No. 14-1568

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

THE RADIANCE FOUNDATION, INC., et al.

Plaintiffs-Appellants

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of Virginia

BRIEF *AMICUS CURIAE* OF NATIONAL BLACK PRO-LIFE COALITION, WALTER B. HOYE II, DR. ALVEDA C. KING, AND DR. DAY GARDNER IN SUPPORT OF APPELLANTS AND REVERSAL

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October 14, 2014

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* make the following disclosures, none of the amici herein are publically held corporations, and none have any parent corporations,

DATED: October 14, 2013

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE[1]

The **National Black Pro-Life Coalition** is a network of organizations committed to restoring a culture that celebrates life and family, cultivating hope in the Black community. Through education and awareness media campaigns, community events, political action, lobbying and coalition building of advocacy groups, the Coalition promotes traditional family values, from a Biblical worldview, to produce strong and healthy families where babies are safe, recognized as persons under the Constitution, and able to reach their full potential in life. Core members of the Coalition, including co-founder **Walter B. Hoye, II**, also seek to recall the civil rights movement to its historical roots of respect for every human life, including the youngest among us, heeding the warning of Dr. Martin Luther King, Jr. that "The Negro cannot win if he is willing to sell the future of his children for his personal immediate comfort and safety."

Dr. Alveda C. King is the niece of Martin Luther King, Jr., and the great-granddaughter of A.D. King, a co-founder of the Georgia chapter of

[1] Pursuant to Cir. Rule 29, counsel certifies that all parties have consented to the filing of this brief, and further certifies that no counsel for any party authored this brief in whole or in part, nor made a monetary contribution intended to fund the preparation or submission of the brief.

the National Association for the Advancement of Colored People. Dr. King has been vocal in her protests against the NAACP's position on abortion, citing the genocidal effect of legalized abortion on the African-American population.

Dr. Day Gardner is the founder and president of the National Black Pro Life Union, which serves as a clearinghouse to coordinate the flow of communications among all African American pro-life organizations.

SUMMARY OF THE ARGUMENT

Over 180 years ago, the American Colonization Society was a well-respected organization that enjoyed the support of prominent clergy and politicians for its benevolent-sounding plan to deal with the problem of slavery by buying slaves and transporting them, as well as free negroes, to Haiti or Africa.[2] William Lloyd Garrison, newspaper editor and pioneer of the abolitionist movement, studied the works, statements, and philosophy of the ACS and concluded that, if abolitionism was to take hold, the ACS had to be defeated.

Garrison's chosen means, consistent with the times, was to print a book-length polemic, entitled *Thoughts on African Colonization: or An*

[2] All material concerning the ACS and William Lloyd Garrison presented here is extracted from Henry Mayer, *All on Fire: William Lloyd Garrison and the Abolition of Slavery* (1998).

Impartial Exhibition of the Doctrines, Principles, and Purposes of the American Colonization Society, together with the Resolutions, Addresses, and Remonstrances of the Free People of Color. The book contained excerpts of statements and speeches of ACS leaders to demonstrate the society's failure to condemn slavery, its implicit recognition of slaves as property, and its repeated assurances that it had no intention of disturbing existing property relations. Garrison's book also included statements condemning colonization from black people who considered themselves Americans, not foreigners.

Were Garrison at work today, he would almost certainly opt for something shorter and punchier, such as an article or blog post, with an attention-grabbing headline, like, "ACS: American Collaboration Society" or "ACS: Americans Condoning Slavery" or "ACS: Americans Compensating Slaveholders."

Were our modern-day Garrison to choose this route, he might be sued for trademark infringement by the ACS, for allegedly "confusing" readers about the source of his article, an article that was *highly critical* of the work and goals of the ACS. And were Garrison to find himself before the lower court here, he might very well be found to have engaged in trademark infringement and dilution and be ordered not to use any of those phrases

about the ACS. He would be allowed to criticize the ACS, but not by using any of the language that had in fact been the most effective in getting the public's attention and stirring people to action.

Such is the case here. While giving lip service to the First Amendment, the District Court, at the behest of the NAACP, brought the hammer of the Lanham Act down on the protected free speech of Appellant Radiance Foundation, Inc. and Ryan Bomberger's (hereinafter collectively "Radiance"). The court effectively took sides in the ideological debate between Radiance and NAACP and implicitly held that Radiance's speech was false. On that premise was built its finding that Radiance had caused "confusion" through its use of NAACP's trademarks. It then ordered Radiance to cease using the phrase that the NAACP itself admitted was the only language that induced readers to contact it to express their opposition to the organization's pro-abortion stance.

