QUESTION PRESENTED

Whether the defendant's conviction must be set aside under the fighting words doctrine of *Chaplinsky,* where the Connecticut Supreme Court recognized a "store manager" exception to the doctrine, thereby paving the way for the removal of verbal epithets from the doctrine's scope and deepening the conflict among the lower and state courts over the existence of the "police" exception and other similar exceptions?

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MISCELLANEOUS

No. _____

In The
Supreme Court Of The United States
October Term, 2017

STATE OF CONNECTICUT,
Petitioner,

v.

NINA C. BACCALA
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Connecticut in this case.

OPINION BELOW

The opinion of the Supreme Court of Connecticut, which is the subject of this petition, is reported as *State v. Baccala,* 326 Conn. 232, 163 A.3d 1 (2017), and is reprinted in the appendix (App.), *infra*, 1a-107a.

JURISDICTION

On July 11, 2017, the Supreme Court of Connecticut entered judgment in the case. The jurisdiction of this Court to review the judgment of the Supreme Court of Connecticut is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

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

Constitution of the United States, Amendment XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the

> State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

This case involves the defendant's successful First Amendment challenge to her breach of the peace conviction for abusing an assistant store manager with degrading epithets in a face-to-face confrontation in a supermarket. The Connecticut Supreme Court concluded that punishing the defendant for targeting the victim with a steady stream of personal insults – "cunt," "fat fucking bitch," and "fuck you" – violated the First Amendment because this vile speech did not constitute fighting words and, therefore, was protected by the First Amendment.[1] The Court's conclusion was based on its recognition of the disputed police exception to the fighting words doctrine, which this Court has referenced but never recognized, and expansion of the exception to store managers, which no court has ever considered. In

[1] The First Amendment is applicable to the States through the Fourteenth Amendment. *Virginia v. Black*, 538 U.S. 343, 358 (2003).

doing so, the Connecticut Supreme Court, in derogation of the First Amendment, has impeded the state's enforcement of its various laws that punish fighting words in the form of epithets, laying the foundation for the elimination of personal and vulgar insults from the ambit of unprotected speech.

A. Summary of Facts Underlying Defendant's Conviction

On September 30, 2013, Tara Freeman was working a 2 p.m. to 11 p.m. shift as an assistant manager of a Stop & Shop grocery store, in Vernon, Connecticut. Transcript (T) (September 11, 2014):22-23. At 9:50 p.m., Freeman received a telephone call requesting a Western Union money transfer, and she informed the caller that the store's service desk, which handled such transfers, was closed. T:23, 53-54. Freeman added that the store's Western Union computer was used for money transfers, but that she lacked a "user ID" to "sign into" that computer. T:24. The caller replied that she "really didn't give a shit," because she needed to pick up her money, and then let loose with "[p]retty much every swear word [one] can think of" before the call ended. T:24-25.

A few minutes later, the defendant appeared at the store's service desk and filled out a Western Union form. T:25-26. Freeman inquired whether the defendant was the person who had telephoned the store, but the defendant denied making the call. T:25. Nevertheless, because Freeman recognized the defendant's voice as the caller's, Freeman informed

the defendant that, as Freeman had previously explained over the telephone, the service desk was closed and Freeman lacked a "user ID." 9T:25. The defendant, who already was "a little upset," "became very upset again" and asked to speak to a store manager, to which Freeman replied that she was a manager. T:27. Freeman pointed to her picture on a wall of the store and stated "several times" that she was the manager. T:27-28. The defendant became "belligerent" and directed every "swear[]" word "in the book" at Freeman.[2] T:28. "[P]retty loud[ly]," the defendant asserted that Freeman was not the manager, said "fuck you" to Freeman, and called Freeman, among other insults, a "fat ugly bitch" and a "cunt," spelling out the word cunt. T:28.

During the incident, the store was open, there were customers inside the store, and some store employees were "around doing their job," including Sara Luce, a head cashier. T:28-29, 64-67, 70. Luce recalled that the defendant angrily directed various vulgarities at Freeman, including that Freeman was a "fat fucking bitch," and that the defendant walked away after Freeman told her to leave. T:69-70. According to Luce, Freeman said "[h]ave a good night" to the defendant, who responded by mumbling under her breath and communicating some "choice

[2] The defendant also raised a cane that was in her hand, but Freeman explained that "maybe [the defendant's raising of her cane] was part of her talking …." T:29.

words" as she left the store. T:29, 31. The entire incident lasted fifteen to twenty minutes. T:31

B. First Amendment Framework

A brief overview of First Amendment jurisprudence and its fighting words doctrine will supply the constitutional context of the decision below and assist in explaining why this petition for a writ of certiorari should be granted.

