light since it was founded in 1988 as America's Finest News Source, leading its writers toward the paper's singular purpose of pointing out that its readers are deeply gullible people.

The Onion's motto is central to this brief for two important reasons. First, it's Latin. And *The Onion* knows that the federal judiciary is staffed entirely by total Latin dorks: They quote Catullus in the original Latin in chambers. They sweetly whisper "*stare decisis*" into their spouses' ears. They mutter "*cui bono*" under their breath while picking up after their neighbors'

dogs. So *The Onion* knew that, unless it pointed to a suitably Latin rallying cry, its brief would be operating far outside the Court's vernacular.

The second reason—perhaps mildly more important—is that the phrase "you are dumb" captures the very heart of parody: tricking readers into believing that they're seeing a serious rendering of some specific form—a pop song lyric, a newspaper article, a police beat—and then allowing them to laugh at their own gullibility when they realize that they've fallen victim to one of the oldest tricks in the history of rhetoric. *See San Francisco Bay Guardian, Inc. v. Super. Ct.*, 21 Cal. Rptr. 2d 464, 466 (Ct. App. 1993) ("[T]he very nature of parody . . . is to catch the reader off guard at first glance, after which the 'victim' recognizes that the joke is on him to the extent that it caught him unaware.").

It really is an old trick. The word "parody" stretches back to the Hellenic world. It originates in the prefix *para*, meaning an alteration, and the suffix *ode*, referring to the poetry form known as an ode.[3] One of its earliest practitioners was the first-century B.C. poet Horace, whose *Satires* would replicate the exact form known as an ode—mimicking its meter, its subject matter, even its self-serious tone—but tweaking it

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[3] *Oxford English Dictionary Online* (3d ed. 2005); *see also Online Etymology Dictionary*, https://bit.ly/3E0WzUB (last updated Oct. 13, 2021).

ever so slightly so that the form was able to mock its own idiocies.[4]

This is not a mere linguistic anecdote. The point is instead that without the capacity to fool someone, parody is functionally useless, deprived of the tools inscribed in its very etymology that allow it, again and again, to perform this rhetorically powerful sleight-of-hand: It adopts a particular form in order to critique it from within. *See Farah v. Esquire Magazine*, 736 F.3d 528, 536 (D.C. Cir. 2013).

Parody leverages the expectations that are created in readers when they see something written in a particular form. This could be anything, but for the sake of brevity, let's assume that it is a newspaper headline—maybe one written by *The Onion*—that begins in this familiar way: "Supreme Court Rules . . . " Already, one can see how this works as a parodic setup, leading readers to think that they're reading a newspaper story. With just three words, *The Onion* has mimicked the dry tone of an Associated Press news story, aping the clipped syntax and the subject matter. *The Onion* could go even further by putting that headline on its website—which features a masthead and Latin motto, and the design of which parodies the aesthetics of major news sites, further selling the idea that this is an actual news story.

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[4] Horace, *Satires, Epistles and Ars Poetica* 196-97 (H. Rushton Fairclough, transl., Harvard University Press, 1926), https://bit.ly/3Rhbm0j.

Of course, what moves this into the realm of parody is when *The Onion* completes the headline with the punchline—the thing that mocks the newspaper format. *The Onion* could do something like: "Supreme Court Rules Supreme Court Rules."[5] *The Onion* could push the parody even further by writing the joke out in article format with, say, a quote from the Justices in the majority, opining that, "while the U.S. Constitution guarantees equality of power among the executive, legislative, and judicial branches, it most definitely does not guarantee equality of coolness," and rounding off by reporting the Supreme Court's holding that the Court "rules and rules totally, all worthy and touched by nobody, in perpetuity, and in accordance with Article Three of the U.S. Constitution. The ability of the President and Congress to keep pace with us is not only separate, but most unequal."[6]

As can be seen, the Associated Press form is followed straight through into the article. That rhetorical form sets up the reader's expectations for how the idiom will play out—expectations that are jarringly juxtaposed with the content of the article. The power of the parody arises from that dissonance into which the reader has been drawn. *Farah*, 736 F.3d at 537.

Here's another example: Assume that you are reading what appears to be a boring economics paper about the Irish overpopulation crisis of the eighteenth

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[5] *Supreme Court Rules Supreme Court Rules*, The Onion, Jan. 22, 1997, https://bit.ly/3UcdWHG.