NAACP's lawsuit follows in a long line of failed court challenges in which private parties have attempted to use civil remedies to silence their critics. The result of this case should be the same: this Court should reverse the lower court and find that Radiance's speech is protected by the First Amendment.

ARGUMENT

I. The District Court Used an Improper Finding on the Truth or Falsity of Radiance's Political Speech to Buttress Its Finding of Trademark Infringement.

A. The District Court Made an Improper and Erroneous Finding that Radiance's Political Speech Was Not True.

The parties to this litigation stipulated to a number of facts, including that "[Appellant] Bomberger used the term 'National Association for the Abortion of Colored People' in order to convey to people that the actual NAACP is pro-abortion." JA 809. The District Court immediately followed this stipulated fact with a factual finding of its own: "The NAACP has no formal or official position or policy regarding abortion because such position may create problems within its diverse membership and constituency, who embrace a wide range of views on the controversial issue of abortion." *Id*. While the court did not say so in as many words, the import of this judicial finding is that Bomberger's message was false.

With unconscious irony, the District Court elaborated on the NAACP's "no-position" position with a second statement, which in fact supported Radiance's message and contradicted the court's own finding. The court stated, "The NAACP generally supports full and equal access for all persons to all legally available forms of healthcare." *Id.* This position of

support for "a woman's right to choose" (JA 556:4-25; 778:8 – 779:18; 910) is exactly the position to which Radiance was trying to direct attention.

In the current realm of legalized abortion, a policy of supporting "full and equal" access to all legal "healthcare" *is* a position on abortion. It is precisely the position on abortion held by Planned Parenthood Federation of America, the nation's largest provider of abortions: "Planned Parenthood is a visible and passionate advocate for policies that enable Americans to access comprehensive reproductive and sexual health care, education, and information."[3] It is the position of the National Abortion Rights Action League: "We believe that women should have the right to choose abortion."[4] It is the position of the National Abortion Federation: "NAF works to ensure access to quality abortion care for all women."[5]

Support for the status quo on abortion is support for legal abortion. The NAACP's position on "full and equal access for all persons to all legally available forms of healthcare" is a pro-abortion rights position, just as a

[3] Planned Parenthood Federation of America, *Who we Are*, http:/www.plannedparenthood.org/about-us/who-we-are#sthash.kbeiOzv.dpuf (all internet sites last visited on October 11, 2014).

[4] NARAL Pro-Choice America, *Abortion*, http://www.prochoiceamerica.org/what-is-choice/abortion/.

[5] National Abortion Federation, *Unequal Access to Abortion*, http://prochoice.org/education-and-advocacy/about-abortion/unequal-access-to-abortion/

position of support for the freedom and security of property rights was a pro-slavery rights position in 1860.[6]

The District Court's failure to recognize the NAACP's position on "full and equal access" as a pro-abortion rights position is a textbook example of why courts should – indeed, must – avoid setting themselves up as the arbiters of truth and falsity in the realm of political speech and advocacy. As the Supreme Court held in *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964), "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials . . . ." The truth of ideas is not to be judged by government or the courts but by the people. "The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *U.S. v. Alvarez*, 132 S.Ct. 2537, 2550 (2012) *quoting Abrams v. United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).

Not only should courts avoid pronouncing on the truth or falsity of political speech, but the First Amendment sharply limits any remedies a

[6] *See, e.g.*, Democratic Platform (Breckenridge Faction) of 1860, *National Party Platforms, 1840 – 1964*, compiled by Kirk H. Porter and Donald Bruce Johnson, (1967) at 31 ("Resolved … That the Government of a Territory organized by an act of Congress is provisional and temporary, and during its existence all citizens of the United States have an equal right to settle with their property in the Territory, without rights, either of person or property, being destroyed or impaired by Congressional or Territorial legislation.").

court might employ to cure purportedly false political or partisan speech. The Supreme Court has consistently held that "[t]he remedy for speech that is false is speech that is true." *U.S. v. Alvarez*, 132 S.Ct. at 2550. *See also, Whitney v. California*, 274 U.S. 357, 377 (1927) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence") (Brandeis, J., concurring, *overruled on other grounds*, *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969)).