1. This Court's fighting words jurisprudence

In *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), this Court defined "insulting or fighting words" as a category of pure speech that, consistent with the First Amendment, is subject to punishment, and it opined that such speech plays "no essential part of any exposition of ideas" and is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." *Id.* at 571-72; see also *R.A.V. v. St. Paul*, 505 U.S. 377, 384-85 (1992) (fighting words "quite expressive," but still play no essential part in exposition of ideas). The *Chaplinsky* Court explained that fighting words are peripheral to the First Amendment because, by their "very utterance," they are "likely to provoke," or "tend to incite," "the average person" to "immediate" "retaliation," and "thereby cause a breach of the peace." 315 U.S. at 572, 574. The Court expressly stated that "[r]esort to epithets or personal abuse is

not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." *Id.* at 572 (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

In rejecting a First Amendment challenge to the application of New Hampshire's breach of the peace statute against a defendant for his speech on a "public sidewalk," near the entrance of "City Hall," where he repeatedly called the victim "a God damned racketeer" and "damned Fascist," and city government "Fascists or agents of Fascists," the *Chaplinsky* Court connected the constitutionally permissible punishment of "epithets or personal abuse" to the likelihood of such speech eliciting violence. 315 US. at 569, 572. The statutory language at issue prohibited "offensive, derisive or annoying word[s]" that are "address[ed]" to another person in a public place, "in his presence and hearing [and] with intent to deride, offend or annoy him…." *Id.* at 569. The state's highest court had interpreted the statute to bar "threatening," "profane," or "other disorderly words," including those that are "[d]erisive and annoying," which "men of common intelligence would understand" to be "likely to cause an average addressee," in a "face-to-face" encounter, "to fight," in the absence of a "disarming smile." *Id.* at 573.

Thus, from the circumstances of the case, the *Chaplinsky* Court both defined fighting words – speech that is likely to provoke the average person to immediate and unlawful retaliation – and held that, as applied, the New Hampshire statute passed First Amendment muster. However, the Court did not incorporate into its fighting words definition all of what the statute explicitly required (the communication of speech directly to an addressee in a face-to-face encounter) and implicitly required (the likelihood of speech provoking retaliation in the context of its surrounding circumstances, such as where speech has been accompanied by a "disarming smile"). 315 U.S. at 573.

Nearly thirty years later, in *Cohen v. California,* 403 U.S. 15 (1971), the Court added to the general fighting words definition that such speech must be directed to a specific addressee. It did so while concluding that punishing the defendant under a state breach of the peace statute for wearing a jacket "visibly" bearing the words "Fuck the Draft," in a municipal courthouse, did not constitute unprotected fighting words because those words were not "directed to the person of the hearer" and, therefore, did not constitute a "direct personal insult." *Cohen,* 403 U.S. at 20 (quoting *Cantwell,* 310 U.S. at 309); accord *Hess v. Indiana,* 414 U.S. 105, 106-08 (1973) (demonstrator's assumedly offensive statement about taking the "fucking street" again while officers tried to clear street not fighting words because his back was to officers and, therefore, statement "not

directed to any person or group in particular") (*per curiam*); *cf. Texas v. Johnson,* 491 U.S. 397, 409 (1989) (flag burning not fighting words because "[n]o reasonable onlooker would have regarded … generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or an invitation to exchange fisticuffs"). The *Cohen* Court also recapitulated *Chaplinsky's* definition of fighting words as words that, "when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"; 403 U.S. at 20; see also *Virginia v. Black,* 538 U.S. 343, 359 (2003) (same); thereby substituting the "ordinary citizen" for the "average person" and adding a "common knowledge" standard for determining which words are inherently likely to provoke violent retaliation from such a citizen.