[6] *Id.*

century, and yet, strangely enough, it seems to advocate for solving the dilemma by cooking and eating babies. That seems a bit cruel—until you realize that you in fact are reading *A Modest Proposal*. To be clear, *The Onion* is not trying to compare itself to Jonathan Swift; its writers are far more talented, and their output will be read long after that hack Swift's has been lost to the sands of time. Still, *The Onion* and its writers share with Swift the common goal of replicating a form precisely in order to critique it from within.

That leverage of form—the mimicry of a particular idiom in order to heighten dissonance between form and content—is what generates parody's rhetorical power. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994) ("Parody needs to mimic an original to make its point."). If parody did not deliver that advantage, then no one would use it. Everyone would simply draft straight, logical, uninspiring legal briefs instead.

II. Because Parody Mimics "The Real Thing," It Has The Unique Capacity To Critique The Real Thing.

Importantly, parody provides functionality and value to a writer or a social commentator that might not be possible by, say, simply stating a critique outright and avoiding all the confusion of readers mistaking it for the real deal. One of parody's most powerful capacities is rhetorical: It gives people the ability to mimic the voice of a serious authority—whether that's

the dry news-speak of the Associated Press or the legalese of a court's majority opinion—and thereby kneecap the authority from within. Parodists can take apart an authoritarian's cult of personality, point out the rhetorical tricks that politicians use to mislead their constituents, and even undercut a government institution's real-world attempts at propaganda. *Farah*, 736 F.3d at 536 (noting that the point of parody is to "censure the vices, follies, abuses, or shortcomings of an individual or society") (cleaned up).

Time and again, that's what has occurred with *The Onion*'s news stories. In 2012, for example, *The Onion* proclaimed that Kim Jong-un was the sexiest man alive.[7] China's state-run news agency republished *The Onion*'s story as true alongside a slideshow of the dictator himself in all his glory.[8] The Fars Iranian News Agency uncritically picked up and ran with *The Onion*'s headline "Gallup Poll: Rural Whites Prefer Ahmadinejad To Obama."[9] Domestically, the number of elected leaders who are still incapable of parsing *The Onion*'s coverage as satire is daunting, but one particular example stands out: Republican Congressman John Fleming, who believed that he needed to warn his constituents of a dangerous escalation of the pro-choice

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[7] *Kim Jong-Un Named* The Onion*'s Sexiest Man Alive For 2012*, The Onion, Nov. 14, 2012, https://bit.ly/2MRuPDH.

[8] John Bacon, *China paper falls for spoof on 'sexiest' Korean leader*, USA Today, Nov. 27, 2012, https://bit.ly/3dhatqA.

[9] Emily Heil, *Iranian news service cites faux* Onion *story on poll finding Ahmadinejad more popular than Obama*, Washington Post, Sept. 28, 2012, https://wapo.st/3S40T99.

movement after reading *The Onion*'s headline "Planned Parenthood Opens $8 Billion Abortionplex."[10]

The point of all this is not that it is funny when deluded figures of authority mistake satire for the actual news—even though that can be extremely funny. Rather, it's that the parody allows these figures to puncture their own sense of self-importance by falling for what any reasonable person would recognize as an absurd escalation of their own views. In the political context, the effect can be particularly pronounced. *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 53–55 (1988); *see also Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir. 1986) (Wilkinson, J., dissenting from denial of rehearing) ("Nothing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed.").

III. A Reasonable Reader Does Not Need A Disclaimer To Know That Parody Is Parody.

At bottom, parody functions by catering to a reasonable reader—one who can tell (even after being tricked at first) that the parody is not real. If most readers of parody didn't live up to this robust standard, then there would be nothing funny about the Chinese government believing that a pudgy dictator like Kim Jong-un was the sexiest man on Earth. Everyone would just agree that it was perfectly reasonable for them to be taken in by the headline.

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[10] Mackenzie Weinger, *Congressman links to* Onion *story*, Politico, Feb. 6, 2012, https://politi.co/3RJFa6B.

