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I. THE DECISION BELOW RECOGNIZED AN EXCEPTION TO THE FIGHTING WORDS DOCTRINE PREMISED ON THE VICTIM'S OCCUPATION AS A STORE MANAGER THAT THIS COURT SHOULD REVIEW

In her brief in opposition, the defendant claims that the decision below does not implicate the issue, presented in the state's petition, of whether the Connecticut Supreme Court, consistent with the First Amendment, properly recognized a store manager exception to the fighting words doctrine, which was predicated on the police exception that this Court has never recognized. According to the defendant, the jurisprudence of fighting words encompasses no exception based on assumptions about occupational proclivities, but rather reflects a consensus that epithets must be assessed in the context of their actual circumstances, which simply includes the addressee's occupational "status," whether a police officer or a store manager. The defendant argues that the Connecticut Supreme Court adhered to this jurisprudence by considering the managerial "status" of an assistant store manager as part of the actual circumstances surrounding the epithets that the defendant directed at her. In the view of the defendant, only such a contextual analysis comports with the fighting words doctrine and its aim of preventing violence, given that only a "real-world" assessment of epithets can

gauge whether they are likely to provoke the ordinary citizen to retaliate with violence, which constitutes the doctrine's touchstone. Therefore, the defendant reasons, incorporating any other analysis of epithets into the fighting words doctrine risks punishing speech based on its protected expressive content, namely its moral or offensive character, in derogation of the First Amendment. Brief in Opposition (Opp.) 1-2, 11-17.

To the contrary, the Connecticut Supreme Court did create a managerial exception to the fighting words doctrine. The federal and state courts that have incorporated a police exception into their fighting words jurisprudence have derived that exception from Justice Powell's concurrence in *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974), and the reference to that concurrence in *Houston v. Hill*, 482 U.S. 451, 461-62 (1987). That concurrence clearly provides 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." *Lewis,* 415 U.S. at 135 (internal quotation marks omitted; emphasis added). By its plain terms, the concurrence carves out an exception to the key fighting words principle, set out in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 574 (1942), that the average citizen will likely respond with violence to such words, for police officers who are "expected" to exercise greater restraint than the average citizen due to their training. Such training is assumed

rather than proven, thereby injecting into the contextual analysis of fighting words a consideration falling outside of the actual circumstances of the speech at issue.

Tellingly, the defendant proffers fighting words jurisprudence that, she claims, assesses the occupational status of police officer addressees as one circumstance among other actual circumstances surrounding the speech at issue, but she does not account for the reliance of that jurisprudence on either the approach of the *Lewis* concurrence or *Hill's* reference to that concurrence. Opp. 15 & n.3.[1] Moreover, the very state jurisprudence that the defendant cites for the proposition that speech must be assessed in the context of the "actual circumstances of the addressee," to determine if it constitutes fighting words, incorporates into the context of those circumstances various assumptions regarding police restraint in the face of verbal abuse that are derived from a police officer's occupation

[1] See Opp 15 n.3 (citing *Posr v. Court Officer Shield No. 207,* 180 F.3d 409, 415 (2d Cir. 1999); *Johnson v. Campbell*, 332 F.3d 1999, 212-13 (3d Cir. 2003); *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 165 (5th Cir. 1997); *Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990); and *United States v. Poocha*, 259 F.3d 1077, 1081 (9th Cir. 2001)).

and the presumed training and practice accompanying that occupation. Opp. 15 & n.4.[2]

In similar vein, the Connecticut Supreme Court's fighting words analysis made pivotal assumptions about aspects of the addressee's occupational status that were outside of the record of the case, and therefore its proven circumstances, based on assumptions about behavior that would be expected of an assistant store manager. Clearly taking its cues from the *Lewis* concurrence, the court below assumed that store managers would be "expected" to exercise restraint in reacting to vulgar epithets in their workplace, by seeking to "diffuse" or "deescalate[e]" a "hostile situation" and "model[ing]" for "subordinates," rather than retaliating with violence. Petitioner's Appendix (App.) 29a-31a, 34a (emphasis added). In addition, the Connecticut Supreme Court explicitly recognized a "fighting words exception [that] is concerned with the likelihood of violent retaliation [and] properly distinguishes between the average citizen and those addressees who are in a position that carries with it

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[2] See Opp. 15 & n.4 (citing *In re Nickolas S.*, 245 P.3d 446, 452 (Ariz. 2011); *State v. Fratzke*, 446 N.W.2d 781, 784 (Iowa 1989); and *State v. John W.*, 418 A.2d 1097, 1104-06 (Me. 1980)); accord *State v. Read*, 680 A.2d 944, 949 (Vt. 1996); *State v. Yoakum*, 638 P.2d 1264, 1266 (Wash. Ct. App. 1982); *B.E.S. v. State*, 629 So.2d 761, 764 (Ala. Crim. App. 1993) (cert. denied, Dec. 3, 1993); *City of Bismarck v. Schoppert*, 469 N.W.2d 808, 812 (N.D. 1991).

an expectation of exercising a greater degree of restraint." App. 17a-19a. In doing so, the Court relied on the *Lewis* concurrence, its own previous decision in *State v. Williams*, 534 A.2d 230, 239 n.7 (Conn. 1987), and a majority of other jurisdictions that "hold police officers to a higher standard than ordinary citizens when determining the likelihood of a violent response by the addressee." App. 19a.

The defendant offers assurances that when epithets are assessed within the context of their actual circumstances, based on evidence in the record, and this analysis leads to the conclusion that those epithets are protected speech rather than fighting words because the addressee is incapable of responding with violence, the epithets may still be subject to punishment on other grounds, under statutes that proscribe harassment, trespass, and true threats. Opp. 16. However, the defendant does not address the indication in *Chaplinsky* that degrading insults may lack First Amendment protection and may be punished even if they did not carry the specific potential to provoke immediate and violent retaliation because the speech itself inflicts injury. 315 U.S. at 598. More importantly, the defendant's assurances miss the point of the decision below. The Connecticut Supreme Court substantially expanded the pool of addressees who have the actual ability to respond with violence to epithets that would likely provoke the ordinary citizen to retaliate, but are deemed to be unlikely to do so based on unproven assumptions about the

addressees adhering to behavior characteristic of their occupation or profession, the very analysis of speech outside of the context of its actual circumstances that the defendant rejects.

In sum, the decision below squarely presents the issue of the propriety of a store manager exception to the fighting words doctrine, which is predicated on, and would constitute an extension of, the police officer exception that this Court has never recognized. Granting the petition would permit this Court to distinguish the police exception, which facilitates criticism of police in the interest of ensuring that our "free nation" does not become a "police state"; *Hill*, 482 U.S. at 462-63; from a store manager exception, which would not facilitate discourse that is valued by a civil society. The defendant's flawed attempt to read the store manager exception out of the decision below rather than defend it, and her rationale for why such an exception would be at odds with the established "actual circumstances" analysis of the fighting words doctrine, is yet another reason why the petition should be granted.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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