Two years after *Cohen*, in *Lewis v. New Orleans*, 415 U.S. 130 (1974), the Court struck down a city ordinance as facially overbroad because it reached opprobrious language that was directed towards the police in the performance of their duties, which had not been narrowed to speech consistent with the fighting words doctrine. In a concurring opinion, Justice Powell opined that whether opprobrious words constituted fighting words "depend[s] upon the circumstances of their utterance"; that it is "unlikely" that the words said to have been used in the case – yelling and screaming you "god damn m. f. police" – "would have precipitated a physical

confrontation between the middle-aged woman who spoke them and the police officer in whose presence they were uttered," provoking him to retaliate violently; and that "a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." *Id.* at 135 (Powell, J. concurring) (internal quotation marks omitted); see also *id.* at 138 (Blackmun, J. dissenting).

Since *Lewis,* this Court has referenced Justice Powell's concurrence only in *Houston v. Hill,* 482 U.S. 451, 461-62 (1987), where it held that a state statute, which had not been limited to fighting words, was facially overbroad, while noting the unresolved question of whether there exists a police exception to the fighting words doctrine. The *Hill* Court made no mention of the additional unresolved question of whether, consistent with Justice Powell's concurrence, such words always depend upon their surrounding circumstances; cf. *Johnson,* 491 U.S. at 409 (noting requirement of considering "actual circumstances surrounding … expression" in ascertaining whether it constitutes proscribable incitement to violence under *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969)); or whether, as the plain language of the fighting words definition signals, there are certain epithets that are so inherently abusive that they are likely to spawn violent retaliation regardless of their context.

2. The fighting words jurisprudence of federal and state courts

By holding that fighting words must be targeted at a particular person, or addressee, the *Cohen* Court afforded those words a direct, personal quality, which it described as amounting to a "direct personal insult." 403 U.S. at 20. Numerous state supreme and appellate courts have determined that these direct personal insults must be communicated face-to-face, with the speaker and addressee in close proximity. *State v. Dugan*, 303 P.3d 755, 765-67 (Mont.), cert. denied, 134 S. Ct. 220 (2013); *State v. Drahota,* 788 N.W.2d 796, 804 (Neb. 2010); *Citizen Publishing Co. v. Miller,* 115 P.3d 107, 113 (Ariz. 2005) (*en banc*); *In re S.L.J.,* 263 N.W.2d 412, 419 (Minn. 1978); *State v. Authelet,* 385 A.2d 642, 649 (R.I. 1978); *Anniskette v. State,* 489 P.2d 1012, 1014-15 (Alaska 1971); *Hartfield v. Commonwealth,* 417 S.E.2d 876, 877-78 (Va. Ct. App. 1992); *State v. Smith,* No. 13-2516, 2014 WL 2974157, at *4-5 (Wis. Ct. App. July 3, 2014).

In addition, there is a consensus in the fighting words jurisprudence of federal and state courts that the likelihood of speech provoking violent retaliation must be examined in context. *State v. Baccala,* 163 A.3d 1, 6-9 (Conn. 2017) (collecting cases). However, a conflict exists in this jurisprudence over one of the key facets of the contextual approach – namely, the relevance of the character of the actual addressee, and specifically whether to recognize a "police exception" requiring a factfinder to assume that

properly trained officers will be more restrained than the average citizen in responding to speech that otherwise is likely to provoke violent retaliation. A federal district court and three state supreme courts have declined to distinguish between police officers and ordinary people in terms of whether they will exercise restraint in the face of fighting words. *McCormick v. Lawrence,* 325 F. Supp. 2d 1191, 1197, 1201 (D. Kan. 2004), aff'd, 130 Fed. Appx. 987 (10th Cir. May 24, 2005); *State v. Robinson,* 82 P.3d 27, 31 (Mont. 2003), cert. denied, 541 U.S. 1037 (2004); *State v. Mathews,* 111 A.3d 390, 401 n.12 (R.I. 2015); *Duncan v. United States,* 219 A.2d 110 (D.C. 1960). Two federal circuit courts of appeal and numerous state supreme and intermediate appellate courts, including the Connecticut Supreme Court prior to *Baccala,* 163 A.3d at 9, have recognized a police exception. *Johnson v. Campbell,* 332 F.3d 199, 213 (3d Cir. 2003); *Buffkins v. City of Omaha,* 922 F.2d 465, 472 (8th Cir. 1990), cert. denied, 502 U.S. 898 (1991); *Leventhal v. Schaffer*, 743 F. Supp. 2d 990, 1002-03 (N.D. Iowa 2010) (collecting cases), cert. denied, 565 U.S. 1160 (2012); *Osborne v. Lohr-Robinette,* No. 05-0106, 2006 WL 3761597, *7 (S.D.W.Va. Dec. 20, 2006) (collecting cases).