The law turns on the same reasonable-person construct. The reasonable-reader test gauges whether a statement can reasonably be interpreted as stating actual facts, thereby ensuring that neither the least humorous nor the most credulous audience dictates the boundaries of protected speech. *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990); *Mink v. Knox*, 613 F.3d 995, 1005 (10th Cir. 2010); *Moldea v. New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir. 1994); *see also Golb v. Att'y Gen. of N.Y.*, 870 F.3d 89, 102 (2d Cir. 2017) ("[A] parody enjoys First Amendment protection notwithstanding that not everybody will get the joke.").

And the "reasonable reader" is "'no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity.'" *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 157 (Tex. 2004) (quoting *Patrick v. Sup. Ct.*, 27 Cal. Rptr. 2d 883, 887 (Ct. App. 1994)). "Nor is the reasonable person some totally humorless drudge who cannot perceive the presence of subtle invective." *Patrick*, 27 Cal. Rptr. 2d at 887. Instead, the reasonable reader's perspective "is more informed by an assessment of her well-considered view than by her immediate yet transitory reaction," particularly "in light of the special characteristics of satire," which leverage that transitory reaction for rhetorical effect. *Farah*, 736 F.3d at 536.

Context matters, but even a "poorly executed" parody[11] is ordinarily susceptible to the intellectual grasp of the reasonable reader. *Farah*, 736 F.3d at 535, 539. Reasonable readers do not need to be told explicitly what they have no serious trouble figuring out for themselves. *Id*. at 537.

And until the Sixth Circuit's decision, that is what most courts have held. Some courts have expressly held that disclaimers aren't required for parody to be protected. *Campbell*, for example, noted that "there is no reason to require parody to state the obvious (or even the reasonably perceived)." 510 U.S. at 582 n.17; *see also*, *e.g.*, *Cliffs Notes, Inc. v. Bantam Doubleday Dell Pub. Grp., Inc.*, 886 F.2d 490, 496 (2d Cir. 1989) ("There is no requirement that the cover of a parody carry a disclaimer that it is not produced by the subject of the parody, and we ought not to find such a requirement. . . .").

Other courts have held that parody published without a disclaimer is nonetheless protected speech. For example, in *NYSE v. Gahary*, 196 F. Supp. 2d 401 (S.D.N.Y. 2002), the district court found it "entirely plausible" that "no one in their right mind" would believe that the defendant—who posted obscene and vulgar messages online under the persona "Richard Grasso"—was the real-life Richard Grasso, the CEO of the New York Stock Exchange. *Id*. at 406–07. The court in *New Times* similarly rejected the notion that the

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[11] *See Gulliver's Travels* and *A Tale of a Tub* from aforementioned hack and rejected *Onion* freelancer, Jonathan Swift.

absence of a disclaimer was dispositive, noting that the reasonable reader had other "obvious clues" that an article was parody when it reported that a six-year-old girl was being prosecuted for her book report on Maurice Sendak's *Where the Wild Things Are* and included a photo of a small child holding a stuffed animal captioned, "Do they make handcuffs this small? Be afraid of this little girl." 146 S.W.3d at 158; *id*. at 160–61; *see also Patrick*, 27 Cal. Rptr. 2d at 887–88 (no reasonable reader would have been deceived by a memorandum purportedly written by a judge that declared a certain legal newspaper "contraband," announced a chambers-by-chambers search for copies of the publication, advised fellow judges and employees to conduct their "amorous escapades" elsewhere while the search was being conducted, and declared the judge's intent to suspend the election of his successor and remain in office indefinitely).

In this case, by contrast, the Sixth Circuit ruled that the defendant officers "could reasonably believe that some of Novak's Facebook activity was not parody" primarily because Mr. Novak "delet[ed] comments that made clear the page was fake." Pet. App. 8a–9a. But the lack of an explicit disclaimer makes no difference to whether a reasonable reader would discern that this speech was parody.

Just to be clear, this was not a close call on the facts: Mr. Novak's spoof Facebook posts advertised that the Parma Police Department was hosting a "pedophile reform event" in which successful participants could be removed from the sex offender registry and become

honorary members of the department after completing puzzles and quizzes; that the department had discovered an experimental technique for abortions and would be providing them to teens for free in a police van; that the department was soliciting job applicants but that minorities were "strongly encourag[ed]" not to apply; and that the department was banning city residents from feeding homeless people in "an attempt to have the homeless population eventually leave our City due to starvation." Pet. App. 139a–41a.