This principle applies not just to pristine disagreements about ideas, but also to claims by a person or entity that it has been directly harmed by the alleged falsehoods of another:

> The first remedy of any victim of defamation is self-help – using available opportunities to contradict the lie or correct the error, and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication, and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."

Gertz v. Robert Welch, Inc. 418 U.S. 323, 344 (1974).

In this David versus Goliath clash between Radiance and the NAACP, the lower court threw its weight behind the party with greater name recognition, greater resources, and greater access to channels of communication with which to correct any false statements, false light, or

false impressions. In its sweeping injunction, the court prohibited Radiance from any use of the phrase National Association for the Abortion of Colored People "*in connection with* [NAACP]'s trademarks," that is, in connection with NAACP's full or abbreviated name. JA 799-800 (emphasis added). Since the only practical use for the phrase "National Association for the Abortion of Colored People" is in connection with the NAACP, the District Court has decreed that the phrase is, regardless of context, an infringement of the NAACP's trademarks and thus out of bounds in public discourse.

In justifying this troubling, to put in mildly, restraint on free speech, the District Court protested that there was no First Amendment violation because "Radiance is not prevented from criticizing the NAACP's positions or activities, but may not present such critiques in a manner that is likely to confuse the public regarding whether certain trademarks espousing a pro-abortion viewpoint are authorized or sponsored by the NAACP." JA 841. However, the District Court's blanket prohibition on Radiance's use of the term "National Association for the Abortion of Colored People" has no qualifications about whether the use is likely to confuse the public. The District Court has determined that the phrase itself causes confusion, and has taken it out of the hands of Radiance to use, on the plea that Radiance is not prevented from other criticism of NAACP.

By the same token, Paul Cohen could have worn a jacket with the words “Darn the Draft” printed on the back. *Cf., Cohen v. California*, 403 U.S. 15 (1971). Gregory Lee Johnson could have written a letter to the editor criticizing President Reagan’s policies rather than burning an American flag. *Cf., Texas v. Johnson*, 491 U.S. 397 (1989). Charles Evers could have merely urged black residents of Claiborne County, Mississippi, to respect the NAACP boycott of stores that did not employ blacks, rather than collecting the names of those who violated the boycott, saying that necks would be broken and noting that the Sheriff wouldn’t be able to help them. *Cf., N.A.A.C.P. v. Claiborne Hardware Co*., 458 U.S. 886 (1982).

"The First Amendment protects appellees’ right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). The District Court cannot dictate to Radiance what language it may use to criticize the NAACP, based on its own view as to where the truth of the matter lies on this highly contentious issue. *Cf., Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993)(“[T]here are common and respectable reasons for opposing abortion. . . .”).

B. The District Court's Finding of Trademark "Confusion" Was Colored by its Improper Finding Concerning the Truth or Falsity of Plaintiffs' Political Speech

Starting from the premise that Radiance's speech about the NAACP's position on abortion was false, the District Court then managed to find "confusion" in what was simply evidence of Radiance having effectively communicated its message to some number of people.

The District Court made a vague factual finding that, "Members of the public who viewed the January 2013 Article called the NAACP to express concern about the 'National Association for the Abortion of Colored People' moniker." JA 812. Later in its opinion, the District Court laid out the anecdotal evidence of "actual confusion." This evidence consisted testimony from NAACP Vice-President for Communication and Digital Media Eric Wingerter that the organization had received calls from people "asking us why we were supporting abortion of people of color" and expressing outrage that "you are supporting the genocide of black babies." JA 832-33.

The District Court interpreted these calls as evidence of "confusion" because the District Court believed that the NAACP does not have a position on abortion. The court apparently never considered the possibility that the reason angry people were calling the NAACP to express their outrage was the exact same reason that the NAACP purported not to have a position on

abortion, *i.e.*, because a pro-abortion position would "create problems within its diverse membership and constituency, who embrace a wide range of view on the controversial issue of abortion." JA 809. The callers were not confused about the source of the information; they were angered when they saw the evidence presented in Radiance's article that the NAACP supports abortion. Nothing in Mr. Wingerter's testimony suggests that the callers believed that the NAACP was the source of the Radiance article, or that they were confused about NAACP's real name.[7]

"The right of free speech is guaranteed every citizen that he may reach the mind of willing listeners . . ." *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949). Moreover, "'[f]ree trade in ideas'" means free trade in the opportunity to persuade to action, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945), quoted in *NAACP v. Claiborne Hardware*, 458 U.S. 886, 910 (1982). Here, the District Court construed the evidence that Radiance had reached minds and persuaded people to action as evidence of "confusion."