C. The *Baccala* Case

On November 24, 2014, the defendant appealed her conviction for breach of the peace, pursuant to Connecticut General Statutes § 53a-181(a)(5), to the Connecticut Appellate Court. On June 29, 2016, the Connecticut Supreme Court transferred the case to

itself pursuant to Connecticut Practice Book § 65-2. On July 11, 2017, the Connecticut Supreme Court issued its opinion, reversing the defendant's conviction and directing the trial court to enter a judgment of acquittal.[3] The 4-justice majority determined that the defendant's conviction, which was based on her use of abusive language in a public place, violated the First Amendment to the United States Constitution because her speech did not constitute unprotected fighting words. App., *infra,* 4a-9a, 34a. The 3-justice dissent concluded that the defendant's language did, indeed, satisfy the fighting words definition, but that reversal of the conviction and remand for a new trial was warranted due to a flawed instruction on fighting words.[4] *Id.* at 36a-42a, 94a-106, (Eveleigh, J., concurring in part and dissenting in part).

In the decision below, a majority of the Connecticut Supreme Court incorporated a contextual analysis into the fighting words doctrine and explained that it entailed: "consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine

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[3] On July 28, 2017, the Connecticut Supreme Court granted the State's motion for a stay of execution of its judgment pending a final decision by this Court.

[4] The dissent did not consider whether any instructional error was harmless beyond a reasonable doubt due to overwhelming evidence of fighting words, pursuant to *Neder v. United States,* 527 U.S. 1 (1999), as the state argued below.

whether there was a likelihood of violent retaliation[,] … [which] necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely." App., *infra,* 26a. This analysis covered the "personal attributes of the speaker and the addressee that are reasonably apparent" (such as "age, gender, race, and status"), which are "necessarily a part of the objective situation in which the speech was made," and included recognition of a broad exception that "distinguishes between the average citizen and those addressees who are in a position that carries with it an expectation of exercising a greater degree of restraint," such as the police. *Id.* at 15a-19a. The Court then opined that this exception included the "average store manager," pointing out that "several courts," in their fighting words analysis, had substituted the ordinary teacher; *In re Nickolas S.,* 226 Ariz. 182, 188 (Ariz. 2011); school official; *In re Louise C.*, 3 P.3d 1004, 1006 (Ariz. Ct. App. 1999); and high school athletic coach; *State v. Tracy,* 130 A.3d 196, 210 (Vt. 2015); for the "ordinary citizen" of *Black,* 538 U.S. at 359, and *Cohen,* 403 U.S. at 20, in considering the "addressee's position." App., *infra,* 19a-20a.

In recognizing a broad exception to the fighting words doctrine and including store managers within

it, the Connecticut Supreme Court relied on the following rationale:

> Store managers are routinely confronted by disappointed, frustrated customers who express themselves in angry terms, although not always as crude as those used by the defendant. People in authoritative positions of management and control are expected to diffuse hostile situations, if not for the sake of the store's relationship with that particular customer, then for the sake of other customers milling about the store. Indeed, as the manager in charge of a large supermarket, [the complainant] would be expected to model appropriate, responsive behavior, aimed at deescalating the situation, for her subordinates, at least one of whom was observing the exchange.
>
> Significantly, as a store manager, [the complainant] would have had a degree of control over the premises where the confrontation took place. An average store manager would know as she approached the defendant that, if the defendant became abusive, the manager could demand that the defendant leave the premises, threaten to have her arrested for trespassing if she failed to comply, and make good on that threat if the defendant still refused to leave. With such lawful self-help tools at her disposal and the expectations attendant to her position, it does

> not appear reasonably likely that [the complainant] was at risk of losing control over the confrontation.

App., *infra,* 29a-30a.

The Court added that because the victim, consistent with "the expectations attendant to her position," failed to "respond with profanity, much less with violence, toward the defendant," and instead "terminated the conversation before it could escalate further with the simple words, `Have a good night,'" there was "no reason to believe that [the victim's] reaction was uncharacteristic of a reasonable professional in a like situation." App., *infra,* 31a. Moreover, the Court pointed to a change in "public discourse "since *Chaplinsky,*" which had "devol[ved]" by becoming "more coarse"; *id.* at 12a; thereby "dull[ing]" "public sensitivities" "to some extent." *Id.* at 32a.