True; not all humor is equally transcendent. But the quality and taste of the parody is irrelevant. *See Hustler*, 485 U.S. at 55; *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 443 (10th Cir. 1982) (extending First Amendment protections to a parody that had "no redeeming features whatever"). And there is no real doubt that reasonable readers would have no difficulty in ascertaining that Parma's finest were not *actually* providing free abortions to teens in a police van, pardoning child sex offenders on the basis of their adeptness at puzzles, or intentionally starving the homeless. The absence of a disclaimer lends nothing to the analysis.

Under a proper understanding of the reasonable-reader test, a disclaimer not only spoils the punchline but is redundant. The Sixth Circuit's holding stands alone among the otherwise uniform approach courts have taken—and not in a good way.

IV. It Should Be Obvious That Parodists Cannot Be Prosecuted For Telling A Joke With A Straight Face.

This is the fifteenth page of a convoluted legal filing intended to deconstruct the societal implications of parody, so the reader's attention is almost certainly wandering. That's understandable. So here is a paragraph of gripping legal analysis to ensure that every jurist who reads this brief is appropriately impressed by the logic of its argument and the lucidity of its prose: *Bona vacantia*. *De bonis asportatis*. *Writ of certiorari*. *De minimis*. *Jus accrescendi*. *Forum non conveniens*. *Corpus juris*. *Ad hominem tu quoque*. *Post hoc ergo propter hoc*. *Quod est demonstrandum*. *Actus reus*. *Scandalum magnatum*. *Pactum reservati dominii*.

See what happened? This brief itself went from a discussion of parody's function—and the quite serious historical and legal arguments in favor of strong protections for parodic speech—to a curveball mocking the way legalese can be both impenetrably boring and belie the hollowness of a legal position. That's the setup and punchline idea again. It would not have worked quite as well if this brief had said the following: "Hello there, reader, we are about to write an *amicus* brief about the value of parody. Buckle up, because we're going to be doing some fairly outré things, including commenting on this text's form itself!"

Taking the latter route would have spoiled the joke and come off as more than a bit stodgy. But more

importantly, it would have disarmed the power that comes with a form devouring itself. For millennia, this has been the rhythm of parody: The author convinces the readers that they're reading the real thing, then pulls the rug out from under them with the joke. The heart of this form lies in that give and take between the serious setup and the ridiculous punchline. As Mark Twain put it, "The humorous story is told gravely; the teller does his best to conceal the fact that he even dimly suspects that there is anything funny about it."[12]

Not only is the Sixth Circuit on the wrong side of Twain, but grafting onto the reasonable-reader test a requirement that parodists explicitly disclaim their own pretense to reality is a disservice to the American public. It assumes that ordinary readers are less sophisticated and more humorless than they actually are.

And the stakes here are significant, involving no less than one of many more or less equally important components of social and political discourse. "[R]hetorical hyperbole . . . has traditionally added much to the discourse of our Nation." *Milkovich*, 497 U.S. at 20 (cleaned up). Although "parody is often offensive, it is nevertheless deserving of substantial freedom—both as entertainment and as a form of social and literary criticism." *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 33 (1st Cir. 1987) (cleaned up).

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[12] Mark Twain, *How to Tell a Story* (1895), https://bit.ly/3UDr3Si.

This Court has traditionally been hesitant to chill speech, and the prospect of chilling parody by imprisoning its practitioners provides equal cause for caution. "What may be difficult to communicate or understand when factually reported may be poignant and powerful if offered in satire." *Rogers v. Grimaldi*, 695 F. Supp. 112, 123 (S.D.N.Y. 1988), aff'd 875 F.2d 994 (2d Cir. 1989). "'[T]he last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them.'" *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 972–73 (10th Cir. 1996) (quoting *White v. Samsung Elecs. Am., Inc.*, 989 F.2d 1512, 1519 (9th Cir. 1993) (Kozinski, J., dissenting)).

The Onion intends to continue its socially valuable role bringing the disinfectant of sunlight into the halls of power. *See Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting Louis D. Brandeis, *Other People's Money and How the Bankers Use It* 62 (National Home Library Foundation ed. 1933)). And it would vastly prefer that sunlight not to be measured out to its writers in 15-minute increments in an exercise yard.

CONCLUSION

The petition for certiorari should be granted, the rights of the people vindicated, and various historical wrongs remedied. *The Onion* would welcome any one of the three, particularly the first.

Respectfully submitted,

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