[7] The District Court's also found a likelihood of confusion "because Internet users looking for webpages related to or sponsored by the NAACP may initially encounter Plaintiffs' website and article by mistake upon entering 'NAACP' into a Google search." This finding establishes nothing but the District Court's own profound confusion about how search engines such as Google function. Nothing in a Google search of an organization's name guarantees the user will initially turn up a link to the organization itself, rather than information from other sources that mention the organization, particularly when an organization is at the center of a controversy.

II. The First Amendment Protects Speech From Civil as Well as Criminal Sanctions.

The NAACP's effort to silence its critics using the civil law is not original. The annals of First Amendment jurisprudence are replete with other examples.

In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), the Supreme Court reversed a jury verdict finding Hustler Magazine liable for damages for intentional infliction of emotional distress based on a parody concerning the plaintiff having sexual relations with his mother. The Court rejected the holding of the lower court that, as long as the elements of the tort of intentional infliction of emotional distress were proved, it was "of no constitutional import whether the statement was a fact or an opinion, true or false." On the contrary, the Court held, such a holding posed an unacceptable risk of leading to censorship and self-censorship of satirists and political cartoonists. *Id*. at 53. Consequently, a claim of intentional infliction of emotional distress "cannot, consistently with the First Amendment, form the basis for the award of damages when the conduct in question is the publication of a caricature such as the ad parody here." *Id.* at 57.

In many instances, civil sanctions may have more of a chilling effect than the threat of criminal liability. In *New York Times v. Sullivan*, 376 U.S.

254 (1964), the Supreme Court noted that the civil judgment awarded against the appellant under the Alabama's libel law "was one thousand times greater than the maximum fine provided by the Alabama criminal statute, and one hundred times greater than that provided by the Sedition Act," The more substantial civil liability was also devoid of the due process safeguards attendant upon the imposition of criminal penalties. *Id*. at 277-78. As such, the state's civil libel law was "a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law." *Id*. at 278 (quoting *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70). Because of this chilling effect on speech, the state's civil law was subject to First Amendment constraints: "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Id*. at 277.

These principles apply with particular force to attempts to use civil law to create a prior restraint on protected speech. In *Organization for a Better Austin v. Keefe,* 402 U.S. 415 (1971), plaintiff, a real estate broker, was accused of "panic peddling" houses by arousing the fears of white residents that blacks were moving into the neighborhood. Organization for a Better Austin leafleted the plaintiff's own neighborhood, in an effort to persuade, even coerce, the broker to change his tactics. The broker

responded by suing the organization for invasion of privacy and intimidation and winning an injunction in state court against further distribution of leaflets. The Supreme Court reversed, striking down the injunction as an impermissible prior restraint on speech: "No prior decisions support the claim that the interest of an individual in being free from criticism of his business practices in pamphlets or leaflets warrants the use of the injunctive power of a court." *Id*. at 419-20.

The District Court's decision combines something from each of the theories rejected by the Supreme Court in the foregoing decisions. The District Court refused to recognize Radiance's speech as a parody on the NAACP's name, not an instance of trademark infringement. It made itself the arbiter of the truth of Radiance's political speech about the NAACP. And it created a prior restraint on Radiance's use of the phrase "National Association for the Abortion of Colored People." In short, it got everything backwards.

CONCLUSION

"Analyzing humor is like dissecting a frog. Few people are interested and the frog dies of it." This quip, with variations attributed to both E.B. White and Mark Twain, captures the subtleties inherent to the sorts of protected speech known as parody and satire.

The District Court here wrenched the phrase "NAACP: National Association for the Abortion of Colored People" from its original context, pinned it down, and proceeded to dissect it with legal scalpel and tweezers. By the end of the process, it was no longer recognizable for what it clearly had been when it was published: a legitimate use of satire to call attention to the NAACP's position on abortion. This Court should reverse the District Court and order entry of judgment for Appellant Radiance on its complaint for declaratory relief.

Respectfully submitted this 14th day of October, 2014,

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using 14 point, proportionately spaced Times New Roman typeface in Microsoft Word for Mac 2011.

2. Exclusive of the corporate disclosure statement; table of contents; table of citations; and the certificate of service, the brief contains **3,406** words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

Dated: October 14, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 14, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all registered participants in the case will receive service by the CM/ECF system.

Respectfully submitted,

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