Thus, the Court concluded that "the natural reaction of an average person in [the victim's] position who is confronted with a customer's profane outburst, unaccompanied by any threats, would not be to strike her," although the Court did not rule out satisfaction of the fighting words definition in other circumstances, where words other than "vulgar insults" are directed "at a store manager." App., *infra,* 34a.

The dissenting justices rejected the majority's "new test for fighting words directed at the position

of the person to whom the words are directed." App., *infra,* 48a-49a (emphasis added). They based their disagreement on: (1) the "absence of evidence in the record regarding what the average store manager knows or does not know"; *id.* at 48a; and (2) their assessment of this Court's fighting words jurisprudence as evaluating the circumstances of the addressee none too "closely," focusing instead on the "effect" of fighting words on the "ordinary" or "average" "person," in a "face to face situation," a confrontation that is so "raw" and "visceral" as to provoke a violent response that is immediate, or essentially reflexive and irrational. *Id.* at 46a-48a (internal quotation marks omitted). Therefore, according to the dissenting justices, under this Court's jurisprudence, there are no exceptions to the fighting words doctrine based on a person's position; instead, the doctrine implicates "personally provocative" words that are "directed to a particular person," in "some physical proximity." *Id.* at 43a-45a; see *id.* at 87a (abusive language, which degrades and instills self-hate, is "form of psychic assault" that does not differ much from "physical assault[]").

REASONS FOR GRANTING CERTIORARI

Although the Connecticut Supreme Court claimed that it was not questioning the vitality of the fighting words doctrine; App., *infra,* 12a; it did just that in two ways. First, regarding verbal epithets or insults, the Court reconfirmed its previous recognition of a police exception to the

doctrine and then added an unprecedented exception for those who occupy a managerial position, which will undoubtedly spawn other occupational or professional exceptions and, thereby, narrow the scope of the fighting words doctrine. But the viability of this new exception depends upon this Court answering in the affirmative the open question dividing the lower federal and state courts of whether there is a police exception to the fighting words doctrine, which falls under the open and broader question of whether the context in which epithets are uttered must be assessed to ascertain whether they would likely provoke the ordinary citizen to violent retaliation, and whether that context includes the occupational proclivities of the addressee. The managerial exception also depends upon this Court answering in the negative the open question of whether the police exception is the only exception that, consistent with the fighting words doctrine, permits any assumptions about such occupational proclivities. Second, the Connecticut Supreme Court further segregated epithets from the fighting words doctrine by broadly suggesting that people have become so inured to personal insults by their ubiquity in societal discourse that they are disinclined to respond violently and immediately to such epithets. However, this Court has never considered the question of whether the prevalence of degrading language generally hardens ordinary citizens to its vulgarity or, instead, sensitizes them, putting them on edge and rendering them prone to

violent retaliation when they are personally targeted.

All of these questions have naturally arisen because this Court has not fully returned to the fighting words field since *Chaplinsky,* nearly 80 years ago.[5] It is important to resolve them now because the answers will define the scope of the fighting words doctrine; because that doctrine permits the punishment of speech that borders on instigating violence; and because legislatures incorporate such unprotected speech into, and make it the object of, penal provisions in order to keep violence at bay and maintain the thin line between civil and uncivil behavior among the citizenry.

A. The Fighting Words Exception For The Average Store Manager Is Unprecedented

The Connecticut Supreme Court, which already had recognized a police exception to the fighting words doctrine, added an exception for the average

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[5] See Linda Friedlieb, *The Epitome of an Insult: A Constitutional Approach to Designated Fighting Words,* 72 U. Chi. L. Rev. 385, 402 n.84 (2005) (noting that because crimes punishing fighting words are "usually misdemeanors carrying light penalties, many defendants likely opt not to spend the time or money challenging convictions for fighting words offenses," which means that "the number of cases at the appellate level likely drastically underreflects the number of cases at the trial court level and even more so the number of arrests on fighting words-related charges").

store manager and intimated that exceptions for average professionals occupying other positions were in the offing in other states. This exception, which was based on the presumption that the average store manager would be more restrained than the ordinary citizen in responding to fighting words, did not rely on managerial training, unlike the police exception that is grounded in officer training. Instead, the Court relied on its own presumptions about: (1) the everyday practice of a store manager – diffusing the anger of frustrated and hostile customers for the purpose of keeping the personal and commercial peace while setting an example (modeling) for subordinate employees; and (2) the citizenry's hardening to the coarse language that is rife in public discourse. Such a managerial exception, however, is inconsistent with this Court's fighting words doctrine, which recognizes only the ordinary citizen as the benchmark for determining the likelihood of an addressee responding immediately and violently to vile personally-directed epithets. Nowhere has this Court ever intimated that the future of the fighting words doctrine is a citizenry divided along occupational, or any other, lines, between restrained (reasoning) and unrestrained (reactive) groups of people. Indeed, all that this Court has ever said about the ordinary citizen is that it is common knowledge that he or she will react violently to fighting words, which is worlds away from the Connecticut Supreme Court's view of a populace increasingly jaded by such language. Left to stand, the decision below presages fighting words

exceptions for myriad occupations, professions, and classifications that would engulf the doctrine. As it is, the decision below will substantially impede Connecticut's enforcement of its breach of the peace, disorderly conduct, interfering, and harassment laws against abusive speech in swaths of retail businesses, where managers interact with customers, or in any situation where a professional class comes in contact with its own members, its clients, or generally the public.

B. Only A Police Exception Is Consistent With The Fighting Words Doctrine And Should Not Be Expanded

The only reason why the Connecticut Supreme Court's exception for store managers has arguable purchase in the fighting words doctrine is that this Court has referenced, although not yet resolved, the issue of the propriety of a police exception, which is a necessary predicate for assessing the propriety of a managerial exception. Resolution of this issue supports the conclusion that the only exception to the fighting words doctrine, if one should exist at all, is one for the police. This is so because a combination of police training and daily practice uniquely enables officers to exercise restraint when they are subjected to speech that would push anyone else to the cusp of violent retaliation. Furthermore, the inquiry into whether police training and practice is especially geared to mitigating the effect of fighting words would afford this Court an opportunity to reexamine

the doctrine itself and, for the first time, consider the First Amendment jurisprudence of state courts that requires that personal insults be communicated in a face-to-face confrontation between the speaker and addressee, in close proximity to each other.

Under *Cohen,* 403 U.S. at 20, and *Chaplinsky,* 315 Conn. at 572-74, the core of the fighting words doctrine concerns epithets that are directed to the addressee personally, which deepens the insult conveyed only by the language. The jurisprudence of state courts aptly describes this dynamic between the speaker and addressee as a face-to-face confrontation. Such a close personal confrontation is consistent with the fighting words doctrine by ensuring the depth of the insult and the likelihood that the addressee will have the opportunity to respond immediately, without any loss of impetus. *Dugan*, 303 P.3d. at 765-67; *Anniskette* 489 P.2d at 1014-15; *Smith,* 2014 WL 2974157, at *4. Notably, this jurisprudence was prefigured by the *Chaplinsky* Court's rejection of a First Amendment challenge to New Hampshire's breach of the peace statute, which required that fighting words be issued in face-to-face encounters. 315 U.S. at 573. Indeed, anyone who has squared-off with another person in this way and been subjected to epithets knows that the insult deepens, becoming more personal and taking on a combustible physical dimension. Only police training and practice is comprehensive enough to successfully mitigate the powerful effect of insults that are issued in such face-to-face confrontations.

Justice Powell's concurrence in *Lewis* generally stressed proper police training as the source of the presumptive expectation that officers will be more restrained than the ordinary citizen in responding to fighting words. 415 U.S. at 135 (Powell, J. concurring). State courts have concluded that law enforcement training prepares officers to calmly and authoritatively handle unruly people, whom they frequently confront behaving in this way; see *State v. Read,* 680 A.2d 944, 950 (Vt. 1996); to diffuse such a volatile and potentially violent situation. *HNP v. State,* 854 So.2d 630, 632 (Ala. Crim. App. 2003). But even then, and allowing for people to verbally "oppose or challenge police action without thereby risking arrest[, which] is one of the principal characteristics by which we distinguish a free nation from a police state"; *Hill,* 482 U.S. at 462-63; it cannot be expected that, in every fighting words encounter, officers will be able to "quash … all the same human reactions that other people have." *Read,* 680 A.2d 950 (internal quotation marks omitted); see also *Duncan,* 219 A.2d at 112-13 (officer does not lose "human nature simply because he wears a star").

The same cannot be said about the managerial profession generally and supermarket assistant managers in particular. No universal assumptions can be drawn from their training, if any, to handle belligerent customers, the frequency of their encounters with such individuals or customers, let

alone that those encounters are regularly face-to-face confrontations, in close proximity. Nor do we know anything about the nature of a manager's public authority in the work or retail space, which is unlike the assumptions attending the authority of the police, who serve as the armed representatives of government, with a monopoly of power in most situations. As for the notion expressed below of professional managers "model[ing]" for their subordinates and, consequently, being especially constrained in the face of fighting words, it reflects an exceedingly benign, even roseate, view of the division of labor and the hierarchical relations between superior and subordinate, as well as a lack of recognition of the potential for face-to-face confrontations transforming insults into fighting words. App., *infra,* 30a.

C. Coarse Public Discourse Has Made The Citizenry More, Not Less, Prone To Retaliate Against Degrading Personal Insults

The Court below also judged public discourse to be increasingly coarse, thereby dulling the citizenry's sensitivities and decreasing the likelihood of the ordinary person retaliating violently against personal insults. App., *infra,* 12a, 32a. Yet this judgment is inconsistent with this Court's unqualified judgment that it is common knowledge that ordinary citizens will likely be provoked to violence by personal insults. *Cohen,* 403 U.S. at 20; see also *Black,* 538 U.S. at 359. Only this Court can

amend its own judgment, and the Connecticut Supreme Court's judgment is no useful guide because it was based solely on an unexamined presumption. Thus, the Court below never entertained the contrary notion that people have become so offended by, and have had their fill of, the personal abuse that is rife in our society that they are primed to retaliate violently when they are the targets of degrading insults, in close face-to-face confrontations.

D. Substituting The Ordinary Citizen For The Average Store Manager Would Make A Difference In This Case

Finally, substituting the ordinary citizen for the lower court's average store manager would mean that the stream of vile insults that the defendant directed at the victim during their close face-to-face confrontation constituted unprotected fighting words. In fact, the defendant's denigration of another woman with words like "cunt," "fat fucking bitch," and "fuck you" could not have pushed the ordinary citizen any closer to the cusp of violence. See *Prak v. Gregart*, 749 F. Supp. 825, 829 (W.D. Mich. 1990) (assuming after "48 years we have progressed to the point that the `fighting words' doctrine may apply to `women of common intelligence'"); *Read*, 680 A.2d at 950 n.4 (fighting words doctrine applies without regard to whether both speaker and hearer are women); *Griffith v. Bay City St. Louis,* 797 So.2d 1037, 1041 (Miss. Ct. App. 2001) (calling someone "b--h" and "slut" likely to

cause average addressee to fight).[6] Given the degrading nature of the defendant's words, her anger, loss of self-control, and overall belligerence in loudly communicating such denigrating speech, and the fighting words' requirement that there need be only a likelihood of the ordinary citizen retaliating immediately and violently, the Connecticut Supreme Court placed undue emphasis on the victim's lack of a violent response and paired it mistakenly with a perceived societal trend toward peaceableness and an assistant store manager's presumed professional restraint.

The upshot of the decision below is not only that the Connecticut Supreme Court strayed far wide of the First Amendment mark in narrowing the fighting words doctrine to exclude the defendant's speech, but also that it seriously misjudged the deprecatory nature of personal insults that she foisted on the victim, which the dissenting justices aptly characterized as a form of "psychic assault" bordering on "physical assault[]." App., *infra,* 87a. It is worth recalling that, under *Chaplinsky,* speech that is so deprecatory may lack First Amendment

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[6] See Clay Calvert, *Fighting Words in the Era of Texts, IMs and E-Mails: Can A Disparaged Doctrine Be Resuscitated to Punish Cyber-Bullies?*, 21 DePaul J. Art, Tech. & Intell. Prop. L. 1, 28-29 (2010) (In *Why We Curse: A Neuro-Psycho-Social Theory of Speech* (2000), research of Professor Timothy Jay, a psycholinguistics expert, finds that females would be likely to fight when words such as "slut," "whore" and "cunt" are used because they "refer to sexual looseness").

protection regardless of its specific potential to provoke immediate and violent retaliation, precisely because it "inflict[s] injury" by its "very utterance." 315 U.S. at 598; see *Snyder v. Phelps*, 562 U.S. 443, 465-66 (2011) (noting *Chaplinsky's* recognition of words lacking First Amendment shield because they inflict injury by their very utterance) (Alito, J. dissenting).

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,
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